

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

JODY L. McVITTIE,)	
)	Case No. 01-3-0002
)	
Petitioner,)	<i>(McVittie VI)</i>
)	
v.)	FINAL DECISION AND ORDER
)	
SNOHOMISH COUNTY,)	
)	
Respondent.)	
)	

I. Procedural Background

On January 26, 2001, 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. 01-3-0002, and is hereafter referred to as *McVittie v. Snohomish County*. The short case title is *McVittie VI*. Petitioner challenges Snohomish County’s (the **Respondent** or **County**) adoption of the 2001-2006 capital facility plan (Ordinance 00-74), amendments to the comprehensive plan relating to capital facilities (Ordinance 00-75), and adoption of the 2001-2006 TIP (Motion 00-364). The basis for the challenge is noncompliance with the Growth Management Act (the **GMA** or **Act**).

On February 26, 2001, the Board conducted the prehearing conference in the above captioned case. On this same date, the Board received “Snohomish County’s Index of the Record re: County’s Adoption of Ordinance Nos. 00-074 & 00-75 and Motion No. 00-364,” (the **Index**).

On March 2, 2001, the Board issued the Prehearing Order (the **PHO**) in this case.

On March 19, 2001, the Board received “Snohomish County’s Revised Index of the Record re: County’s Adoption of Ordinance Nos. 00-074 & 00-075 and Motion No. 00-364,” (the **Revised Index**).

On April 5, 2001, the Board received from Petitioner the “Prehearing Brief and Request to Officially Recognize County Code and Motions,” (the **PHB**) with Exhibits attached.

On April 26, 2001, the Board received “Snohomish County’s Prehearing Brief” (the **County’s Brief**) with Exhibits attached.

On April 27, 2001, the Board received “Errata to Snohomish County’s Prehearing Brief.”

On May 3, 2001, in response to a request from the Petitioner, and in view of the Respondent’s concurrence, the Board issued an “Order Extending Deadline for Reply Brief.”

On May 7, 2001, the Board received “Petitioner’s Reply Brief” (the **Reply**) with Exhibits attached and copies of Core Documents with the following Index Numbers: 451, 621, 666, 693, 694, 704, and 710.

On May 15, 2001, the Board received “Snohomish County’s Motion to Supplement the Record,” (the **County’s Motion to Supplement**). Attached to the County’s Motion to Supplement were Exhibit A “Declaration of Jacqueline Statz,” and Exhibit B “Public Hearing Notices and Affidavits of Publication for the weekly community newspapers re: Ordinance nos. 00-074 and 00-075, and Motion No. 00-0364.”

The Board conducted the hearing on the merits beginning at 10:00 a.m. on May 17, 2001 in Suite 1022 of the Financial Center, 1215 Fourth Ave., Seattle, WA. Present for the Board were Lois H. North, Edward G. McGuire, and Joseph W. Tovar, presiding officer. Also present was the Board’s legal intern, Brian Norkus. Representing the County were Barbara Dykes and Brent Lloyd. Petitioner Jody McVittie represented herself *pro se*. Court reporting services were provided by Duane Lodell of Robert Lewis and Associates of Tacoma. No witnesses testified.

II. FINDINGS OF FACT

1. On November 1, 2000, the County published a “Notice of Introduction of Ordinance and Notice of Publish Hearing” with respect to ordinance No. 00-074, the heading of which reads: ADOPTING THE CAPITAL FACILITIES PLAN/YEAR 2000 UPDATE AND THE 2001-2006 CAPITAL IMPROVEMENT PROGRAM AS PART OF SNOHOMISH COUNTY’S GROWTH MANAGEMENT ACT COMPREHENSIVE PLAN, AMENDING AMENDED ORDINANCE NO. 94-125. Index No. 659.
2. On November 1, 2000, the County published a “Notice of Introduction of Ordinance and Notice of Public Hearing” with respect to ordinance No. 00-075, the heading of which reads: ADOPTING AMENDMENTS TO THE GENERAL POLICY PLAN RELATING TO THE CAPITAL FACILITIES ELEMENT AS A PART OF SNOHOMISH COUNTY’S GROWTH MANAGEMENT ACT COMPREHENSIVE PLAN, AMENDING AMENDED ORDINANCE NO. 94-125. Index No. 697.

3. On November 21, 2000, the Snohomish County Council adopted Ordinance No. 00-74, with Exhibit A: Capital Facilities Plan, Year 2000 Update; and Exhibit B: 2001-2006 Capital Improvement Program. Index. No. 666.

4. On November 21, 2000, the Snohomish County Council adopted Ordinance No. 00-75, the title caption of which reads: **ADOPTING AMENDMENTS TO THE GENERAL POLICY PLAN RELATING TO THE CAPITAL FACILITIES ELEMENT AS A PART OF SNOHOMISH COUNTY’S GROWTH MANAGEMENT ACT COMPREHENSIVE PLAN, AMENDING ORDINANCE NO. 94-125.** Index No. 704.

5. The Capital Facilities Plan 2000 Update lists as “Public Facilities Necessary to Support Development” the following: [for urban development] Public Streets and Transit Routes, Public Water Supply System, Public Wastewater System, Surface Water Management System (urban), Electric Power, and Public Schools; [for rural development] Public Roads, Surface Water Management System (rural), Electric Power, and Public Schools. Also included is a minimum level of service standard for each of these facilities. Index No. 666, Ex. A, at 25.

