

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

KENNETH and SHARON GAIN,	)	
	)	<b>Case No. 99-3-0019</b>
Petitioners,	)	
	)	
v.	)	
	)	<b>ORDER on DISPOSITIVE MOTIONS</b>
PIERCE COUNTY,	)	
	)	
Respondent,	)	
	)	
CASCADIA DEVELOPMENT CORPORATION,	)	
	)	
	)	
Intervenor.	)	
	)	

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**i. PROCEDURAL BACKGROUND**

On October 22, 1999, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Kenneth and Sharon Gain (**Petitioners** or **Gain**). The matter was assigned Case No. 99-3-0019. Petitioners challenge the Pierce County (**County**) Hearing Examiner’s approval of the Cascadia Employment Based Planned Community (**EBPC**), the County’s adoption of Ordinance No. 99-93S2 and the County’s actions regarding forestlands. The basis for the challenge is noncompliance with the Growth Management Act (**GMA** or **Act**).

On November 1, 1999, the Board issued a “Notice of Hearing” (**NOH**) in the above-captioned case. The Order set a date for a prehearing conference (**PHC**) and established a tentative schedule for the case.

On November 4, 1999, the Board received from Cascadia Development Corporation (**Cascadia** or **Intervenor**) a “Motion to Dismiss All Claims Regarding Cascadia Employment-Based Planned Community” (the **Cascadia Motion to Dismiss**).

On November 22, 1999, the Board held a Prehearing Conference (the **First Prehearing Conference**) in this case. Board Member Edward G. McGuire presided. Petitioner Sharon Gain

represented herself and Kenneth Gain. Representing the County was Jill Guernsey. Margaret Archer appeared for Cascadia Development Corporation. Also in attendance were Kenneth Gain, Petitioner, and Andrew Lane, Law Clerk to the Board. During the First Prehearing Conference, the legal issues in the case, the record and schedule were discussed.

On November 24, 1999, the Board issued a “Prehearing Order” (the **First Prehearing Order**) signed by presiding officer McGuire.

In response to motions filed by Petitioners, on December 1, 1999, the Board issued its “Order on Motion Requesting Change of Presiding Officer” (the **First Order on Motion Requesting Change of Presiding Officer**). In the First Order on Motion Requesting Change of Presiding Officer, Edward G. McGuire withdrew as presiding officer. Later that same date, the Board issued its “Notice of Second Prehearing Conference and Order on Motion for Joinder” (the **Notice of Second Prehearing Conference**) signed by new presiding officer Joseph W. Tovar. The Notice of Second Prehearing Conference contained a statement of the legal issues to be decided in this case as well as a schedule for the submittal of motions and briefs.

On December 23, 1999, Board Member McGuire issued an “Order Recusing Board Member McGuire.”

Also on December 23, 1999, the Board issued an “Order on Miscellaneous Motions” (the **First Order on Miscellaneous Motions**).

On December 29, 1999, the Board received “Motion to Include Memorandum for the Record of Pierce County’s Failure to Provide Forest Land Ordinances/Legislative History” (the **Gain Motion re: 12/28/99 memorandum from Jill Guernsey**).

On December 30, 1999, the Board received “Pierce County’s Response to Petitioners’ “Motion to Include Memorandum for the Record of Pierce County’s Failure to Provide Forest Land Ordinances/Legislative History” and “Respondent’s Motion for Summary Judgment of Dismissal” (the **County’s Motion to Dismiss**).

Also on December 30, 1999, the Board received from Gain “Motion to Supplement the Record – Exhibits” (the **Gain Motion to Supplement**) and from the County and Intervenor “Respondents’ Motion for Summary Judgment of Dismissal.”

On January 14, 2000, the Board received from Cascadia “Intervenor’s Response to “Motion to Supplement the Record – Exhibits,” and “Respondent Pierce County’s Concurrence with Cascadia’s Response to Gain’s “Motion to Supplement the Record – Exhibits.”

Also on January 14, 2000, the Board received “Petitioners’ Reply to Respondents Motion to Dismiss.”

On January 20, 2000, the Board received “Petitioners’ Rebuttal to Cascadia’s Response to Motion to Supplement the Record – Exhibits.”

Also on January 20, 2000, the Board received “Memorandum of Transcription Error Petitioners’ Reply Brief” and a revised “Petitioners’ Reply to Respondents Motion to Dismiss.”

