CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

JODY L. McVITTIE, et al.,	)	**Case No. 99-3-0016c**
	)	
Petitioners,	)	
	)	***(McVittie)***
v.	)	
	)	
SNOHOMISH COUNTY,	)	**FINAL DECISION AND ORDER**
	)	
Respondent.	)	
	)	

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I. Procedural Background

A. General

On August 2, 1999, 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. 99-3-0015. Petitioner challenges Snohomish County's adoption of Ordinance No. 99-027, which adopted "Snohomish County: 1999 – 2004 Capital Plan Detail" (**Capital Plan** or **1999-2004 CIP**). The basis for the challenge is noncompliance with several sections of the Growth Management Act (**GMA** or **Act**).

On August 12, 1999, the Board issued a "Notice of Hearing" (**NOH**) for CPSGMHB Case No. 99-3-0015. The NOH set a date for a Prehearing Conference (**PHC**) and established a tentative schedule for the *McVittie* case.

On August 13, 1999, the Board received a PFR from the Patricia C. Bourgault and South Snohomish County Preservation Association (**SSCPA**) (collectively, **Petitioners** or **Bourgault**). The matter was assigned Case No. 99-3-0016. Petitioners also challenge Snohomish County's adoption of Ordinance No. 99-027, which adopted "Snohomish County: 1999 – 2004 Capital Plan Detail."

On August 23, 1999, the Board issued an "Order of Consolidation and Notice of Hearing." The two PFRs were consolidated into one case. The consolidated case was assigned case number 99-3-0016c and captioned ***McVittie, et al. v. Snohomish County***. The Order rescinded the prior

NOH and established a new tentative schedule for the consolidated case.

On September 8, 1999, the Presiding Officer mailed a memo to the parties suggesting that Petitioners clarify the issues presented in their respective PFRs and be prepared to discuss them at the PHC.

On September 13, 1999, the Board conducted the PHC at the Financial Center, Seattle. Board member Edward G. McGuire, Presiding Officer in this matter, conducted the conference. Petitioners Jody L. McVittie and Patricia C. Bourgault participated in the conference. Dawn Findley and Barbara Dykes represented Snohomish County. Greg Williams[1] and Thomas J. Ehrlichman, representing Snohomish County-Camano Association of Realtors (**Realtors**) also attended.

At the PHC, the Board and parties discussed and clarified the Legal Issues to be decided. Petitioner McVittie provided a "Restatement of Legal Issues as Requested by Board," twenty-one issues were set forth. Petitioners Bourgault and SSCPA provided a "Restatement of Legal Issues Presented in PFR 99-3-0016," twenty-three issues were set forth. The issues were eventually combined and consolidated into nine potential issues.[2] Several issues were joint issues for all Petitioners; Petitioners Bourgault and SSCPA also raised additional issues. Petitioners were given until 12:00 p.m., Thursday, September 16, 1999, to provide further clarification on the issues and to decide whether several issues would be abandoned. Respondent County was given until 12:00 p.m., Friday, September 17, 1999, to comment on Petitioners' submittals.

On September 16, 1999, the Board received "Restatement of Legal Issues as Requested by Board." Petitioners' jointly presented six consolidated issues. Four of the issues were raised in both PFRs; two of the issues were only raised in the Bourgault PFR. Specific challenges to RCW 36.70A.010, .030 and .130 were abandoned.

On September 17, 1999, the Board received "Snohomish County's Comments Relating to Petitioners' Legal Issues." Later that day, the Board received a follow-up letter from the County correcting a statement made in the County's filing.

On September 20, 1999, the Board issued its "Prehearing Order" (**PHO**), setting the final schedule and stating the six Legal Issues for this case.

B. Intervention

At the beginning of the September 13, 1999 PHC, Mr. Ehrlichman presented the Board and the parties with "Snohomish County-Camano Association of Realtors' Motion to Intervene and Memorandum of Support." The Realtors indicated interest in all issues. The parties were given

until 12:00 p.m., Friday, September 17, 1999, to respond to the Realtors' Motion. The Realtors were given until 12:00 p.m., Monday, September 20, 1999, to reply.

On September 17, 1999, the Board received "Jody McVittie's Motion for Denial of Intervention by Snohomish County – Camano Association of Realtors."

The Realtors did not file a reply.

Included in the Board's September 20, 1999 PHO was an Order **granting** intervention to the Snohomish County-Camano Association of Realtors. The Order set the parameters of the Realtors participation.

C. Motions to Supplement And amend index

On September 13, 1999, the Board received "Snohomish County's Index of the Record RE: Adoption of Ordinance No. 99-027."

On October 1, 1999, the Board received two copies of a **core document (CD)**[3] in this matter entitled Snohomish County: 1999-2004 Capital Plan Detail.

Also on October 1, 1999, the Board received Petitioner McVittie's "Motion to Supplement the Record." Attached to the Motion were fourteen proposed exhibits. The Motion asked that eight general types of documents be included in the record.

On October 15, 1999, the Board received "Snohomish County's Response in Opposition to Petitioner's Motion to Supplement the Record" and "Snohomish County-Camano Association of Realtors' Response to McVittie's Motion to Supplement the Record." The Board also received a late attachment to the McVittie Motion. The attachment was a copy of a letter from McVittie to the County Council dated May 24, 1999.

On October 20, 1999, the Board received another late attachment to the McVittie Motion, indicating that a proposed exhibit was not available at the time the motion was filed; it was forwarded when Petitioner received the proposed exhibit from the County.

On October 22, 1999, the Board received "Petitioners' Reply on Motion to Supplement."

On October 26, 1999, the Board issued its "Order on Motion to Supplement the Record." The Board admitted or took official notice of five of the general types of documents offered, denied two types of offerings and denied, admitted, and officially noticed various documents in the final category of general documents. The Order summarized the items comprising the record in this case.

On November 1, 1999, the Board received "Snohomish County's Revised Index."

On November 2, 1999, the Board received McVittie's "Motion to Reconsider Order on Motion to Supplement (10/26/99)." This Motion was filed the same day as "Petitioners' Prehearing Brief." The prehearing brief referenced exhibits that had not been admitted to the record in the "Order on Motion to Supplement the Record"; however, the prehearing brief stated that the use of the exhibits were subject to a motion for reconsideration.

On November 10, 1999, the Presiding Officer issued an "Order Striking Portions of Prehearing Brief." The Order explained that the Board's October 26, 1999 Order on Motions to Supplement the Record was not subject to, and was not reconsidered by the Board. Accordingly, portions of the prehearing brief were struck.

D. Dispositive Motions

On October 1, 1999, the Board received "Snohomish County's Motion to Dismiss Legal Issues" (**Co**. **Motion - Dismiss**), with three attached exhibits; and "Snohomish County-Camano Association of Realtors' Motion to Dismiss Based on Lack of Subject Matter Jurisdiction" (**Realtors Motion – Dismiss**), with one attached exhibit.

On October 15, 1999, the Board received "Petitioners' Response to Dispositive Motions" (**McVittie Response – Dismiss**), with two attached exhibits; and "Petitioners' Response to Dispositive Motions (Legal Issues 5 & 6)" (**Bourgault Response – Dismiss**), with five attached exhibits.

On October 22, 1999, the Board received "Snohomish County's Reply Brief in Support of its Motion to Dismiss Legal Issues" (**Co**. **Reply - Dismiss**), with one attached exhibit. No reply brief was received from the Realtors.

On October 23, 1999, the Board received a copy of a letter dated October 23, 1999, from Petitioner Bourgault to the County's representative, Ms. Findlay. The letter included a copy of the last page of "Petitioners' Response to Dispositive Motions" signed by Petitioner Bourgault and SSCPA.

On October 25, 1999, the Board received correspondence from the County indicating that the County had not received "Petitioners' Response to Dispositive Motions (Legal Issues 5 & 6)." On October 26, 1999, the County notified the Presiding Officer that the County had located the "missing" response brief.

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

On October 26, 1999, the Board issued its "Order on Dispositive Motions." The Order **denied**

both the County's and the Realtors' Motions to Dismiss.

e. Briefing and Hearing on the Merits

On November 2, 1999, the Board received: McVittie's "Petitioners' PreHearing Brief" with numerous attached exhibits and core documents; Bourgault's "Legal Issues 5 & 6 BRIEF for Issue 5" with several attached exhibits (**Bourgault #5 PHB**); and Bourgault's "Legal Issues 5 & 6 BRIEF for Issue 6" with several attached exhibits (**Bourgault #6 PHB**).

On November 8, 1999, the Board received McVittie's "Petitioners' PreHearing Brief – Corrected" The corrected copy clarified citations and typographical errors (**McVittie PHB**).

On November 10, 1999, the Presiding Officer issued an "Order Striking Portions of Prehearing Brief." *See* Section I.C, *supra*.

On November 23, 1999, the Board received "Snohomish County's Prehearing Brief (with Exhibits)"[4] (**County PHB**). The County's PHB included a request for the Board to take official notice of certain actions taken by the County Council on November 22, 1999. On the same day, the Board received "Snohomish County-Camano Association of Realtors' Prehearing Response Brief" (**Realtors** PHB), no exhibits were attached.

On December 3, 1999, the Board received "Petitioner's Prehearing Reply Brief" (**McVittie Reply**), McVittie's "Motion to Supplement the Record" (**Motion to Supplement #2**) and Bourgault's "Legal Issues 5 & 6 (Optional Reply Brief)" (**Bourgault Reply**).[5]

On December 7, 1999, the Board received a "Notice of Appearance," indicating David A. Bricklin represented Petitioners.

On December 8, 1999, after attempts to reschedule the Hearing on the Merits (**HOM**) to accommodate the parties,[6] the Board issued a "Notice of Change of Date for Hearing on the Merits." The Order cancelled the December 9, 1999 HOM and rescheduled it for 10:00 a.m., Tuesday, December 14, 1999, at the Board's offices – Suite 1022.

On December 14, 1999, the Board held a hearing on the merits in Suite 1022 of the Financial Center, 1215 4th Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, and Joseph W. Tovar were present for the Board. David A. Bricklin represented Petitioners Jody L. McVittie, Patricia C Bourgault and the South Snohomish County Preservation Association. Dawn Findlay and Barbara Dykes represented Respondent Snohomish County. Thomas J. Ehrlichman represented Intervenor Snohomish County-Camano Association of

Realtors. Court reporting services were provided by (Cynthia LaRose) of Robert H. Lewis & Associates, Tacoma. The hearing convened at 10:00 a.m. and adjourned at approximately 1:30 p. m.

On January 12, 2000, the Board received a telefacilmile from the County indicating the dates of publication for Ordinance No. 99-027 (June 10 and 17, 1999) and for Ordinance No. 99-092 (December 16 and 23, 1999).

II. <u>presumption of validity, burden of proof and standard of review</u>

Petitioners challenge Snohomish County's adoption of the Snohomish County: 1999-2004 Capital Plan Detail, as adopted by Ordinance No. 99-027. Pursuant to RCW 36.70A.320(1), Snohomish County's Ordinance No. 99-027 is presumed valid upon adoption.

The burden is on Petitioners to demonstrate that the actions taken by Snohomish 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 action taken by [Snohomish County] is 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. <u>board jurisdiction and Prefatory note</u>

A. Board Jurisdiction

The Board concludes that: (1) the PFRs filed by Petitioners McVittie and Bourgault/SSCPA were timely filed, pursuant to RCW 36.70A.290(2), Findings of Fact (**FoF**) 1, 2; (2) Petitioners McVittie, Bourgault and SSCPA have standing to appear before the Board, pursuant to RCW 36.70A.280(2), FoF 3; and (3) the Board has subject matter jurisdiction over the challenged ordinance [Ordinance No. 99-027], pursuant to RCW 36.70A.280(1)(a), FoF 4.