On January 21, 2000, the Board received “Petitioners’ Motion to Strike Pierce County’s January 21, 2000 Response to Petitioners’ Motion Designate Exhibits from Index Prepared for Ord. No. 99-93S2” (the **Gain Motion to Strike**).<sup>[1]</sup>

On January 24, 2000, the Board received “Pierce County’s Response to Petitioners’ Motion to Designate Exhibits from Index Prepared for Ord. No. 99-93S2.”<sup>[2]</sup>

Also on January 24, 2000, the Board received “Pierce County’s Reply Brief in Support of Motion to Dismiss” and “Cascadia’s Reply on Motion to Dismiss.”

On January 25, 2000, the Board received “Pierce County’s Reply Re: Petitioners’ Motion to Designate Index.”

## ii. discussion

The County and Intervenor moved to dismiss the majority of Petitioner’s 35 legal issues. The grounds for dismissal are: 1. untimely appeal; 2. lack of standing; 3. lack of subject matter jurisdiction; and 4. certain issues allege noncompliance with GMA rural lands requirements where no rural lands are involved. The Board will first discuss the law as it relates to each of these grounds. The Board then will apply the law to each of the 34 challenged issues.

### Statement of Applicable Law

#### 1. Timeliness of appeal

Petitions for review must be timely filed. RCW 36.70A.290(2) provides:

All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter or chapter 90.58 or 43.21C RCW must be filed within sixty days after publication by the legislative bodies of the county or city.

The statute is unambiguous; if a petition is not filed within sixty days after publication, the Board is without authority to review the petition. In the present case, those legal issues that challenge

any County action that was published more than sixty days before the Gains filed their PFR must be dismissed.

However, “[a] petition relating to the failure of a state agency, city or county to take an action by a deadline specified in the act may be brought at any time after the deadline for action has passed.” WAC 242-02-220(5). In other words, if a city or county failed to take any action relating to a GMA deadline, a petitioner may challenge the failure of that city or county to act by that deadline. On the other hand, if a city or county has taken some action relating to a GMA deadline, and published notice of that action, a challenge to that action must be filed within sixty days after publication. [\[3\]](#)

## 2. Standing to appeal

Petitioners must have standing and standing must be alleged in the petition for review. WAC 242-02-210(2)(d). RCW 36.70A.280(2) provides in relevant part:

A petition may be filed only by: . . . (b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested; . . . or (d) a person qualified pursuant to RCW 34.05.530 [Administrative Procedure Act].

Participating before the local government regarding one aspect of its GMA action is not necessarily sufficient to challenge other aspects of its GMA action. This Board recently explained that a petitioner’s participation before the local government must be reasonably related to the petitioner’s issues as presented to the Board. *Alpine v. Kitsap County*, CPSGMHB Case No. 98-3-0032, coordinated with *Bremerton v. Kitsap County*, CPSGMHB Case No. 95-3-0039, Order on Dispositive Motions (Oct. 7, 1998), at 8. In the present case, if the Gains’ participation before the County was not reasonably related to any legal issue now before the Board, that legal issue must be dismissed.

## 3. Board subject matter jurisdiction

The Legislature has authorized the Board to hear and determine only those petitions alleging either:

(a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW; or

(b) That the twenty-year growth management planning population projections adopted by the office of financial management [OFM] pursuant to RCW 43.62.035 should be adjusted.<sup>[4]</sup>

RCW 36.70A.280(1). The Legislature has not conferred “jurisdiction upon this Board to review land use project permit decisions.” *Hanson v. King County*, CPSGMHB Case No. 98-3-0015, Order Granting Dispositive Motions (Sep. 28, 1998), at 5. The State Supreme Court determined that the Board does not have jurisdiction over challenges to the approval of a development that does not involve the issue of whether the local government properly complied with the GMA. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868 (1997). In the present case, those issues that challenge project approval that does not involve the issue of whether the County properly complied with the GMA must be dismissed.

#### 4. Issues alleging noncompliance with GMA rural lands requirements where no rural lands are involved

This ground for dismissal will be discussed in the context of each issue challenged by the County.

### Application to Legal Issues

*Legal Issue 1: Whether Pierce County has failed to comply with the Growth Management Act’s (GMA or Act) 1991 deadline for classification and designation of all qualified Forest Lands (FL) of long-term commercial significance that are not characterized by urban growth in Ordinance (Ord.) 91-123S2, Ord. 92-79S and the Pierce County Comprehensive Plan (PCCP), including Cascadia and other lands in Ex. DD.*

Petitioners challenge the County’s designation of forest lands of long-term commercial significance (**GMA forest lands**), required by RCW 36.70A.170. The County and Intervenor argue that this issue is untimely and that Petitioners have no standing. Petitioners respond that they are raising a failure-to-act challenge that may be brought at any time, and that their participation on certain issues satisfied standing requirements to raise this issue.