B. Prefatory Note

On its face, this case involves a challenge of the 1999-2004 Capital Plan Detail of the Capital Facilities Element of Snohomish County's Comprehensive Plan. This is not the first time Snohomish County's Capital Facilities Element has been brought before this Board. The County adopted its GMA Comprehensive Plan, including a Capital Facilities Element, in June of 1995. Ex. 281, Ordinance No. 94-125, Section 4, at 17. This Plan became the focus of the Board's

case: *Sky Valley, et al. v. Snohomish County* (***Sky Valley***), CPSGMHB Case No. 95-3-0068c, Final Decision and Order (Mar. 12, 1996). The 134 page *Sky Valley* FDO,[7] devoted approximately ten pages of discussion to issues involving the County Plan's Capital Facilities Element[8] and the Transportation Element,[9] that are similar to some of the issues raised in this case. From 1996 until the present PFRs were filed with the Board, Snohomish County's capital improvement planning process proceeded unchallenged.

The present challenge questions the contents of the County's 1999-2004 Capital Plan Detail as adopted by Ordinance No. 99-027.[10] However, portions of the challenged document have been recently replaced by the County's adoption of its 2000-2005 Capital Plan through Ordinance No. 99-092.[11]

In their briefing, Petitioners raise some issues originally addressed in *Sky Valley* and pose some issues the Board will not address due to mootness. On other issues, all the parties have asked the Board to provide clarification of what the GMA requires. In short, the issues the Board has been asked to resolve in this case have evolved and been refined, as the case has moved through the process. Additionally, Petitioner McVittie filed a new PFR on January 24, 2000, challenging the County's new 2000-2005 Capital Plan. In this decision, the Board will address as many issues as it is permitted to resolve the dispute between the parties, providing, where appropriate, the guidance requested by the parties to the County for its capital improvement planning process. To provide further context for the Board's decision, Petitioners' theory of the case and the evolution of the "issues" and concerns is provided below.

The Board construes Petitioners' theory of the case to be: if the GMA is to have real meaning, local jurisdictions are going to have to come to grips with the financing side of implementing the GMA. The GMA establishes a framework for using regulatory techniques to conserve rural and resource lands, to protect critical areas, and to guide growth into urban growth areas; to assist in accommodating this urban growth, the GMA establishes the financing of needed infrastructure as an additional GMA required implementation tool. Petitioners contend that the Act requires communities to take a serious look at what it can afford, where to allocate its recognized limited financial resources, disclose funding shortfalls and find options, including reassessing the land use element, so that the citizens of the County can live within their means. In essence, in this case, Petitioners question the County's financial commitment to implementing its GMA Plan as required by the Act.[12] However, Petitioners failed to articulate and support this theory in the early stages of this case when the Legal Issues were framed.

When the PFRs were originally filed in this case, each presented one similar broad issue for

resolution by the board.[13] Prior to, and at the PHC, the parties and the Board attempted to clarify and narrow the issues of concern to the Petitioners and concisely state them for the PHO. Ultimately, six Legal Issues (four common to all Petitioners and two raised solely by Bourgault/ SSCPA) were included in the PHO. Subsequent briefing on the Motion to Supplement, Dispositive Motions, and Prehearing Briefs further clarified the concerns and issues of Petitioners. However, while the briefing clarified the concerns and issues of Petitioners, the briefing does not conveniently relate to the Legal Issues as stated in the PHO. Further, at the HOM during argument on the question of mootness, the parties agreed that the Board should provide further clarification on the specific requirements of certain sections of the GMA.

Therefore, in this Order, the Board attempts to address the concerns, issues and arguments of the parties within the confines of the PHO, and PFRs. Also, to the extent that the Board can provide necessary clarification on the GMA implementation scheme, it will do so. The Board has organized the discussion along topical areas, while being mindful to "not issue advisory opinions on issues not presented to the board in the statement of issues, as modified by [the] prehearing order." RCW 36.70A.290(1).

From a review of the briefing and the record in this case, it is understandable that Petitioners had difficulty grasping which of the County's documents were designed to address which of the GMA's requirements;[14] difficulty in understanding the relationship between the various County documents, and difficulty in discerning how amendments to one or more of those documents affects the County's compliance with the Act's requirements. This is not a criticism of the insight or tenacity of these lay Petitioners. Even the Board struggled to divine the answers to these questions.

While the Board appreciates the fact that the various County documents were adopted in different years by, in effect, different Councils, the net result is that it is not a simple matter to understand what exactly the County has done to meet its duty regarding these important infrastructure issues. The parties have invited the Board to provide clarification about the Act's requirements, and notwithstanding the mootness of certain issues, the Board is obliged to do so. Simply put, the County must do a better job of explaining, clearly and succinctly, how its various planning and finance documents meet the Act's requirements to plan for and provide necessary public infrastructure, including (1) *concurrency* mechanisms for, at the very least, transportation levels of service and (2) *adequacy* mechanisms for the other public facilities identified in its Capital Facilities Plan as necessary to support development.

The concurrency and adequacy "triggering mechanisms" in the GMA oblige the County, on finding that funding for a particular facility is lacking, and consequently a particular service level will fall below an adopted standard, to take some action in response. The County's Plan includes

a non-exhaustive list of options, but it 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. These GMA provisions provide a vital opportunity to engage the public in a dialogue about the infrastructure needs and the costs and consequences of various options, including the failure of financing tools dependent on voter approval.[15] While the responsibility to adopt plans, regulations and budgets to manage growth rests with local elected officials, the success of those efforts is largely dependent on active and responsible participation by the public.

Prior to discussing the merits of the case, the Board addresses several preliminary matters: Motions to Supplement the Record or Take Official Notice, Mootness, and Dispositive Motion.

IV. PRELIMINARY MATTERS

A. Motions to Supplement the Record And Take Official Notice

In the County PHB, the Board is asked to take official notice of a 1998 ordinance relating to school district impact fees and a series of ordinances and motions adopted on November 22, 1999. County PHB, *footnote 68* at 25, 28.

Petitioner McVittie also filed a Motion to Supplement along with her Reply Brief, requesting inclusion of a one-page staff presentation on Motion 99-400. Motion to Supplement #2, at 1.

After reviewing the submitted materials, the Board determined that they would be necessary and of substantial assistance to the Board in reaching its decision. Therefore, at the HOM, the Presiding Officer ruled that the Board takes official notice, pursuant to WAC 242-02-660(4), or admits the submitted materials. Additionally, the Board asked the County to provide the Board with a copy of the affidavits of publication for the Ordinances and Motions adopted November 22, 1999. *See* WAC 242-02-670(2). The Board's ruling on the items and assigned Index Nos.[16] are listed in the summary table below.

Proposed Exhibit: Documents	Ruling
1. County Exhibit B. Ordinance No. 98-126 (Establishing School Impact Fees)	**Board takes notice** – Index No. 284
2. County Exhibit B. Attachments D-1 through D-13 (13 School District Capital Facilities Plans)	**Board takes notice** – Index No. 284, D-1 through D-13, respectively.

3. County Exhibit C-1. Ordinance No. 99-092 (Adopting the 2000 – 2005 Capital Improvement Plan as part of Snohomish County's Growth Management Act Comprehensive Plan and Amending Ordinance No. 94-125 and Amended Ordinance No. 99-027)	**Board takes notice –** Index No. 285
4. County Exhibit C-2. Amended Motion 99-400 (Adopting the Six-Year Transportation Improvement Program)	**Board takes notice –** Index No. 286
5. Remainder of County Exhibit C. "Budgetary Enactments C-3 through C-13" (Amended Ordinance Nos. 99-093 and 99-091; Amended Motion Nos. 99-403, 99-404, 99-401, 99-402; November 19, 1999 Memorandum to County Council from Ann Good - Re: Amendment to Ordinance No. 99-091; Amended Ordinance No. 99-094, Ordinance No. 99-095, and Amended Ordinance No. 99-097)	**Board takes notice –** Index No. 287, C-3 through C-13, respectively.
6. One page handout used in the County Staff presentation on Motion 99-400, entitled "Substantial Need"	**Admitted** – Index No. 288
7. Affidavit of Publication for Notice of Enactment of Amended Ordinance No. 99-092, *The Herald*, published December 16 and 23, 1999.	**Board takes notice** – Index No. 289

B. Mootness

Background

As noted *supra*, the Board has taken official notice of various budgetary enactments the Snohomish County Council adopted on November 22, 1999. Among these recent enactments of the County are Ordinance No. 99-092 and Motion 99-400.[17]

Ordinance No. 99-092:

Ordinance No. 99-092 is entitled:

> *adopting the 2000-2005 capital improvement plan* as a part of snohomish county's growth management act comprehensive plan *and amending* amended ordinance no. 94-125 and *amended ordinance No. 99-027*.

(Emphasis supplied.) Ex. 285, at 1. Ordinance No. 99-027 is the focus of Petitioners' challenge in this case. Sections 1 and 2 of this ordinance adopt findings of fact and set forth the basis for the enactment.

Section 3 provides:

> Based on the foregoing findings and conclusions, the Snohomish County: 1999-2004 Capital Plan Detail adopted as Exhibit D in Section 4 of Amended Ordinance No. 94-125 and as Exhibit A in Section 6 of Amended *Ordinance No. 99-027* on May 24, 1999, *is hereby amended by replacing pages 50-230*[18] *of that document with the 2000-2005 Capital Improvement Plan, which is attached hereto as Exhibit A,* and hereby incorporated into this ordinance as if set forth in full. Amended Ordinance No. 99-027 is also amended by revising the title of its attached Exhibit A to read: "Snohomish County: ~~1999-2004~~ 2000-2005 Capital Plan ~~Detail~~."

Ex. 285, at 3 (emphasis supplied).

Section 5 of this ordinance adopts the 2000-2005 Capital Improvement Plan (**2000-2005 CIP**). Section 6 provides:

> *The 2000-2005 Capital Improvement Plan adopted pursuant to this ordinance supersedes all other county capital improvement programs.* In the event of any inconsistency between the 2000-2005 Capital Improvement Plan and any other capital improvement plan adopted by the county, the 2000-2005 Capital Improvement Plan shall control.

Ex. 285, at 4 (emphasis supplied).

The effect of this enactment is twofold: First, Ordinance No. 99-027's Departmental Capital Plan List (pp. 50-59) and the Detailed Departmental Capital Plan Lists (pp. 59-230) are replaced with the 112 page, 2000-2005 CIP;[19] second, Ordinance No. 99-092 makes it clear that the 2000-2005 CIP supercedes the 1999-2004 CIP adopted by Ordinance No. 99-027. However, the Board

notes that the first 50 pages of the 1999-2004 CIP are not affected by the adoption of Ordinance No. 99-092.

Motion 99-400:

This enactment is entitled: "Adopting the Six Year Transportation Improvement Program." Ex. 286, at 1. This Motion states:

> WHEREAS, this update of the six year transportation improvement program conforms as nearly as practicable to the County's long range transportation plan as contained in the Transportation Element for the Snohomish County Comprehensive Plan, June 1, 1995, and the Snohomish County Transportation Needs Report (1995-2012), originally published in November 1990 and last revised in August 1999;
> . . .
> 1. The Snohomish County 2000-2005 Six Year Transportation Improvement Program submitted by the County Engineer, attached hereto and by this reference incorporated herein, is hereby adopted.

Ex. 286, at 1.

This enactment replaces the County's former Transportation Improvement Program (**TIP**) with the new 2000-2005 TIP.

Applicable Law and Discussion

The County argues that "Despite the fact that the County fully complied with RCW 36.70A.070 (3)(d)[20] when it amended the [Capital Facilities Element in adopting Ordinance No. 99-027], this issue is now moot. On November 22, 1999, as part of its 2000 budget process, the County Council passed Ordinance No. 99-092, which adopted a new six-year capital facilities financial plan." County PHB, at 27-28. Also, regarding the challenge of compliance with RCW 36.70A.070(3)(e),[21] the County asserts: "due to adoption of Ordinance No. 99-92, this issue is now moot." County PHB, footnote 84, at 29. Finally, regarding the challenge to compliance with RCW 36.70A.070(6)(b), the County refers to the newly adopted[22] TIP to illustrate its financial commitment to address road deficiencies within the next six-years. County PHB, at 36.

In reply, Petitioners state:

> Cases are not considered moot if the potential exists for the issues never to be resolved because the responding party repeatedly takes action to try and moot each successive case in turn before a challenge to it can be completed. [Citations omitted]

> Here, the fundamental issues need to be addressed. If a new PFR is filed against the newly adopted financing plan, that PFR can be rendered moot days before that hearing on the merits by the County adopting yet another financing plan.

McVittie Reply, at 29. Petitioner notes: "The financing plan adopted [November 22, 1999] was the third such plan adopted by the County in the last fifteen months." *Id.*

At the HOM, notwithstanding the question of mootness, the County asked the Board for guidance "with regards to the capital facility element and the idea of the level of service standards being tied to a type of concurrency enforcement mechanism." Transcript, at 13. Additionally, the County stated: "if this Board is now going to reverse itself and state that there is a level of service criteria [the County apparently uses a range of standards, depicted by Service Guidelines] tied to concurrency, not just the one level of service itself, but the *actual mechanism*; if that is now a requirement of a capital facilities plan, then we need to know that. We would invite the Board to articulate whether or not that is, in fact, a GMA duty." Transcript, at 17 (emphasis supplied). Notwithstanding the mootness question regarding the County's specific six-year financing plan, the Petitioners also ask the Board to address the broader question of "the reassessment provision . . . [which has] tremendous significance, not just for Snohomish County but for the other counties planning under the Act." Transcript, at 20-21. Intervenor also stated: "We don't disagree with the County that the Board may issue an opinion as to what is required with respect to the level of service and that may be helpful in resolving future appeals." Transcript, at 25-26.

"A case is moot if a court can no longer provide effective relief." *Orwick v. Seattle,* 103 Wn.2d 249, 253, 692 P.2d 793 (1984). In *Orwick*, the court recognized an exception to moot cases involving "matters of continuing and substantial public interest." *Id.*, at 253. In *Tacoma, et al. v. Pierce County,* CPSGMHB Case No. 94-3-0001, Order on Dispositive Motions (Mar. 4, 1994), at 16-17, this Board adhered to the reasoning in *Orwick*.

Here, the 1999-2004 six-year capital facilities financing program contained in challenged Ordinance No. 99-027 has been replaced by the 2000-2005 CIP six-year capital facilities financing program contained in Ordinance No. 99-092. Likewise, the County's prior capital budget decisions regarding roads have been replaced by the new capital budget decisions contained in the County's new six-year TIP adopted in Motion 99-400. The Board is not persuaded that the County's adoption of these recent budgetary enactments was an evasive action to avoid Board review in the present case. Rather, the Board accepts the explanation given in the County Executive's transmittal letter in the 2000-2005 CIP. This letter indicates that the 2000-2005 financing program is to coordinate the County's budget processes and allow for timely update of the long-range components of the County's GMA Capital Facilities Element. Ex. 285 (attached Ex. A, at 2). In other words, the County's procedure has changed – now the capital

facilities financing plans are adopted at the same time as the County's budget.

In these circumstances, the Board could not provide effective relief if it found the prior six-year financing programs (1999-2004 CIP) did not comply with requirements of the Act. Therefore, to the extent Petitioners' challenges, issues and arguments address the six-year financing programs adopted by the County that were superceded by the County's adoption of Ordinance No. 99-092 and Motion 99-400, the issues are moot. This means that direct challenges to the contents of the 1999-2004 six-year financing program are moot; that claims of inconsistency between the 1999-2004 financing program and other provisions of the County's Plan are moot; and that claims based on the 1999-2004 financing program to show that the County is not making its capital budget decisions in compliance with its comprehensive plan are moot.

However, the Board has determined that the guidance sought and requested by the parties at the HOM constitutes "matters of continuing and substantial public interest." Therefore, elsewhere in this Order, the Board addresses these questions and issues arising from those portions of Ordinance No. 99-027 that have not been altered or replaced by the County's recent budgetary enactments.

Conclusion

To the extent Petitioners' challenges, issues and arguments address the six-year financing programs adopted by the County that were superceded by the County's adoption of Ordinance No. 99-092 and Motion 99-400, the issues are **moot**. Those portions of Ordinance No. 99-027 that have not been altered or replaced by the County's recent budgetary enactments, as well as the guidance sought and requested by the parties which the Board has determined constitute matters of continuing and substantial public interest are addressed in the remainder of this Final Decision and Order.

C. Dispositive Motions

Background

In the Board's October 26, 1999 "Order on Dispositive Motions," the Board denied the County's motion to dismiss certain legal issues. However, the Board stated: "in denying the motion, the Board is not taking a position on the merits of the arguments presented by the parties; following the hearing on the merits, the Board will address the issues and arguments presented [in the dispositive motion briefs] in its final decision and order." *McVittie, et al. v. Snohomish County*, CPSGMHB Case No. 99-3-0016c, Order on Dispositive Motions (Oct. 26, 1999), at 3. The Board now turns to the arguments raised in the briefs on dispositive motions.

In its October 1, 1999 motion, the County seeks to have the Board dismiss: Legal Issue 5 (Housing Element), Legal Issue 6 (Utilities Element), Legal Issues 3 and 4 (Transportation Element), and part of Legal Issue 1 (Goals 3, 4 and 9). In essence, the County argues that Petitioners' issues attack the validity of elements that were not amended by Ordinance No. 99-027 (the **Ordinance**), and that such challenges are untimely. County Motion – Dismiss, at 1-9.

The numerous WHEREAS clauses of the Ordinance refer to the GMA required six-year plan to finance capital facilities. Ex. 2, at 1-2. Section 3 of the Ordinance amends the 1994 Ordinance, which adopted the County's GMA Plan, to update the title of the six-year financing plan. Ex. 2, at 4. Section 4 of the Ordinance repeals the prior 1998-2003 CIP and replaces it with the 1999-2004 Capital Plan Detail. Ex. 2, at 4. Section 5 adopts the 1999-2004 Capital Plan Detail. Ex. 2, at 4. Finally, Section 7 provides that the 1999-2004 Capital Plan adopted by Ordinance No. 99-027 supersedes all other County capital improvement programs. Ex. 2, at 5. As the County contends "Ordinance No. 99-027 does not amend the County's [GMA Plan's] Transportation, Park, Utility or Housing Elements." Co. Motion – Dismiss, at 5.

Discussion

Housing Element (Legal Issue 5):[23]

It is clear from review of Ordinance No. 99-027 that it did not amend the Housing Element of the County's GMA Comprehensive Plan. Ex. 2, at 1-5. A challenge to the County's GMA Plan Housing Element, at this time, is untimely. Therefore, the challenge to the County's compliance with RCW 36.70A.070(2), as stated in the PHO, is **dismissed**.

The Board notes, however, that the briefs submitted by Petitioner Bourgault/SSCPA, articulate Petitioners' concerns as follows: The County's GMA Plan (Policy HO1.C4) commits to maintaining the County's Housing Trust Fund (**HTF**) as a local source of financial assistance for low income and special needs housing; yet, the 1999-2004 Capital Plan Detail neither provides such funding nor even mentions the HTF. Bourgault Response – Dismiss, at 2; and Bourgault PHB, at 2. In this context Bourgault's argument suggests: (1) the County failed to make its capital budget decisions in conformity with its Plan; and/or (2) the Housing Element of the County's GMA Plan and the 1999-2004 Capital Plan Detail (Capital Facility Element) are internally inconsistent. Nonetheless, even in this context Petitioners' arguments must fail as moot, since they rely on the 1999-2004 Capital Plan Detail, which has been replaced by the 2000-2005 Capital Plan.

Utilities Element (Legal Issue 6):[24]

It is clear from review of Ordinance No. 99-027 that it did not amend the Utilities Element of the County's GMA Comprehensive Plan. Ex. 2, at 1-5. A challenge to the County's GMA Plan Utilities Element, at this time, is untimely. Therefore, the challenge to the County's compliance with RCW 36.70A.070(4), as stated in the PHO, is **dismissed**.

Again, the Board notes that the briefs submitted by Petitioner Bourgault/SSCPA, articulate Petitioners' concerns as follows: The Capital Plan Detail is not complete with regard to discussion of sewer and water systems. Additionally, the County's GMA Plan (Policy UT 3a) provides that the County will maintain an updated inventory or wastewater collection and treatment systems and plans to be used in evaluating land use and capital facility decisions. Bourgault Response – Dismiss, at 2-3; and Bourgault PHB, at 2. These arguments and issues are germane to compliance with the GMA's requirements for the Capital Facilities Element and they will be addressed below in the Board's discussion of the Capital Facilities Element (Legal Issue 2). Specifically, the question of the Plan's treatment of sewer and water systems and the need for inventory updates, is covered in the Board's discussion *infra* under section V. Legal Issues and Discussion, B. Capital Facilities Element.

Transportation Element (Legal Issues 3[25] and 4[26]):

Regarding Legal Issue 3, a review of Ordinance No. 99-027 indicates that it did not amend the Transportation Element of the County's GMA Comprehensive Plan. Ex. 2, at 1-5. Regarding the issues raised in Legal Issue 3, a challenge to the County's GMA Plan Transportation Element, at this time, is untimely. Therefore, the challenge to the County's compliance with RCW 36.70A.070(6), as stated in the PHO, is **dismissed**.

Regarding Legal Issue 4, a review of Ordinance No. 99-027 indicates that it did not amend the Transportation Element of the County's GMA Comprehensive Plan. Ex. 2, at 1-5. Regarding the challenges to RCW 36.70A.070(6)(a)(i), (iii)(E), and (iv)(B) raised in Legal Issue 4, a challenge to the County's GMA Plan Transportation Element, at this time, is untimely. Therefore, that portion of Legal Issue 4 challenging compliance with RCW 36.70A.070(6)(a)(i), (iii)(E), and (iv)(B), as stated in the PHO, is **dismissed**. However, the challenge regarding compliance with RCW 36.70A.120 remains and will be discussed *infra* under section V. Legal Issues and Discussion, A. Transportation Element.

[27]

Goals (Legal Issue 1):

Snohomish County asks the Board to dismiss Petitioners' challenges relating to compliance with RCW 36.70A.020(3), (4) and (9). County Motion – Dismiss, at 9. However, the County offers no basis or argument to support its request. County Motion – Dismiss, at 1-9. In response,

Petitioner McVittie notes that Goal 3 relates to transportation and Goal 9 relates to open space; since the capital plan lays out funding for both transportation and open space, neither issue should be dismissed. McVittie Response – Dismiss, at 6. Petitioner Bourgault offers no comment on Goal 4 (housing) in response. Bourgault Response – Dismiss, at 1-5. In reply, the County offers no support for its request to dismiss Petitioners' challenges to Goals 3, 4 or 9. The County's motion to dismiss challenges to the County's compliance with RCW 36.70A.020, certain GMA Goals, is **denied**. These issues are addressed *infra* under section V. Legal Issues and Discussion, A. Goals.