The threshold question is whether the County “acted” to designate GMA forest lands and to adopt development regulations for those forest lands as required by RCW 36.70A.170 and .060(1).

The County initially designated GMA forest lands and adopted interim development regulations on October 8, 1991, in Ord. 91-123S2.<sup>[5]</sup> Notification of adoption of this ordinance was published on October 23, 1991. The County amended its Forest Lands zone classification on its zoning atlas on August 25, 1992, in Ord. 92-79S.<sup>[6]</sup> Notification of adoption of this ordinance was published on September 9, 1992. The County adopted its comprehensive plan on November

29, 1994, in Ord. 94-82S.<sup>[7]</sup> Notification of adoption of this ordinance was published on December 7, 1994.

The record is clear that the County designated GMA forest lands and adopted development regulations. The County did not “fail to act.” Petitioners’ disagreement with the County’s actions at this late date cannot re-open review of the County’s action. Had the County never designated GMA forest lands or adopted development regulations, Petitioners’ present challenge would be timely, pursuant to WAC 242-02-220(5). However, that is not the case. Petitioners’ present appeal was filed too late to challenge the County’s previous GMA forest land actions. **Legal Issue 1 is untimely and is dismissed with prejudice.** The Board need not, and will not, reach the issue of standing.

***Legal Issue 2:** Whether the PCCP has failed to comply with the GMA’s, RCW 36.70A.060, 1992 deadline for adopting development regulations, which assure the conservation and preservation of Forest Lands (including Cascadia), discourage FL conversion/incompatible uses on adjacent lands and reclassification criteria for conversion of qualified FLs?*

Petitioners challenge the County’s adoption of development regulations to conserve GMA forest lands pursuant to RCW 36.70A.060. As stated in the discussion of Legal Issue 1, the County adopted development regulations regarding GMA forest lands in 1991 and 1992. In addition, the County amended its forest practices regulations on October 13, 1998, in Ord. 98-67S.<sup>[8]</sup> Notice of adoption of this ordinance was published on November 4, 1998. **Legal Issue 2 is untimely and is dismissed with prejudice.** The Board need not, and will not, reach the issue of standing.

***Legal Issue 3:** Whether the PCCP has failed to address FL conversion and established criteria for FL zoning changes, FL Comprehensive Plan (CP) amendments or identified FLs most susceptible to conversion as stated in the PCCP LU-FL Objective 27?*

Petitioners here challenge the County’s GMA forest lands development regulations and GMA forest land provisions in the County’s Plan. As discussed in previous Legal Issues, the time to appeal these enactments has passed. **Legal Issue 3 is untimely and is dismissed with prejudice.** The Board need not, and will not, reach the issue of standing.

***Legal Issue 4:** Did the County fail to preserve FLs and discourage conversion of Cascadia FLs under Pierce County Chapter 18H.20.010, which provides that an applicant must obtain an approved Conversion Option Harvest Plan (COHP) before converting to another land use?*

Petitioners challenge the County’s forest practices regulations. As stated in the discussion of Legal Issue 2, the County’s forest lands-related development regulations were adopted in 1991, 1992, and 1998. **Legal Issue 4 is untimely and is dismissed with prejudice.** The Board need

not, and will not, reach the issue of standing.

***Legal Issue 5:*** *Whether the Pierce County Comprehensive Plan (PCCP) is invalid because it allows approval of Fully Contained Communities (FCC), Master Planned Communities (MPC) and Employment Based Planned Communities (EBPC), including Cascadia, without consideration of the GMA's maximum 25% market land factor?*<sup>[9]</sup>

Petitioners challenge the County's Plan. As set out above, the Plan was adopted in 1994 by Ord. 94-82S. The time to appeal provisions adopted in that enactment has passed. **Legal Issue 5 is untimely and is dismissed with prejudice.** The Board need not, and will not, reach the issue of standing.

***Legal Issue 6:*** *Is the PCCP Generalized Proposed Land Use Map invalid because it fails to comply with the GMA and the Board's 1994 Cities of Tacoma, et al. v. Pierce County, 94-3-0001, decision because it allows urban densities (MPCs, Planned Unit Developments), including Cascadia, on lands inside the County Urban Growth Area (CUGA or "metropolitan UGA"), but outside of designated Urban Growth Areas (UGA)?*

This is another challenge to the County's Plan. The time to appeal provisions adopted in that enactment has passed. **Legal Issue 6 is untimely and is dismissed with prejudice.** The Board need not, and will not, reach the issue of standing.