Conclusion

The County's motion to dismiss Petitioner's challenge to the County's compliance with RCW 36.70A.070(2), the Housing Element requirements, is **granted**. The County's motion to dismiss Petitioner's challenge to the County's compliance with RCW 36.70A.070(4), the Utilities Element requirements, is **granted**. The County's motion to dismiss Petitioners' challenge to the County's compliance with RCW 36.70A.070(6), the Transportation Element requirements, is **granted**. The County's motion to dismiss that portion of Legal Issue 4, related to compliance with RCW 36.70A.120, is **denied**. The County's motion to dismiss Petitioners' challenge to the County's compliance with RCW 36.70A.020, related to certain GMA's Goals, is **denied**.

v. legal issues and discussion

A. TRANSPORTATION ELEMENT – RCW 36.70A.120

Applicable Law and Discussion

RCW 36.70A.120 provides, in relevant part:

> Each county. . . *shall* perform its activities and *make capital budget decisions in conformity with its comprehensive plan*.

(Emphasis supplied.) In relation to roads, Petitioners' question whether the County has complied with this provision.[28]

A threshold issue for determining whether the County has made its capital budget decisions, pertaining to roads, in conformity with its comprehensive plan, is the relationship of the County's Transportation Element, the six-year financing plan in the 1999-2004 Capital Plan Detail and the TIP.

Conceptually, the starting point for this inquiry is the County's Transportation Element, as

adopted by Ordinance No. 94-125 in 1995. Ex. 261. Within this document, the County identifies its proposed transportation improvements for the short range (1995-2000 Phase) and long range (2001-2012 Phase).[29] Ex. 261, at 69-106. The transportation improvements identified in the Transportation Element are the baseline Plan provisions against which conformity of capital budget decisions are measured.

The next question for assessing Petitioners' .120 challenge: is which document(s) contains the capital budget decisions that must conform to the comprehensive plan?[30]

Petitioners' contend that the 1999-2004 Capital Improvement Plan Detail, at 39-43, and at 182-190 contain the relevant information. McVittie Response – Dismiss, at 2, and 4. The County counters: "Petitioner confuses the very nature of the Capital Facilities Plan and the Counties Transportation Improvement Program ('TIP'), which is the 'multiyear financing plan' required by RCW 36.70A.070(6)(a)(iv)." County Reply – Dismiss, at 5. Additionally, at the HOM, in explaining the relationship of the Transportation Element, the 1999-2004 Capital Plan Detail and the TIP, the County stated:

> What this document [1999-2004 Capital Plan Detail] does is it refers to, it summarizes, and it utilizes the information in both the TIP, we'll use the old one not just the one that was updated, and the transportation element. It did that so it could give the viewers a comprehensive review of all the numbers. . . . So, the relationship is it [put summary references into the 1999-2004 Capital Plan Detail] so the average reader could understand basically the bottom line for everything as opposed to saying see TIP, see Transportation Element for these numbers.

Transcript, at 57. Given these arguments and explanation by the County, the Board concurs with the County's procedure.[31]

In Snohomish County, the 1999-2004 Capital Facility Plan Detail within the capital facilities element of the County's GMA Plan contains a *summary* of the County's transportation improvement capital budget decisions, it does not contain the actual capital budget decisions. Those actual capital budget decisions for roads are contained, as the County correctly contends, in the TIP.

Thus, for Petitioners to sustain a challenge as to whether the County is making its capital budget decisions in conformity with its plan, as it pertains to roads, Petitioners must challenge the County's TIP, which Petitioners have not done. Petitioners only challenged the County's adoption of Ordinance No. 99-027. Further, the Board notes that even if Petitioners had challenged the County's "old" TIP, Motion 99-400 adopted the 2000-2005 TIP thereby replacing

the "old" TIP. In that situation, Petitioners' challenge would have been **moot**; however, in the present circumstances, Petitioners' challenge to the County's compliance with RCW 36.70A.120 is misplaced and is **dismissed**.

Conclusion

In order for Petitioners to argue that the County is not making its capital budget decisions for roads in conformity with its comprehensive plan, Petitioners must rely on the TIP, not the summary provided in the County's 1999-2004 Capital Plan Detail. Petitioners did not challenge the County's TIP. Petitioners' arguments are misplaced. Therefore, the remaining challenge to the County's compliance with RCW 36.70A.120 is **dismissed**.

B. GOALS - RCW 36.70A.020(1), (3), (4), (9) and (12)

Respondent points out that Petitioners have failed to adequately brief this issue[32] as it relates to RCW 36.70A.020(1), (3), (4) and (9). County PHB, footnote 20, at 7. McVittie counters that RCW 36.70A.020(4) was not among her issues, but RCW 36.70A.020(1), (3) and (9) were cited on several occasions; Attachment A notes the pages where these Goals are referenced. McVittie Reply, at 11, Appendix A, at 1. Neither brief submitted by Petitioner Bourgault argues RCW 36.70A.020(4). Bourgault #5 PHB; Bourgault Reply. The Board confirms that the McVittie PHB *cites* Goals (1), (3) and (9) as shown in Appendix A; but the question of whether the County was guided by or complied with these goals was not *briefed*. An issue is abandoned if it is not briefed. WAC 242-02-570(1). Since neither Petitioner briefed the challenge to RCW 36.70A.020 (4) or RCW 36.70A.020(1), (3) and (9), these challenges are deemed **abandoned**. Therefore, the surviving Goal challenge is to RCW 36.70A.020(12) – Goal 12.

Applicable Law and Discussion

Goal 12 provides:

> Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

RCW 36.70A.020(12).

Petitioners' PHB is laced with references to the County's alleged failure to adhere to the guidance provided in Goal 12. *See e.g.*, McVittie PHB, at 7-22. Petitioners also cite *Diehl v. Mason County*, 94 Wn App. 645 (1999), apparently for the proposition that an LOS single standard is

required for facilities contained in a capital facilities element. Bourgault Response – Dismiss, at 2-4, McVittie PHB, at 10, Bourgault #5 PHB, at 4, Bourgault #6 PHB, at 6.

The County acknowledges Petitioners' concern: "Petitioner McVittie argues throughout her brief that the County failed to comply with goal RCW 36.70A.020(12)." County PHB, footnote 20, at 7. However, both the County and Intervenor dispute the significance of *Diehl*. County PHB, at 8-9; Realtors PHB, at 6-7. Citing prior decisions of this Board,[33] the County contends that Petitioner has failed to demonstrate that there is any duty under Goal 12 other than complying with the requirements of RCW 36.70A.070(3). County PHB, at 7-10.

In reply, Petitioners quote the Western Washington Growth Management Hearings Board's (**Western Board**) discussion of Goal 12 in *Taxpayers for Responsible Growth v. City of Oak Harbor* (***Oak Harbor***), WWGMHB Case No. 96-2-0002, Final Decision and Order (Jul. 16, 1996), and argue that complying with Goal 12 is broader than meeting the requirements of RCW 36.70A.070(3), since Goal 12 refers to both facilities and services. McVittie Reply, at 3-4, and Attachment B.

Finally, at the HOM, the parties requested that the Board provide clarification as to the scope of this Goal. *See supra*, at 8 and 13.

To provide the clarification requested by the parties, the Board will examine the interrelationship between Goal 12 and certain requirements sections of the Act. To do this the Board must answer the following questions:

> ***1. Does Goal 12 create a duty beyond the capital facilities planning that is required by RCW 36.70A.070(3)?***
>
> ***2. Does Goal 12 require the designation of a single Level of Service (LOS) standard for the facilities and services contained in a Capital Facilities Element?***
>
> ***3. Does Goal 12 require an enforcement mechanism or "trigger" that forces a reassessment action by a jurisdiction?***
>
> ***4. Does Goal 12 require "concurrency" for all public facilities and services beyond the explicit concurrency requirement contained in RCW 36.70A.070 (6)(b) for transportation?***

The Board now addresses each of these questions.

1. Does Goal 12 create a duty beyond the capital facilities planning that is required by RCW 36.70A.070(3)?

As the County has shown, this Board has said that "The way to achieve that goal [Goal 12] is through the Capital Facility Element Requirements for the Plan specified in RCW 36.70A.070 (3)." *Robison*, at 27; *WSDF I*, at 49. The Board still adheres to this statement. However, Goal 12 means more.

In oral argument, the County argued that if implementing Goal 12 goes beyond the capital facilities element requirements of .070(3), then any additional duty is interrelated with implementing the transportation element requirements of .070(6). Transcript, at 63. The Board agrees. Goal 12 may be achieved or implemented through compliance with the requirements of the capital facilities element or the transportation element found at RCW 36.70A.070(3) and (6).

While Board review of a challenge to RCW 36.70A.070(3) or (6) focuses on the specific requirements of the section, the Board's review must be done in light of Goal 12, not in lieu of Goal 12. However, a challenge to Goal 12 is not necessarily restricted to argument regarding compliance with these two requirement provisions of the GMA.

In *Rabie, et al. v. City of Burien* (***Rabie***), CPSGMHB Case No. 98-3-0005c, Final Decision and Order (Oct. 19, 1998), the Board discussed its prior holdings regarding procedural[34] and substantive compliance with the Goals of the GMA. Regarding substantive compliance with the GMA's goals the Board stated:

> Local governments must use the planning goals "to point the way for enactment of development regulations and comprehensive plans that substantively comply with the GMA." *Association of Rural Residents v. Kitsap County*, CPSGMHB Case No. 93-3-0010, Final Decision and Order (Jun. 3, 1994), at 27. The Board will review the challenged enactments to "determine whether [they] achieve the legislature's intended result: consistency with the planning goals of the Act." *Id.*, at 28. In other words, *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*.

Rabie, at 5-6 (emphasis supplied).

As one of the GMA's planning goals, Goal 12 requires substantive compliance as described in *Rabie*. Thus, Goal 12's reach may go beyond a challenge to a jurisdiction's compliance with the

requirements of RCW 36.70A.070(3) or (6). A petitioner may make a case that some enactment of a jurisdiction, other than a capital facility or transportation element, is not consistent with, or thwarts, the provisions of Goal 12.

The answer to the question 1 - Does Goal 12 create a duty beyond the capital facility planning that is required by RCW 36.70A.070(3)? – is **yes**. Goal 12's reach extends to compliance with RCW 36.70A.070(6). Additionally, Goal 12 may go beyond a challenge to compliance with the requirements of RCW 36.70A.070(3) or RCW 36.70A.070(6). Goal 12 also requires substantive compliance. Other plan or development regulation provisions of the local government may not thwart its provisions.

2. Does Goal 12 require the designation of a single Level of Service (LOS) standard for the facilities and services contained in a Capital Facility Element?

It is not disputed that the GMA requires local governments to establish a single LOS standard[35] for transportation facilities. *See* RCW 36.70A.070(6)(a)(iii)(B). This provision of the transportation element contributes to achieving and implementing the directives of Goal 12. However, the parties dispute whether a single LOS is required for all facilities in a capital facilities plan element adopted to comply with RCW 36.70A.070(3).

The Board acknowledges that the term "levels of service" standard never appears in the text of RCW 36.70A.070(3). The fact that the term does not appear in this section of the GMA does not mean that the concept of a baseline service standard is not a necessary component of capital facilities planning. Such a standard is critical in providing the basis for objective measurement of facility need and system performance.