***Legal Issue 7:*** *Whether the designation of the Cascadia UGA is a legislative act under the GMA and the Pierce County Planning Policies (PCCP)?*

Designation of UGAs pursuant to RCW 36.70A.110 is a legislative act. The County designated UGAs when it adopted its Plan in 1994 in Ord. 94-82S. Among the UGAs designated by the County was the Comprehensive Urban Growth Area (CUGA).<sup>[10]</sup> It was a legislative act to designate the UGAs, including the CUGA.

Cascadia is located within a UGA; specifically, it is located within the County's CUGA.<sup>[11]</sup> Any subsequent project-specific decision cannot alter the Plan designation of this area as a UGA. In other words, a hearings examiner's decision to approve or disapprove the Cascadia development would not alter the fact that it has been located within a UGA since 1994. Because this legislative act of adopting UGAs occurred in 1994, it is too late to challenge the provisions adopted in this 1994 enactment. **Legal Issue 7 is untimely and is dismissed with prejudice.** The Board need not, and will not, reach the issue of standing.

***Legal Issue 8:*** *Whether the Board has jurisdiction to review the County's designation of the Cascadia FCC UGA designation under the GMA?*

As set out in Legal Issue 7, Cascadia has been within a UGA since adoption of the County's Plan in 1994 and Petitioners cannot now challenge this 1994 UGA designation. Therefore, the issue presented by Legal Issue 8 is limited to the question of whether the Board has jurisdiction to review the County's designation, or approval, of the Cascadia development.

As set out in the Statement of Applicable Law, above, the Board does not have jurisdiction to review project permit decisions. Consequently, unless the County's designation or approval of the Cascadia development raises a question of compliance with the GMA, the Board is without subject matter jurisdiction. Petitioners rely on RCW 36.70A.350 for the proposition that the County's approval of the Cascadia development amounts to a UGA designation.<sup>[12]</sup> Petitioners' Reply to Respondent's Motion to Dismiss ("Before a County can approve [new] FCCs, it must first comply with the procedural requirements of RCW 36.70A.350"), at 11.

RCW 36.70A.350 permits a county to "establish a process as part of its urban growth areas, that are designated under RCW 36.70A.110, for reviewing proposals to authorize new fully contained communities located outside of the initially designated urban growth areas" (emphasis added). Because the proposed Cascadia development is located within a designated UGA, the CUGA, the provisions of RCW 36.70A.350 do not apply.<sup>[13]</sup> Therefore, the County's designation or approval of the Cascadia development does not raise a question of compliance with a GMA requirement and the Board does not have jurisdiction to review the Cascadia development approval. **Legal Issue 8 is dismissed with prejudice.**

***Legal Issue 9:** Is approval of Cascadia valid under the GMA if the County failed to amend the CP in conformance with RCW 36.70A.130-.140, CP amendments, and an FCC is a CP amendment under RCW 36.70A.350?*

As stated in the discussion of Legal Issue 8, because the Cascadia development is located within an existing, designated UGA, the GMA does not impose the requirements of RCW 36.70A.350 on the Cascadia development. Therefore, the County's designation or approval of the Cascadia development does not amend the County's Plan. Absent a challenge to a GMA requirement, the Board does not have jurisdiction to review the Cascadia development approval. **Legal Issue 9 is dismissed with prejudice.**

***Legal Issue 10:** Did the County fail to reserve a portion of its Office of Financial Management (OFM) 20-year population projection and offset the UGAs for Cascadia and other planned developments when it designated UGAs under the CP?*

As stated above, the County's Plan was adopted in 1994. The County allocated its OFM population projections in that 1994 Plan. The time to appeal provisions adopted in that enactment has passed. Petitioners state: "no statute of limitations exists for a petition for

adjustment of a County's OFM population projection requirements." Petitioners' Reply to Respondent's Motion to Dismiss, at 16. Although an accurate statement, Petitioners' reliance on this statement is unfounded.

WAC 242-02-220(3) provides:

A petition alleging that the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted can be filed at any time.

This provision addresses challenges to OFM's adoption of population projections; it does not address a county's allocation of its OFM population within the county. **Legal Issue 10 is untimely and is dismissed with prejudice.** The Board need not, and will not, reach the issue of standing.

***Legal Issue 11:** Is the County's CP invalid because it fails to comply with the GMA's requirement of no more than one FCC approval every five years outside established UGAs, and the County has approved more than 3 FCCs in four years, including Cascadia?*

This is another challenge to the County's Plan. The time to appeal provisions adopted in that enactment has passed. **Legal Issue 11 is untimely and is dismissed with prejudice.** The Board need not, and will not, reach the issue of standing.

***Legal Issue 12:** Did Pierce County fail to designate Cascadia as a UGA in the CP as required under RCW 36.70A.110(5) and (6)?*

This is another challenge to the County's Plan. The time to appeal provisions adopted in that enactment has passed. **Legal Issue 12 is untimely and is dismissed with prejudice.** The Board need not, and will not, reach the issue of standing.

***Legal Issue 13:** Has the PCCP failed to comply with the GMA's requirement that the CP contain policies prohibiting an excess of industrial and employment lands?*

This is another challenge to the County's Plan. The time to appeal provisions adopted in that enactment has passed. **Legal Issue 13 is untimely and is dismissed with prejudice.** The Board need not, and will not, reach the issue of standing.

***Legal Issue 14:** Does the County's designation of Cascadia as a FCC/UGA violate the CPPs/GMA when the GMA mandates consistency of CPs, CPPs and development regulations (DR)?*

This is another challenge to the County's designation or approval of the Cascadia development. As set out in Applicable Law and the discussion of Legal Issue 8, the County's designation or

approval of the Cascadia development does not raise a question of compliance with a GMA requirement and the Board does not have jurisdiction to review the Cascadia development approval. **Legal Issue 14 is dismissed with prejudice.**

*Legal Issue 15: Whether the County's 1999 approval of Cascadia violates the GMA, RCW 36.70A.070(e), when the statute prohibits approval of development proposals if the capital facilities (cf) are below the established levels of service, including roads and sewers?*

This is another challenge to the County's designation or approval of the Cascadia development. As set out in Applicable Law and the discussion of Legal Issue 8, the County's designation or approval of the Cascadia development does not raise a question of compliance with a GMA requirement and the Board does not have jurisdiction to review the Cascadia development approval. **Legal Issue 15 is dismissed with prejudice.**

*Legal Issue 16: Whether the County failed to consider the GMA's tiering criteria when it approved the Cascadia FCC in 1999?*

To the extent this issue challenges the County's designation of the area in which Cascadia is located as a UGA, this Legal Issue is untimely. To the extent this issue challenges the designation or approval of the Cascadia development, the County's designation or approval of the Cascadia development does not raise a question of compliance with a GMA requirement and the Board does not have jurisdiction to review the Cascadia development approval. **Legal Issue 16 is dismissed with prejudice.**

*Legal Issue 17: Whether Pierce County's approval of Cascadia failed to consider the GMA's Planning Goals 8 and 9, when the nearly 5,000 acres is classified as critical areas because the site is Bonney lake's sole aquifer recharge area and the site has steep slopes, wetlands, wildlife habitat and a downstream fish hatchery?*

This is another challenge to the County's designation or approval of the Cascadia development. As set out in Applicable Law and the discussion of Legal Issue 8, the County's designation or approval of the Cascadia development does not raise a question of compliance with a GMA requirement and the Board does not have jurisdiction to review the Cascadia development approval. **Legal Issue 17 is dismissed with prejudice.**

*Legal Issue 18: Whether the CP is inconsistent with the GMA/CPPs/DRs when it failed to apply the 20 or 80 acre FL minimum lot size to development proposals on qualified FLs, including Cascadia?*

This is another challenge to the County's Plan. The time to appeal provisions adopted in that enactment has passed. To the extent this issue challenges the designation or approval of the Cascadia development, the Board does not have jurisdiction to review this challenge. **Legal**

**Issue 18 is untimely and is dismissed with prejudice.** The Board need not, and will not, reach the issue of standing.

***Legal Issue 19:** Whether the County failed to consider the GMA's Planning Goal 9 when the Examiner refused PALS' request that the 20-year development agreement comply with new regulations under the Endangered Species Act (ESA) and the three adjacent waters (Carbon River, South Prairie Creek and the Puyallup River) are designated critical salmon water habitat?*

This is another challenge to the County's designation or approval of the Cascadia development. As set out in Applicable Law and the discussion of Legal Issue 8, the County's designation or approval of the Cascadia development does not raise a question of compliance with a GMA requirement and the Board does not have jurisdiction to review the Cascadia development approval. **Legal Issue 19 is dismissed with prejudice.**

***Legal Issue 20:** Did the Hearing Examiner violate the appearance of fairness doctrine when he declined to recuse himself from the Cascadia decision-making process?*

As stated in Applicable Law above, RCW 36.70A.280 sets out the Board's jurisdiction. Nothing in that statute, or elsewhere in the GMA, grants the Board with subject matter jurisdiction to determine an appearance of fairness doctrine issue. The Board does not have jurisdiction to resolve this issue. **Legal Issue 20 is dismissed with prejudice.**