Apparently, Petitioners interpret *Diehl* as meaning that a LOS standard is required for all capital facility planning. Bourgault Response – Dismiss, at 2-4, McVittie PHB, at 10, Bourgault #5 PHB, at 4, Bourgault #6 PHB, at 6. However, the Board agrees with the conclusions reached by the County and Intervenor Realtors, *Diehl* is inapplicable to, and distinguishable from, the present case. Unlike Snohomish County, Mason County failed to establish a basis of measuring future capital facility needs for any facilities other than transportation facilities. *Diehl*, 94 Wn. App. at ___, 972 P.2d at 549. *Diehl* sheds no light on the present question. The light is found in Goal 12.

As the Board discussed *supra*, at 19, "While Board review of a challenge to RCW 36.70A.070(3) or (6) focuses on the specific requirements of the section, the Board's review must be done in light of Goal 12, not in lieu of Goal 12."

The plain language of Goal 12 provides:

> Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use *without decreasing current service levels below locally established minimum standards*.

RCW 36.70A.020(12) (emphasis supplied). This language clearly contemplates and implicitly requires a capital facilities element, which deals with public facilities and services, to include a locally established minimum standard for included capital facilities.

The Western Board's *Oak Harbor* analysis also supports a single standard requirement as a basis for measuring facility need and performance. Its analysis of the phrase "without decreasing current service levels below locally established minimum standards" concluded:

> *This component imposes a requirement for local governments to establish a baseline for public facilities and services so that an objective test is available*. A local government must determine whether "new development" places additional demands that would create a decline of LOS below the locally adopted minimums.

Oak Harbor, at 12 (emphasis supplied).

The procedural guidelines also support the single point basis for measurement and evaluation.

> "Level of service" means *an established minimum capacity* of public facilities or services that must be provided per unit of demand or other appropriate measure of need.

WAC 365-195-210 (emphasis supplied).

Thus, reading RCW 36.70A.070(3) in light of Goal 12, the Board concludes that the Capital Facilities Element must include locally established minimum standards, a baseline, for included public facilities, so that an objective measurement test of need and system performance is available.

If a local jurisdiction develops a "range" of service standards, the locally established minimum standard that provides the basis for objective measurement of need and facility performance must be clearly indicated. If the minimum standard is not clearly identified, it must be assumed that the "minimum" standard is the lowest point indicated within the range of service standards.

The answer to question 2 - Does Goal 12 require the designation of a single Level of Service (LOS) standard for the facilities and services contained in a Capital Facilities Element? – is **yes**. Goal 12 gives context to RCW 36.70A.070(3). Goal 12 requires a locally established single minimum (level of service) standard to provide the basis for objective measurement of need and system performance for those facilities locally identified as necessary. The minimum standard must be clearly indicated as the baseline standard, below which the jurisdiction will not allow service to fall. The minimum standard may be the lowest point indicated within a range of service standards for a type of facility.

3. Does Goal 12 require an enforcement mechanism or "trigger" that forces a reassessment action by a jurisdiction?

Recall that Goal 12 provides:

> Public facilities and services. *Ensure* that *those public facilities and services necessary to support development* shall be adequate to serve the development at the time the development is available for occupancy and use *without decreasing current service levels below locally established minimum standards*.

RCW 36.70A.020(12) (emphasis supplied). Goal 12 explicitly provides an action-forcing requirement if public facilities cannot support development without decreasing levels of service below the locally established minimum standards. This provision of Goal 12 is supported by RCW 36.70A.070(3) and (6), which include specific mechanisms to trigger a reevaluation action by the local government.

For transportation, the "trigger mechanism" is found in RCW 36.70A.070(6)(a)(iv)(C), which provides:

> *If probable funding falls short of meeting identified needs* [the transportation element must contain], *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.

(Emphasis supplied.) It is clear that a local government must take action to ensure that the level of service standards will be met, if (the "trigger") probable transportation funding falls short of meeting identified transportation needs.

The capital facilities element also specifies a "trigger" for reevaluation action by the local government. RCW 36.70A.070(3)(e) provides:

> [The capital facility element must contain a] requirement to reassess the land use

> element *if probable funding falls short of meeting existing needs* and to ensure that the land use element, capital facilities element, and financing plan within the capital facilities element are coordinated and consistent.

(Emphasis supplied.) Again, it is clear that a local government must take action to ensure that existing identified needs are met, if (the "trigger") probable capital facility funding falls short of meeting capital facility needs.

It is important to recognize that a local government may use various regulatory techniques to avoid the situation where funding shortfalls occur. However, once local action is forced by a probable funding shortfall, a local government has numerous options to consider in reassessing and reevaluating its plan. In reassessing or reevaluating its plan, a local government is not automatically required to revise its land use element. There are other options that may be considered to meet identified capital facility needs and maintain plan consistency. A useful, but not exclusive, listing of possible options for a local government to consider is articulated in the County's "Capital Facilities Requirements 1994-1999 (and to 2013)."[36] This report provides:

- Reduce the standard of service, which will reduce the cost; or
- Increase revenues to pay for the proposed standard of service (higher rates for existing revenues, and/or new sources of revenue; or
- Reduce the average cost of the capital facility (i.e., alternative technology or alternative ownership or financing), thus reducing the total cost, an possibly the quality; or
- Reduce the demand by restricting population[37] (i.e., revise the land use element), which may cause growth to occur in other jurisdictions; or
- Reduce the demand by reducing consumption (i.e., transportation demand management, recycling solid waste, water conservation, etc.), which may cost more money initially, but which may save even more money later; or
- Any combination of [the options listed above].

Ex. 9(a), at 4.

Finally, if 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.[38]

The answer to question 3 - Does Goal 12 require an enforcement mechanism or "trigger" that forces a reassessment action or implements concurrency by a jurisdiction? – is **yes**. The GMA is to work as an integrated whole. RCW 36.70A.070(3) and (6) operate to achieve and implement Goal 12. These provisions require a "trigger mechanism" to compel reevaluation. However, local governments have numerous options to consider during reassessment. Also, if a local reassessment action is "triggered" the responsive action must occur in compliance with the public participation provisions of the GMA.

4. Does Goal 12 require "concurrency" for all public facilities and services beyond the explicit concurrency requirement contained in RCW 36.70A.070 (6)(b) for transportation?

In answering this question, the Board first turns to the analysis of Goal 12 the Western Board conducted in *Oak Harbor*. In interpreting the phrase "those public facilities and services necessary to support development," the Western Board stated:

> The general scheme of the GMA is that within the parameters of the goals and requirements of the Act, local governments have a wide variety of discretion to make localized decisions. [Citations omitted.] Because the legislature chose the word "those" instead of "all" we conclude that local governments have the discretion to determine which public facilities and services are necessary to support development. A county may have entirely different priorities on public facilities and services than that of a city. An urban growth area outside of current city boundaries may have different public facility and service requirements than areas either within municipal boundaries or for county areas outside UGAs.

Oak Harbor, at 10-11. This Board concurs.

Therefore, Goal 12 enables local governments to exercise their discretion in making the reasoned determinations of which public facilities and services are necessary to support development within the jurisdiction. The Board now turns to the question of facilities being provided concurrent with development.[39]

The transportation element clearly specifies an enforcement procedure to ensure that transportation improvements coincide with development:

> *[L]ocal jurisdictions must adopt and enforce ordinances which prohibit development approval* if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation

> element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development.

RCW 36.70A.070(6)(b) (emphasis supplied).

Thus, the transportation element requires a local government to adopt a "concurrency" ordinance that will prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan.[40]

Unlike the transportation element, the capital facilities element does not use the phrase "concurrent with development" and does not specify an enforcement procedure. RCW 36.70A.070(3) provides:

> [A comprehensive plan must contain a] capital facilities plan element consisting of: (a) An inventory of existing capital facilities owned by public entities, showing locations and capacities of the capital facilities; (b) a forecast of the future needs for such capital facilities; (c) the proposed locations and capacities of expanded or new capital facilities; (d) at least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes; and (e) a requirement to reassess the land use element if probable funding falls short of meeting existing needs and to ensure that the land use element, capital facilities plan element, and financing plan within the capital facilities element are coordinated and consistent.

However, Goal 12 sheds light on this omitted enforcement component. Recall that Goal 12 provides:

> Public facilities and services. Ensure that those public facilities and services necessary to support development *shall be adequate to serve the development at the time the development is available for occupancy and use* without decreasing current service levels below locally established minimum standards.

(Emphasis supplied.) Thus, a local government is obligated to take steps to ensure that those facilities and services it has identified as being necessary to support development are adequate and available to serve development.

Goal 12 requires enforcement and, just as it allows local discretion in identifying necessary facilities to support development, it allows local discretion in developing the type of enforcement

mechanism or programs to ensure public facilities are adequate and available to support development. These enforcement mechanisms and programs, that ensure the adequacy and availability of facilities, may involve the use of existing regulatory techniques that are authorized, or even required, by other statutory authority.[41]

In short, the adoption of a specific "concurrency" ordinance that prohibits development approval if the development causes the level of service for a facility or service (identified as being necessary to support development) to decline below the locally adopted minimum standards is *not required* by Goal 12 or RCW 36.70A.070(3). However, it is *not prohibited*. Adoption of such an ordinance by a local government is clearly within local discretion. Nonetheless, the jurisdiction must have an enforcement mechanism to ensure that identified necessary facilities and services for development are adequate and available.

Therefore, the answer to question 4 – Does Goal 12 require "concurrency" for all public facilities and services, beyond the explicit concurrency requirement contained in RCW 36.70A.070(6)(b) for transportation? - is **no**. Goal 12 does not require a development-prohibiting concurrency ordinance for non-transportation facilities and services. Goal 12 allows local governments to determine what facilities and services are necessary to support development and develop an enforcement mechanism for ensuring that identified necessary facilities and services for development are adequate and available.

Conclusion

The answer to question 1 - Does Goal 12 creates a duty beyond the capital facilities planning that is required by RCW 36.70A.070(3)? - is **yes**. Goal 12's reach extends to compliance with the requirements of RCW 36.70A.070(3) and (6), and includes an independent requirement for substantive compliance.

The answer to question 2 - Does Goal 12 require the designation of a single Level of Service (LOS) standard for the facilities and services contained in a Capital Facilities Element? – is **yes**. Goal 12 gives context to RCW 36.70A.070(3). Goal 12 requires a locally established single minimum (level of service) standard to provide the basis for objective measurement of need and system performance for those facilities locally identified as necessary. The minimum standard must be clearly indicated as the baseline standard, below which the jurisdiction will not allow service to fall. The minimum standard may be the lowest point indicated within a range of service standards for a type of facility.

The answer to question 3- Does Goal 12 require an enforcement mechanism or "trigger" that forces a reassessment action by a jurisdiction? – is **yes**. The GMA is to work as an integrated whole. RCW 36.70A.070(3) and (6) operate to achieve and implement Goal 12. These

provisions require a "trigger mechanism" to compel reevaluation. However, local governments have numerous options to consider during reassessment. Also, if a local reassessment action is "triggered" the responsive action must occur in compliance with the public participation provisions of the GMA.

The answer to question 4 – Does Goal 12 require "concurrency" for all public facilities and services, beyond the explicit concurrency requirement contained in RCW 36.70A.070(6)(b) for transportation? - is **no**. Goal 12 allows local governments to determine what facilities and services are necessary to support development and develop an enforcement mechanism for ensuring that identified necessary facilities and services for development are adequate and available.

Although Petitioners have assisted the Board in interpreting Goal 12 and providing the guidance requested by the parties, Petitioners have not demonstrated that the County has not complied substantively with the requirements of Goal 12.[42] Therefore, Petitioners have failed to carry their burden of proof regarding the County's compliance with Goal 12. The Board is not convinced that the County's action was clearly erroneous.

C. CAPITAL FACILITIES ELEMENT[43] – RCW 36.70A.070(3)(a), (b), (c), (d), and (e)

Applicable Law and Discussion

RCW 36.70A.070(3) provides:

> A capital facilities plan element consisting of: (a) An inventory of existing capital facilities owned by public entities, showing locations and capacities of the capital facilities; (b) a forecast of the future needs for such capital facilities; (c) the proposed locations and capacities of expanded or new capital facilities; (d) at least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes; and (e) a requirement to reassess the land use element if probable funding falls short of meeting existing needs and to ensure that the land use element, capital facilities plan element, and financing plan within the capital facilities element are coordinated and consistent.

At the HOM, the County argued that the enactment of Ordinance No. 99-092 clearly made the challenge under .070(3)(d) and (e) moot. Transcript, at 10. As the Board has previously stated:

> [D]irect challenges to the contents of the 1999-2004 six-year financing program are moot; claims of inconsistency between the 1999-2004 financing program and other provisions of the County's Plan are moot; and claims based on the 1999-2004 financing program to show that the County is not making its capital budget decisions

in compliance with its comprehensive plan are moot.

Supra, at 13.

The Board agrees with the County. Petitioners' challenge to the County's compliance with RCW 36.70A.070(3)(d) is **moot**, since the six-year financing plan has been replaced. Also, Petitioners' challenge to the County's compliance with RCW 36.70A.070(3)(e) is **moot**, since without the six-year financing plan there is no basis to determine if probable funding has fallen short of meeting existing needs.

Regarding the County's alleged noncompliance with RCW 36.70A.070(3)(c), pertaining to the requirement to identify the location and capacity of needed new or expanded public facilities, Petitioners' argue extensively about whether the County had adequately identified future facility needs, but not whether it had adequately addressed the location and capacity provision of .070(3)(c). McVittie PHB, at 27-42; and McVittie Reply, at 21-28. Petitioners have failed to meet the burden of showing how the County has failed to comply with this requirement. Petitioners' challenge to the County's compliance with RCW 36.70A.070(3)(c) is **dismissed**.

The surviving portions of Petitioners' challenge relate to the County's compliance with RCW 36.70A.070(3)(a) and (b), the inventory and future needs assessment requirements, and internal consistency.

<u>Inventories – RCW 36.70A.070(3)(a)</u>

Petitioners contend that the County has "no current inventory of the existing capital facilities owned by public entities, showing the locations and capacities of the capital facilities" and "the [1999-2004] Capital Plan Detail is not based on up to date data." McVittie PHB, at 23-27. Petitioner Bourgault also challenges the County's compliance with the inventory requirements of RCW 36.70A.070(a) and complains about the lack of updated data. Bourgault #6 PHB, at 2-12.

The County responds by arguing that the "Board has interpreted RCW 36.70A.070(3)(a) and (b), to include an inventory and needs analysis of existing publicly-owned capital facilities, regardless of ownership, in their capital facilities elements." County PHB, at 11 (citing *Sky Valley*, at 65). The County contends that its inventories are adequate and have been upheld by this Board. The County also notes that it has updated its inventories and needs analysis for roads and parks when it adopted Ordinance No. 99-027. County PHB, at 5. Petitioners do not dispute that the County has updated its inventories for roads and parks, or that the inventories contained in the Capital Facility Requirements 1994-1999 (and to 2013) were not accurate at the time the County enacted its GMA Plan. However, Petitioners claim that those old inventories are no longer reliable for meeting the purposes of the GMA. McVittie Reply, at 21.

In *Sky Valley*, in order to determine whether Snohomish County complied with RCW 36.70A.070 (3), the Board had to determine which documents constituted the County's capital facilities plan element. The Board determined that the required inventories were contained within the County's "Capital Facility Requirements 1994-1999 (and to 2013) and the Countywide Utility Inventory Report for Snohomish County – Public Water Supply and Wastewater Collection and Treatment Systems. *Sky Valley*, at 64-65; *see also*, Exs. 9(a), 159, and 160. The Board affirms its inventory determination in *Sky Valley*.[44]

Notwithstanding the fact that the use of the most current inventory information yields the best basis for formulating GMA policies and plans, Petitioners point to no requirement in RCW 36.70A.070(3) that requires the County to act on updated information, or to use current data, for capital facility inventories. The "voluntary" inventory updates for roads and parks[45] accomplished by Snohomish County is commendable, but not a GMA requirement at this time. However, the Board notes, and the County should be aware, that the GMA does require:

> *Not later than September 1, 2002*, and at least every five years thereafter, *a county* or city *shall take action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure that the plan and regulations are complying with the requirements of this chapter*.

RCW 36.70A.130(1) (emphasis supplied).

Petitioners have failed to meet the burden of showing how the County has failed to comply with the requirements of RCW 36.70A.070(3)(a). The Board is not convinced that the County's action was clearly erroneous.

<u>Needs Assessment – RCW 36.70A.070(3)(b)</u>

The future needs analysis required by RCW 36.70A.070(3)(b) is contained in the Henderson Young report. *See* Transcript, at 55[46] and Ex. 9, at 6 ("The first two elements of the capital facilities plan, the inventory summary data [.070(3)(a)] and forecasts of future needs for county-provided facilities [.070(3)(b)] are contained in the report *Capital Facilities Requirements 1994-99 (and to 2013)* prepared by Henderson, Young & Company in March of 1994"). Ex. 9a.

Petitioners argue: "The 1999-2004 [Capital Plan Detail] does not adequately identify needs of the <u>current</u> residents of unincorporated UGAs [citation omitted] or the needs to <u>accommodate growth</u> in the unincorporated UGAs . . . because there has been limited detailed analysis of the needs of unincorporated UGAs." McVittie PHB, at 34 (emphasis in original). Petitioners also contend that "Snohomish County has paid little attention to the *changing circumstances* of the

sewer and water service delivery system on which it depends to accomplish its growth objectives." Bourgault #6 PHB, at 3 (emphasis in original). In other words, Petitioners argue for replacing the "outdated" needs assessment done in the County Plan, with a reassessment of the County's future needs based on recognition of changed conditions and current growth patterns occurring outside city limits. While Petitioners' position is sound from a planning policy point of view, updates of needs assessments, based on the most recent data,[47] is not an explicitly listed GMA requirement, and the Board cannot read the Act to yield this result. Also, as discussed *supra*, the GMA *required* trigger for reassessment is a shortfall in funding, not changed conditions or emerging growth patterns.

As with the discussion regarding the inventory required by RCW 36.70A.070(3)(a), Petitioners point to no requirement in RCW 36.70A.070(3) that requires the County to act on updated information, or to use current data for capital facilities future needs assessments. As the Board noted above, the GMA does require a review of the comprehensive plan and development regulations no later than September 1, 2002, "to ensure that the plan and regulations are complying with the requirements of [the GMA]." RCW 36.70A.130(1).

Petitioners also assert that the County's needs assessment must contain a more detailed analysis of those specific areas experiencing rapid growth. McVittie PHB, at 34; *see also*, Transcript, at 45. The County responds that its capital facilities element "is a 'generalized' document that was never intended to focus its analysis on the needs of one area." County PHB, at 15. The County's response is supported by this Board's decision in *WSDF I*, in which the Board determined that a comprehensive plan need be only a generalized document with citywide application. *See WSDF I*, at 43-51. The Board's observation in *WSDF I* also applies to this case, where the County's capital facilities planning is countywide, not area-specific.

Petitioners contend that the needs assessment for sewer and water[48] must be contained within the capital facilities element. Bourgault #6 PHB, at 3. The County responds that the needs assessments for sewer and water facilities (Exs. 159 and 160) are contained within the Utility Element of the County's Plan. Policies within that element also recognize and address need. County PHB, at 20-24. It is undisputed that the GMA requires the County to include an inventory and needs assessment (including the basis for determining need – minimum standards) within its Plan. However, as is discussed in *Sky Valley*, at 66-67, the location of the required information may be contained in another Plan element. Nonetheless, if capital facilities element information is contained elsewhere in a jurisdiction's Plan, the location of that information must be referenced in the Capital Facilities Element.

To support their contention that the County's capital facilities needs assessment is outdated, Petitioners refer to the "Snohomish County Economic Investment Plan (EIP) – Critical Infrastructure Project (CIP)." Ex. 252. This report is cited as evidence of the current critical

infrastructure needs in the County and the basis for five funding measures (known as ***Ascent 21***) that the County Council placed on the ballot in 1998. McVittie PHB, at 29-34. "These specific infrastructure needs, carefully identified before the voters in 1998 (and attached to each ordinance) are not discussed in the Capital Plan Detail. The County treats the other needs, clearly identified in the EIP report (Ex. 252) and those eventually put before the voters as if they did not exist.[49] This fails the citizens of Snohomish County." McVittie PHB, at 33.

In response, the County contends that the five unfunded infrastructure improvements anticipated in Ascent 21 were intentionally omitted from the Capital Plan, since the County could not identify a source of public funding for them. County PHB, at 27. At the HOM, the County stated:

> Now, what we had in Ascent 21 was several ordinances which said to the voters here are needs we *think* are needs and you voters need to vote on it. The voters did, they came back and said County, County Council, you are wrong, those aren't needs to us because we don't want to pay for it. That is not a level of service that we want. The County Council [in response to the vote] dropped them from the capital facility plan, as we were required to do. Because had we put them in our plan and they had been unfunded, we would be facing petitioners who say there is no funding.

Transcript, at 74 (emphasis supplied).

The situation described here may have provided a GMA basis (trigger) for reassessing and reevaluating the County's Plan, since apparently, funding fell short of meeting anticipated needs.[50] However, the financing plan in question has been replaced and further pursuit of this issue is moot.

Petitioners have failed to meet their burden of showing how the County has failed to comply with the requirements of RCW 36.70A.070(3)(b). The Board is not convinced that the County's action was clearly erroneous.

Internal Consistency – RCW 36.70A.070

The preamble of RCW 36.70A.070 provides, in part:

> The plan shall be an internally consistent document and all elements shall be consistent with the future land use map.

Petitioners challenge the consistency of the County's 1999-2004 Capital Plan detail with its Comprehensive Plan. The allegations are that the County pledged that the six-year finance plans

will reflect a "realistic" assessment of future revenue, that certain environmental policies are not being implemented for lack of funds (NE Policy 3.C.3, Objective NE 3.F and Objective NE 4A), and that the Plan calls for phasing of land development and the provision of public facilities and services within UGAs (Objective LU 2.C, LU 2.C.1, LU 2.C.2 and Objective UT3.B). McVittie PHB, at 63-66.

In response, the County notes that "Petitioner McVittie concludes that the 1999-2004 Capital Plan fails to demonstrate adequate funding for needed infrastructure, and therefore is not consistent with the land use plan and the County has failed to make capital budget decisions in conformity with the requirement to reassess the land use to maintain consistency." County PHB, at 37. To sustain these challenges, Petitioner must rely on funding provisions of the 1999-2004 Capital Plan Detail that have been repealed and replaced. Petitioner McVittie's internal inconsistency challenge is moot.