***Legal Issue 21:** Whether the Hearing Examiner, who is a quasi-judicial officer, has the legal authority to approve legislative actions under the GMA, such as CP amendments including FCCs/ MPCs outside UGAs?*

As stated in Applicable Law above, RCW 36.70A.280 sets out the Board's jurisdiction. Nothing in that statute, or elsewhere in the GMA, grants the Board with subject matter jurisdiction to determine the scope of authority of a hearings examiner. The Board does not have jurisdiction to resolve this issue. **Legal Issue 21 is dismissed with prejudice.**

***Legal Issue 22:** Whether Cascadia can be approved under the GMA, RCW 36.70A.350(f), when Pierce County has failed to enact development regulations that ensure urban growth will not occur in adjacent nonurban areas, including the rural cities of Bonney Lake and Orting?*

As discussed in Legal Issue 8, because the proposed Cascadia development is located within a designated UGA, the provisions of RCW 36.70A.350 do not apply. Therefore, the County's designation or approval of the Cascadia development does not raise a question of compliance with a GMA requirement and the Board does not have jurisdiction to review the Cascadia development approval. **Legal Issue 22 is dismissed with prejudice.**

***Legal Issue 23:** Whether approval of the Cascadia FCC is inconsistent with Pierce County's*

*Development regulations established for the protection of critical areas and the GMA requires consistency between DRs and CPs?*

This is another challenge to the County's designation or approval of the Cascadia development. As set out in Applicable Law and the discussion of Legal Issue 8, the County's designation or approval of the Cascadia development does not raise a question of compliance with a GMA requirement and the Board does not have jurisdiction to review the Cascadia development approval. **Legal Issue 23 is dismissed with prejudice.**

***Legal Issue 24:*** *Whether the County's designation and approval of Cascadia fails to comply with the GMA's substantive requirements for approval of an FCC under RCW 36.70A.350?*

As discussed in Legal Issue 8, because the proposed Cascadia development is located within a designated UGA, the provisions of RCW 36.70A.350 do not apply. Therefore, the County's designation or approval of the Cascadia development does not raise a question of compliance with a GMA requirement and the Board does not have jurisdiction to review the Cascadia development approval. **Legal Issue 24 is dismissed with prejudice.**

***Legal Issue 25:*** *Is the Pierce County Hearing Examiner's 1999 approval of Cascadia legally binding under the GMA when the PCCP failed to designate Cascadia as an Urban Growth Area (UGA)?*

As discussed in Legal Issue 7, Cascadia is located within a UGA; specifically, it is located within the County's CUGA. Consequently, the Hearings Examiner's decision to approve Cascadia does not alter the fact that it has been located within a UGA since 1994. In addition, as discussed in Legal Issue 21, the Board has no authority to determine whether a decision of a hearings examiner is legally binding. The Board does not have jurisdiction to resolve this issue. **Legal Issue 25 is untimely and is dismissed with prejudice.**

***Legal Issue 26:*** *Whether the Board should invalidate Cascadia in the PCCP when it violates the GMA?*

This is another challenge to the County's designation or approval of the Cascadia development. As set out in Applicable Law and the discussion of Legal Issue 8, the County's designation or approval of the Cascadia development does not raise a question of compliance with a GMA requirement and the Board does not have jurisdiction to review the Cascadia development approval. To the extent this issue challenges designations made in the County's Plan, this challenge is untimely. **Legal Issue 26 is dismissed with prejudice.**

***Legal Issue 27:*** *Does Ord. 99-93S2, 19A.30.030, which allows large planned Employment Center (EC) and Employment Based Planned Communities (EBPC), comply with the GMA when*

*the PCCP failed to include a market land factor for employment and industrial lands or a limited number of FCCs and the new centers will be located in 20-year planning areas (CUGA) rather than the CP/PCPP/GMA's 6-year public facility availability areas (UGAs)?*

Although prefaced with a reference to Ord. 99-93S2, Petitioners challenge the County's Plan. As set out above, the Plan was adopted in 1994 by Ord. 94-82S. The time to appeal provisions adopted in that enactment has passed. **Legal Issue 27 is untimely and is dismissed with prejudice.** The Board need not, and will not, reach the issue of standing.