Petitioner Bourgault argues that by not updating the inventories for sewer and water facilities, the County "has violated its own directives contained in . . . portions of the GPP[51], particularly Appendix H, UT 3.a." Bourgault #6 PHB, at 8. The County responds that "the County has updated inventories as funding has become available to do so, and as need has dictated." The County also argues that it recognizes the 2002 review requirement, but nothing in the GMA has required the desired updates." County PHB, at 48-49.

Appendix H of the County's GMA Plan describes the implementation measures the County will use to implement its Plan. Implementation Measure UT 3a provides:

> Maintain an updated inventory of wastewater collection and treatment systems and plans to be used in evaluating land-use and capital facility decisions.

Ex. 283 (General Policy Plan, Appendix H), at H – 17.

It is undisputed that the County has not updated its inventories for wastewater collection and treatment systems. Although the GMA has not imposed this requirement on the County, the County has imposed on itself. However, the County has not set forth a time certain for accomplishing the stated update. As the County explains, it has accomplished updates as funding has become available and as needs dictate. Thus the County is obligated to include the update as part of its review for 2002. The County is reminded that although the Utility Element contain the information on sewer and water, these facilities are capital facilities subject to the requirements of the capital facility element, specifically, RCW 36.70A.070(3)(a) and (b).[52] Therefore, the update must comply with the inventory and needs assessments (including minimum standards) as set forth in these provisions of the capital facilities element.

Petitioners have failed to meet their burden of showing how the County has failed to comply with the internal consistency requirements of RCW 36.70A.070. The Board is not convinced that the County's action was clearly erroneous.

Conclusions

Petitioners' challenge to the County's compliance with RCW 36.70A.070(3)(d) is **moot**, since the six-year financing plan has been replaced. Also, Petitioners' challenge to the County's compliance with RCW 36.70A.070(3)(e) is **moot**, since without the six-year financing plan there is no basis to determine if probable funding has fallen short of meeting existing needs.

Petitioners have failed to meet the burden of showing how the County has failed to comply with RCW 36.70A.070(3)(c). Petitioners' challenge to the County's compliance with RCW 36.70A.070(3)(c) is **dismissed**.

Petitioners have failed to meet the burden of showing how the County has failed to comply with the inventory requirements of RCW 36.70A.070(3)(a). Petitioners' challenge to the County's compliance with RCW 36.70A.070(3)(a) is **dismissed**.

Petitioners have failed to meet their burden of showing how the County has failed to comply with the needs assessment requirements of RCW 36.70A.070(3)(b). Petitioners' challenge to the County's compliance with RCW 36.70A.070(3)(b) is **dismissed**.

Petitioners have failed to meet their burden of showing how the County has failed to comply with the internal consistency requirements of RCW 36.70A.070(preamble). Petitioners' challenge to the County's compliance with RCW 36.70A.070(preamble) is **dismissed**.

VI. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the Act, prior decisions of the Boards and having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

> The County's motion to dismiss certain Legal Issues as untimely is **granted**. Petitioners' challenges to Snohomish County's compliance with RCW 36.70A.070(2), (4) and (6), as stated in the PHO [Legal Issues 3, 5, 6 and part of 4], are **dismissed with prejudice**.
>
> Petitioners' challenge to Snohomish County's compliance with RCW 36.70A.120, as stated in the PHO [part of Legal Issue 4], is **moot** and is **dismissed with prejudice**.

Petitioners' challenges to Snohomish County's compliance with RCW 36.70A.020(1), (3), (4) and (9), as stated in the PHO [part of Legal Issue 1], are deemed **abandoned** and are **dismissed with prejudice**.

Petitioners have **failed to meet their burden** of showing how Snohomish County has failed to comply with RCW 36.70A.020(12), as stated in PHO [Legal Issue 1 - Goal 12]. The Board is not convinced the County's action was clearly erroneous. Petitioners' challenge to Snohomish County's compliance with RCW 36.70A.020(12) is **dismissed with prejudice**.

Petitioners' challenges to Snohomish County's compliance with RCW 36.70A.070(3)(d) and (e), as stated in the PHO [part of Legal Issue 2], are **moot** and **dismissed with prejudice**.

Petitioners have **failed to meet the burden** of showing how the County has failed to comply with RCW 36.70A.070(3)(a), (b), (c) and .070(preamble), as stated in the PHO [part of Legal Issue 2]. The Board is not convinced the County's action was clearly erroneous. Petitioners' challenges to the County's compliance with RCW 36.70A.070(3)(a), (b), (c) and .070(preamble) are **dismissed with prejudice**.

So ORDERED this 9th day of February, 2000.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____

Edward G. McGuire, AICP
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.

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Appendix A

Findings of Fact

1. On May 24, 1999, the Snohomish County Council adopted Ordinance No. 99-027. No publication date is indicated in the PFRs; however, the County has indicated that notification of adoption was published on June 10 and 17, 1999. The County did not contest the timeliness of the PFRs. McVittie PFR, at 1; Bourgault PFR, at 1; and Snohomish County's Motion to Dismiss Legal Issues, at 1-9.

2. Petitioner McVittie's PFR was filed with the Board on August 2, 1999; Petitioner Bourgault and SSCPA's PFR was filed with the Board on August 13, 1999. *Supra* Procedural History, at 1

3. Petitioners assert participation standing in their respective PFRs. McVittie PFR, at 1-2; Bourgault PFR, at 1.

4. Petitioners challenge Snohomish County's adoption of Ordinance No. 99-027, adopting "Snohomish County 1999-2004 Capital Plan Detail." McVittie PFR, at 1; Bourgault PFR, at 1.

5. The County adopted its GMA Comprehensive Plan, including a Capital Facilities Element, in June of 1995. Ex. 281, Ordinance No. 94-125, Section 4, at 17.

6. The County's GMA Plan adopted in 1995, became the focus of the Board's case: *Sky Valley, et al. v. Snohomish County* (***Sky Valley***), CPSGMHB Case No. 95-3-0068c, Final Decision and Order (Mar. 12, 1996).

7. From 1996 until PFRs 99-3-0015 and 99-3-0016 were filed with the Board in August 1999, Snohomish County's capital improvement planning process proceeded without being challenged in a PFR before this Board.

8. The present challenge questions the contents of the County's 1999-2004 Capital Plan Detail as adopted by Ordinance No. 99-027. PFRs, at 1, and Ex. 9 [Core Document 9 (**CD-9**)].

9. Pages 50 - 230 of the challenged 250 page document have been replaced by the County's November 23, 1999 adoption of its 2000-2005 Capital Plan through Ordinance No. 99-092. Ex. 285.

10. On November 23, 1999, the County adopted Motion 99-400, adopting the County's Six Year (2000-2005) Transportation Improvement Program (TIP). Ex. 286.

11. At the December 14, 1999 Hearing on the Merits (**HOM**), the Board took official notice of the 13 enactments adopted by the County on November 23, 1999. Exs. 284 though 287.

12. Adoption of Ordinance No. 99-092, which replaced portions of Ordinance No. 99-027, made Petitioners' challenge to portions of Ordinance No. 99-027 and its interrelationship with other challenged provisions of the County's Plan moot.

13. At the December 14, 1999 HOM, the parties asked the Board to clarify provisions of the GMA pertaining to RCW 36.70A.020(12), .070(3) and (6) and their interrelationship, if any. December 14, 1999, HOM Transcript, at 13, 17, 20-21, and 25-26.

14. Ordinance No. 99-027 amended the Capital Facilities Element of the County's GMA Comprehensive Plan. Ex. 9, CD-9.

15. Neither Petitioner briefed the challenge to the County's compliance with RCW 36.70A.020 (1), (3), (4) or (9). McVittie PHB, at 1-68; Bourgault #5 PHB, at 1-7.

16. Snohomish County's GMA Comprehensive Plan General Policy Plan contains a Capital Facilities Element. Ex. 281, Ord. No. 94-125, at 10, 16-17.

17. Snohomish County's GMA Comprehensive Plan General Policy Plan contains a Transportation Element. Ex. 281, Ord. No. 94-125, at 9, 16 and 17.

18. According to the original adopting ordinance, the Plan's Capital Facilities Element consists of: (1) the General Policy Plan section on capital facilities (**GPP** – Ex. 283, at CF 1-20); (2) an inventory and needs assessment contained in the report entitled: *Capital Facility Requirements 1994-99 (and to 2013) for Snohomish County* (Ex. 9a); and (3) a six-year capital improvement program for capital facilities provided by Snohomish County (**Capital Plan** – here, Ex. 9). Ex. 281, Ord. No. 94-125, at 10.

19. According to the Board in *Sky Valley*, the Plan's Capital Facilities Element consists of: (1) the GPP (Ex. 283, at CF 1-20); (2) the inventory and needs assessment contained in the report entitled: *Capital Facility Requirements 1994-99 (and to 2013) for Snohomish County* (Ex. 9a); (3) Countywide Utility Inventory Report for Snohomish County – Public Water Supply and Wastewater Collection and Treatment Systems (Water and Sewer Inventory, here – Exs. 159 and 160); and (4) a Capital Plan (here, Ex. 9). *Sky Valley*, at 64-65.

20. Based upon review of the current record, the Plan's Capital Facilities Element consists of: (1) the GPP (Ex. 283, at CF 1-20); (2) the inventory and needs assessment contained in the report entitled: *Capital Facility Requirements 1994-99 (and to 2013) for Snohomish County* (Ex. 9a); (3) Countywide Utility Inventory Report for Snohomish County – Public Water Supply and Wastewater Collection and Treatment Systems (here – Exs. 159 and 160; (4) Comprehensive Park and Recreation Plan Snohomish County (Ex. 9b); and (5) a Capital Plan (here, Ex. 9). Ex. 9.

21. Based upon review of the current record, the Plan's Transportation Element consists of: (1) the General Policy Plan section on transportation (Ex. 283, at TR 1-17); and (2) the Transportation Element (Ex. 261).

22. The Capital Facility Requirements 1994-1999 (and to 2013) for Snohomish County contains a range of three alternative service levels for included capital facilities, but it is unclear if any, or all, of these were adopted by the County and which is the County's minimum standard. Ex. 9a.

23. The Transportation Element contains the LOS for surface transportation facilities. Ex. 9a, at 34.

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[1] Mr. Williams is a member of the SSCPA.

[2] Both Petitioners abandoned their original PFR challenge to the County's compliance with RCW 36.70A.040.

[3] The parties subsequently agreed that several other documents should be **core documents** to be filed along with briefs.

[4] Attachment A contains the Snohomish County Code regulations that are referenced in the brief (eight chapters); Attachment B contains Ordinance No. 98-126 (authorizing school impact fees) and capital facilities plans from thirteen school districts; Attachment C contains five motions, seven ordinances and one amendment passed November 22, 1999.

[5] At the HOM, the County's representative indicated that she had not personally received Ms. Bourgault's Reply. Ms. Bourgault responded that they were mailed and faxed to the County. December 14, 1999 Transcript (**Transcript**), at 9. The Board notes the County's comments for the record, and notes a similar problem in finding the "Bourgault's Response – Dismiss" brief. *See* Section I.D, *supra.*

[6] *See* "Stipulation of Parties Changing Hearing Time" and location dated December 8, 1999.

[7] The County was ultimately found to be in full compliance with the remand issues originating in *Sky Valley* in June 1999. *See Sky Valley*, CPSGMHB Case No. 95-3-0068c, Finding of Compliance [Darrington Portion] (Jun. 29,

1999).

[8] *Sky Valley*, at 62-67.

[9] *Sky Valley*, at 125-130.

[10] Core Document 9 (CD-9), Ex. 2.