**Legal Issue 28:** *Whether 19A.40.040-.0050 of Ord. 99-93S2 (P 304-305) is inconsistent with the GMA's requirements and the PCPP when it allows extension of Sanitary Sewers outside UGAs to rural areas of more intensive development and extensions of sewer lines between the UGAs when the County considers the CUGA as a UGA?*

Ord. 99-93S2 did not amend 19A.40.050. Because this code provision was not amended, by the challenged enactment, the Board is without jurisdiction to review 19A.40.050. However, 19A.40.040 is properly before the Board. **That portion of Legal Issue 28 relating to 19A.40.050 is dismissed with prejudice.**

**Legal Issue 29:** *Whether PCC 19A.40.060 of Ord. 99-93S2-Rural Centers-(p 311) allows prohibited urban development and services in rural areas?*

Petitioners challenge Rural Centers, which were created by the County's 1994 Plan. A challenge to whether Rural Centers allows prohibited urban development and services in rural areas is now untimely. **Legal Issue 29 is untimely and is dismissed with prejudice.** The Board need not, and will not, reach the issue of standing.

**Legal Issue 30:** *Whether PCC 19A.30.070-Resource Lands-of Ord. 99-93S2 (p 317) encourages conversion of agricultural resource lands to urban uses and the GMA requires protection/conservation of Agricultural Resource Lands?*

This is a challenge to the resource lands provisions of the County's Plan. The amendment to 19A.30.070 made by Ord. 99-93S2 was simply grammatical ("is" to "are"); it did not substantively amend the resource lands provisions of the Plan. The time to challenge the resource lands provisions adopted in the 1994 enactment has passed. **Legal Issue 30 is untimely and is dismissed with prejudice.** The Board need not, and will not, reach the issue of standing.

**Legal Issue 31:** *Whether the reclassification of Employment Centers (EC) and EBPC lands in Amendment M-19, M-20 and M-22 (p 371) of Ord. 99-93S2 promotes future conversion of resource lands and rural areas?*

This issue challenges Amendments M-19, M-20, and M-22. However, it is based on a faulty

premise – none of these amendments involve Rural Lands, and only M-19 involved Resource Lands (mineral resource overlay), with no re-classification to or from EC or EBPC. **To the extent this issue challenges Ord. 99-93S2, it is based on a faulty premise and is dismissed with prejudice. To the extent this issue challenges land uses adopted in the 1994 Plan, it is untimely and is dismissed with prejudice.**

*Legal Issue 32: Whether Amendment M-8-Crystal Mountain and Dana Meeks Master Planned Resort (MPR) (p 368), which reclassifies 4,374 acres of Designated FLs and Rural Twenty-R-20-lands to MPR, fails to preserve FLs under the GMA and is invalid because the County has not enacted DRs precluding suburban or urban densities in MPRs?*

Neither the County nor the Intervenor challenge Legal Issue 32.

*Legal Issue 33: Whether the County has complied with the GMA's requirements for Master Planned Resorts, RCW 36.70A.363(2)?* [\[14\]](#)

Petitioners challenge the County's Master Planned Resorts (MPR) ordinance, although they do not identify which provision of Ord. 99-93S2 they challenge. The text of the MPR ordinance was not amended by Ord. 99-93S2. **Legal Issue 33 is untimely and is dismissed with prejudice.** The Board need not, and will not, reach the issue of standing.

*Legal Issue 34: Whether T-7A-PCC 19A.30.100 of Ord. 99-93S2 (p 323) encourages leapfrog development, overextension of sewer facilities and pressure to prematurely convert reserve and rural areas when it allows for "shadow platting," which authorizes approvals for increased development densities once sanitary sewer is available to the specific property and the GMA made sewers the primary vehicle for controlled growth?*

Petitioners here incorrectly assume that 19A.30.100 applies to Rural Lands. PCC 19A.30.100 refers to residential densities within a UGA. **To the extent this issue challenges 19A.30.100, it is based on a faulty premise and Legal Issue 34 is dismissed with prejudice. To the extent this issue challenges the County's UGA designations, it is untimely and Legal Issue 34 is dismissed with prejudice.** The Board need not, and will not, reach the issue of standing.

*Legal Issue 35: Whether 19A.30.100-Alternative Sewage Disposal Systems- (p 328) is inconsistent with the GMA and the PCPPs because it encourages development without tiered, planned public facilities at the time of project approval?*

As stated in the discussion of Legal Issue 34, PCC 19A.30.100 applies only within the UGA. The County and Intervenor argue that, since any alternative sewage disposal methods must be consistent with residential densities allowed by the County's Plan, [\[15\]](#) it is inaccurate to allege

that 19A.30.100 encourages improper development. Petitioners' response does not attempt to rebut the County and Intervenor's characterization of this issue. **To the extent this issue challenges 19A.30.100, it is based on a faulty premise and Legal Issue 35 is dismissed with prejudice. To the extent this issue challenges the County's UGA designations, it is untimely and Legal Issue 35 is dismissed with prejudice.** The Board need not, and will not, reach the issue of standing.

### Conclusion

The County's Motion to Dismiss and Cascadia's Motion to Dismiss are **granted**. Legal Issues 1-27, 29-31, 33-35, and that portion of Legal Issue 28 relating to PCC 19A.40.050 are **dismissed with prejudice**.

### iii. order

Based upon review of the Petitions for Review, the filings of the parties, including the motions, briefs and exhibits submitted by the parties, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

1. The County's Motion to Dismiss and Cascadia's Motion to Dismiss are **granted**:

a. Legal Issues 1-27, 29-31, 33-35 are **dismissed with prejudice**.

b. That portion of Legal Issue 28 relating to PCC 19A.40.050 is **dismissed with prejudice**.

2. The remaining Legal Issues to be resolved by the Board are:

***Legal Issue 28:** Whether 19A.40.040-0050 of Ord. 99-93S2 (P 304-305) is inconsistent with the GMA's requirements and the PCPP when it allows extension of Sanitary Sewers outside UGAs to rural areas of more intensive development and extensions of sewer lines between the UGAs when the County considers the CUGA as a UGA?*

***Legal Issue 32:** Whether Amendment M-8-Crystal Mountain and Dana Meeks Master Planned Resort (MPR) (p 368), which reclassifies 4,374 acres of*

*Designated FLs and Rural Twenty-R-20- lands to MPR, fails to preserve FLs under the GMA and is invalid because the County has not enacted DRs precluding suburban or urban densities in MPRs?*

3. The filing of briefs for the two remaining legal issues shall follow the schedule set forth in the Second Prehearing Order. The Hearing on the Merits will commence at **10:00 a.m. on Wednesday, March 8, 2000** in Suite 1022 of the Financial Center, 1215 Fourth Avenue in Seattle.

So ORDERED this 28<sup>th</sup> day of January, 2000.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Joseph W. Tovar, AICP  
Board Member

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Lois H. North  
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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[1] The Gain Motion to Strike arrived via telefacsimile, three days before the County pleading to which it is directed, because the latter arrived via U.S. mail.

[2] Although the Board did not receive this pleading until January 24, 2000, it was signed on January 21, 2000.

[3] The distinction between “failure to act” and action that fails to comply with the GMA is important. As this Board noted in an early case:

A major distinction between a petition for review alleging a failure to act by a specified deadline, and a petition challenging an action for not complying with the GMA, is that with the former, no record per se exists. On the other hand, a complete record below does exist when a jurisdiction has taken an adoption action.

*Friends of the Law v King County*, CPSGMHB Case No. 94-3-0009, Order Granting Dispositive Motions (Nov. 8, 1994), at 11.

[4] In Legal Issue 10, Petitioners challenge the County's allocation of OFM's population projections; however, Petitioners have not alleged that OFM's population projections should be adjusted.

[5] Declaration of Anna Graham in Support of Motion to Dismiss, Ex. A.

[6] Declaration of Anna Graham in Support of Motion to Dismiss, Ex. B.

[7] Declaration of Anna Graham in Support of Motion to Dismiss, Ex. C.

[8] Declaration of Anna Graham in Support of Motion to Dismiss, Ex. D.

[9] The Gains assert that the Cascadia development is an FCC. The County asserts that it is an EBPC and not an FCC. For purposes of this Order, the Board will refer to this project as the "Cascadia development."

[10] Declaration of Anna Graham in Support of Motion to Dismiss, Ex. F.

[11] Declaration of Anna Graham in Support of Motion to Dismiss, Ex. F; Petitioners' PFR, filed October 22, 1999 ("The site lies outside of a designated UGA but within Pierce County's County Urban Growth Area (CUGA)"), at 2.

[12] Petitioners erroneously state: "The [County's comprehensive plan] did not designate Cascadia as [a new] FCC or UGA." Petitioners' Reply to Respondent's Motion to Dismiss, at 11-12. The County's Plan did designate a UGA, the CUGA, which includes the Cascadia property.

[13] The County's choice to employ the criteria provided in RCW 36.70A.350 for a development to be located in an existing, initially designated UGA is elective.

[14] The reference to RCW 36.70A.363(2) is in error – no such provision exists. Petitioners apparently intended to cite either RCW 36.70A.360 or .362.

[15] County's Motion to Dismiss, at 17 (citing PCC 19A.30.100(C)(13), Ex. A to Ord. 99-93S2, attached as Ex. E to Declaration of Anna Graham in Support of Motion to Dismiss).