[11] Ex. 285.

[12] *See* McVittie PHB, at 1; McVittie Reply, at 1, 15; and Transcript, at 29-31.

[13] The Legal Issue presented in PFR 99-3-0015 (McVittie) read as follows:

> In approving Ordinance 99-027 and adopting the 1999-2004 Capital Plan as part of Snohomish County's Growth Management Act Comprehensive Plan on May 24, 1999, did the County comply with the goals and requirements of the GMA? RCW 36.70A.010, 36.70A.020, 36.70A.030, 36.70A.040, 36.70A.070, 36.70A.120, 36.70A.130.

The Legal Issue presented in PFR 99-3-0016 (Bourgault) read as follows:

> The approval of Snohomish County ordinance No. 99-027 and the adoption of the 1999-2004 Capital Plan does [*sic*] not fully comply nor is consistent with the goals and requirements of GMA. Specifically the following sections: RCW 36.70A.010, 36.70A.020, 36.70A.030, 36.70A.040, 36.70A.070, 36.70A.120, 36.70A.130.

[14] *See* FoF 18-23.

[15] Voter approval of funding for infrastructure is a viable and probable source of infrastructure financing. However, the voters may reject such funding measures. When this occurs, the governing body must look to the citizens for cooperation in devising and evaluating alternative responses to meeting infrastructure needs.

[16] Index Nos. assigned to various items also will serve as the Exhibit Nos.

[17] Notice of the enactment of Ordinance No. 99-092 was published in The Herald on December 16 and 23, 1999. Apparently, the County did not publish notice of its adoption of Motion 99-400. *See* Ex. 289.

[18] The Snohomish County: 1999-2004 Capital Plan Detail adopted by Ordinance No. 99-027 contains 250 pages.

[19] Ex. 285, Exhibit A to Ordinance No. 99-092, Ex. 285.

[20] This section of the Act requires at least a six-year financing plan.

[21] This section of the Act contains a requirement to reassess the land use element if probable funding falls short.

[22] Motion 99-400.

[23] In the PHO, at 9, Legal Issue 5 is stated as follows:

> Did the County fail to comply with RCW 36.70A.070(2) when it adopted its 1999-2004 Capital Plan Detail, because the County failed to document and make adequate provision for low income and special needs housing?

[24] In the PHO, at 9, Legal Issue 6 is stated as follows:

> Did the County fail to comply with RCW 36.70A.070(4) when it adopted its 1999-2004 Capital Plan, because the County failed to include and evaluate, in the Capital Plan Detail, the adequacy of the location, proposed location, and capacity of all existing and proposed utilities and their consistency with comprehensive plan objectives and projections?

[25] In the PHO, at 8, Legal Issue 3 is stated as follows:

> Did the County fail to comply with RCW 36.70A.070(6)(a)(b) and (c), when it adopted its 1999-2004 Capital Plan, because the transportation facilities forecasting is based on land use assumptions that are no longer consistent with the adopted Plan and regulations; the needs assessment was not based on up to date data; there is no specific action to bring transportation facilities that are below the LOS standard ([for] concurrency) back into compliance; the identification of state and local (transportation) system needs to meet current and future demand is incomplete; impacts to state facilities have not been estimated; the multi-year financing program is not coordinated with or consistent with the 6-year improvement program developed by the department of transportation; the "probable funding" is not clearly identified and not analyzed against funding needs; there is a lack of funding and planning for specific demand management strategies that require capital investment; and there is no clear discussion of how land use assumptions will be reassessed to ensure that the level of service standards will be met?

[26] In the PHO, at 8-9, Legal Issue 4 is stated as follows:

> Did the County fail to comply with RCW 36.70A.070(6)(a)(i), (6)(a)(iii)(E), (6)(a)(iv)(B) and RCW 36.70A.120 when it adopted its 1999-2004 Capital Plan, because though the Comprehensive 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 because the County has failed to perform its activities and make capital budget decisions in conformity with its comprehensive plan?

[27] In the PHO, at 7-8, Legal Issue 1 is stated as follows:

> Did Snohomish County (the County) fail to comply with RCW 36.70A.020(1),(3),(4),(9) and (12) when it adopted Ordinance No. 99-027 (1999-2004 Capital Plan Detail), because the County has failed to: a) set minimum standards; b) define adequate public facilities; c) assess and document the needs of the state transportation system; d) address the capital facilities requirements for low income and special needs housing; e) adequately address the capital facilities needs for fish and wildlife conservation; f) set a level of service standard or adequate funding to address the needs for park, open space and recreational services; g)establish completely "locally established minimum standards" by which to measure adequacy; and h) complete the "public services" and "public facilities" included in the Capital Plan Detail?

[28] *See* Legal Issue 4, footnote 26 *supra*, or PHO, at 8.

[29] Whether this document reflects the most recent information or whether it has been updated since 1995 is not germane to discussing its relationship to the other noted documents. However, the Board notes that the 1998 Transportation Needs Report (**98 TNR**) states:

> The Transportation Element of the County's comprehensive plan identifies new arterials and improvements on existing arterials that will be needed to support the land use plan. *For the road projects identified in the Transportation Element, the 98 TNR provides updated information about locations, scopes and estimated costs*.

Ex.235A, at 3 (emphasis supplied). The Board also notes that it is not clear from the record whether the "new arterials and improvements on existing arterials" identified in: the 95 TNR (Ex. 235B); the 1997 revisions to Appendices A and B of the 95 TNR; or the 98 TNR (Ex. 235A) were ever adopted as amendments to the Transportation Element. The point is that those projects identified in the Transportation Element are those that govern for purposes of the question posed here.

[30] To gain insight on this question, the Board looked to the parties' briefs on the Motion to Dismiss, specifically, on the issue of whether the Transportation Element was amended by Ordinance No. 99-027.

[31] Other jurisdictions may coordinate their transportation and capital facilities finance planning differently and include their transportation capital budget decisions for the Transportation Element, within the six-year financing program of the Capital Facilities Element; or otherwise distinguish these specific road commitments from those in the TIP. Nonetheless, RCW 36.81.121 requires the TIP to be consistent with GMA Plans.

[32] *See* footnote 27 for text of Legal Issue 1.

[33] *West Seattle Defense Fund v. City of Seattle* (***WSDF I***), CPSGMHB Case No. 94-3-0016, Final Decision and Order (Apr. 4, 1995) and *Robison, et al. v. City of Bainbridge Island* (***Robison***), CPSGMHB Case No. 94-3-0025, Final Decision and Order (May 3, 1995).

[34] Procedural compliance with a planning goal generally means that the elected officials have considered the goal during their deliberations.

[35] Note that the "screenline" methodology, which uses a *single LOS for a system of arterials*, rather than individual intersections, was found to comply with the requirements of RCW 36.70A.070(6) in *WSDF I.*

[36] The Board notes that similar "capital facility requirements reports" have been prepared and adopted by numerous local jurisdictions throughout the region. These requirements reports typically contain the quoted listing of options.

[37] The GMA does not permit local governments to restrict the twenty-year population projection that the Office of Financial Management makes for each county. The Act mandates that population must be accommodated. RCW 36.70A.110(2). Nonetheless, a county may reallocate its county-wide population and employment distribution, thereby directing growth to a different part of the county (i.e., to within city limits or other unincorporated UGA). *See City of Edmonds and City of Lynwood v. Snohomish* County, CPSGPHB Case No. 93-3-0005c, Final Decision and Order (Oct. 4, 1993). Likewise, a city could redistribute its allocated population and redirect growth within its jurisdiction.

[38] Note that a reassessment, in light of a shortfall in transportation funding specifically *must* be included in the transportation element. RCW 36.70A.070(6)(a)(iv)(C).

[39] It is important to note that the term "concurrency" never appears in the GMA. However, the phrase "concurrent with development" appears within the enforcement provisions of the transportation element. *See* RCW 36.70A.070 (6)(b). The Board also notes that WAC 365-195-210 offers the following definition for the term:

> "Concurrency" means that adequate public facilities are available when the impacts of development occur. This definition includes the two concepts of "adequate public facilities" and of "available public facilities."

These terms, in turn, are described as:

> "Adequate public facilities" means facilities which have the capacity to serve development without decreasing levels of service below locally established minimums.
>
> "Available public facilities" means that facilities or services are in place or that a financial commitment is in place to provide the facilities or services within a specified time. In the case of transportation, the specified time is six years from the time of development.

[40] Note that even the mandated transportation "concurrency ordinance" contemplates options, such as making the needed traffic improvements <u>or</u> including other "strategies to accommodate the impacts of development."

[41] For example: Chapter 19.17 RCW, Chapter 43.21C RCW, Chapter 58.17 RCW or Chapter 90.58 RCW.

[42] The question of the County's compliance with RCW 36.70A.070(3) and (6) is discussed *supra*, at 31-42 and 18-20, respectively.

[43] In the PHO, at 8, Legal Issue 2 is stated as follows:

> Did the County fail to comply with RCW 36.70A(3)(a), (b), (c), (d) and (e) when it adopted its 1999-2004 Capital Plan Detail, because no modifications to the land use portion of the comprehensive plan and development regulations are not [sic] reflected in the capital facilities plan; there is no current inventory of the existing capital facilities owned by public entities showing the locations and capacities of the capital facilities; there is not a forecast of the future needs for such capital facilities; location and capacities of the expanded or new capital facilities are not identified; there is not a six-year plan that will finance such capital facilities within projected funding capacities; sources of public money are not clearly identified for all of the elements of the plan; when probable funding falls short of meeting existing needs, the land use element has not been reassessed; the Capital Plan Detail is not based on up to date data; and the land use element, the capital facilities plan element, and the financing plan within the capital facilities plan element are not coordinated and consistent?

[44] It is not clear from the record whether or not Ordinance No. 99-027 amended the relevant documents constituting the County's capital facilities inventory.

[45] While the County notes that its roads and parks inventories have been updated in recent years, the Board finds no support in the record that the updated inventories were ever adopted by the County (by reference or otherwise) and incorporated into the capital facility element of its comprehensive plan.

[46] Noting also that the needs assessment for roads is found in the transportation element and for parks in the updated parks plan and Capital Plan Detail. Ex. 9.

[47] The Board notes that a reassessment of Plan provisions may be required if the most recent data indicates shortfalls in probable funding, but this is not the same as updating needs assessments.

[48] Exs. 159 and 160.

[49] The five measures were each subsequently rejected by the voters. *See* Ex. 253.

[50] However the Board notes that the County may not simply "drop" items from its six-year financing scheme unless they are projects that are not needed to meet the needs (capacity) identified in the needs assessment. In other words, if items are deleted from the six-year financing program, service levels for those facilities may not fall below the locally established minimum standards. If projects or items are needed to meet identified (capacity) needs and there is a funding shortfall, a reassessment must occur which includes, among other options, consideration of lowering the adopted minimum standards.

[51] General Policy Plan – the County's GMA Comprehensive Plan.

[52] *See WSDF I*, at 45-50; *West Seattle Defense Fund v. City of Seattle*, CPSGMHB Case No. 96-3-0033 (***WSDF IV***), Final Decision and Order (Mar. 24, 1997), at 16, 28, and 29; *Bremerton v. Kitsap County*, CPSGMHB Case No. 95-3-0039c, coordinated with *Port Gamble S'Klallam Tribes v. Kitsap County*, CPSGMHB Case No. 97-3-0024c, Finding of Noncompliance and Determination of Invalidity in *Bremerton* and Order Dismissing *Port Gamble* (Sep. 8, 1997), at 40.