6. The Capital Facilities Plan 2000 Updates also includes other facilities, including law and justice, general government, solid waste and park facilities. *Id.*, at 26.

7. On November 21, 2000, the Snohomish County Council adopted Motion 00-034, the title caption of which reads: **ADOPTING THE 2001-2006 SIX YEAR TRANSPORTATION IMPROVEMENT PROGRAM.** Index No. 710.

III. STANDARD OF REVIEW

Pursuant to RCW 36.70A.320, comprehensive plans and development regulations, and amendments thereto, adopted pursuant to the Act, are **presumed valid** upon adoption. The **burden is on the petitioner** to demonstrate that any action taken by the respondent jurisdiction is not in compliance with the Act.

The Board “shall find compliance with the Act, unless it determines that the [County’s] action[s] are] **clearly erroneous** in view of the entire record before the Board and in light of the goals and requirements of the [GMA].” RCW 36.70A.320 (3). For the Board to find the 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).

IV. MOTIONS and PREFATORY NOTE

A. Motions

Petitioner McVittie requested the Board “to officially notice Snohomish County Code 26B.” PHB, at 18, fn. 13. Petitioner also requested the Board to officially notice SCC 32.05. PHB, at 29, unnumbered footnote. The Board construes McVittie’s requests to be motions to take official notice pursuant to WAC 242-02-660(94).

The McVittie motions for the Board to take official notice of Snohomish County Code Title 26B and SCC 32.05 are **granted**.

The County’s Motion to Supplement the Record is **granted**.

B. Prefatory Note

The Board answers the Legal Issues in the following sequence: first, Legal Issue 2 [Public Participation goal and requirement]; then Legal Issue 1 [Goals 1, 9, 11 and 12] together with Legal Issue 3 [Capital Facilities Element requirements and the interplay with Goal 12]; and finally Legal Issue 4 [Consistency between the TIP and the Transportation Element]. After presenting analysis and conclusion of these legal issues, the Board then addresses the request for a determination of Invalidity.

V. LEGAL ISSUES

Legal Issue 2

Did the County’s adoption of Ordinances 00-74 and 00-75 fail to comply with the requirements of RCW 36.70A.035, .070 (preamble), and .140 and fail to be guided by RCW 36.70A.020(11)?

Applicable Law

a. Statutory provisions

The GMA provisions relevant to this legal issue are RCW 36.70A.020(11)^[1], .035^[2], .070 (preamble)^[3], and .140^[4].

b. Prior Board Decisions

In *McVittie V*,^[5] the Board recapped a number of the GMA’s provisions regarding public participation, and the interplay between the notice requirements of .035, the public participation

requirements of .140 and the consistency requirements of .070 (preamble), as follows:

RCW 36.70A.035, the GMA notice requirements, states, “The public participation requirements of this chapter shall include notice procedures that are reasonably calculated to provide notice. . .of proposed amendments to comprehensive plans and development regulations. . .” This language is unambiguous; it is not limited. It applies to *all* plan amendments, permanent, temporary or interim. Procedures that are reasonably calculated to provide notice of proposed plan amendments are required; . . .

RCW 36.70A.070 (preamble) explicitly provides “A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140.” This section of the Act . . . is merely a cross reference to the substantive requirements contained in RCW 36.70A.140. However, failure to comply with .140 also necessitates a finding of noncompliance with .070 (preamble).

RCW 36.70A.020(11), the public participation goal, is the umbrella over *all* the GMA’s public participation requirements; . . . However, the Board looks first to the requirements sections of the Act to determine compliance. *See: Litowitz v. City of Federal Way (Litowitz)*, CPSGMHB Case No. 96-3-0005, Final Decision and Order (Jul. 22, 1996), at 7; *The Children’s Alliance and Low Income Housing Institute v. City of Bellevue (Children’s II)*, CPSGMHB Case No. 96-3-0023, Final Decision and Order (Nov. 3, 1996), at 9. Review is done in light of the goals of the Act, not in lieu of the Goals. *See: Jody L. McVittie v. Snohomish County (McVittie)*, CPSGMHB Case No. 99-3-0016c Final Decision and Order (Feb. 9, 2000), at 22. If the Board finds noncompliance with a requirement of the Act, it returns to the goals to determine whether substantial interference has occurred, thereby meriting a determination of invalidity. *McVittie V*, at 22.

RCW 36.7A.140 is the original and primary public participation requirement of the GMA. This is the public participation bedrock upon which all GMA plans and development regulations in the state are built. It embodies the Act’s “enhanced” public participation process that requires *early and continuous* public participation during development and amendment of plans and development regulations . . . *McVittie V*, at 22-23.

Discussion

a. Positions of the Parties

McVittie argues that the County failed to give effective notice for Ordinance Nos. 00-074 and 00-075, thereby failing to comply with RCW 36.70A.035, .070 (preamble) and .140. She further argues that the County's action failed to encourage public participation, and indeed precluded it, thereby substantially interfering with fulfillment of the GMA's public participation goal RCW 36.70A.020(11). She states: "Although the County did publish a notice in the paper that public hearings were to be held (Exhibits 659, 697), the notice was incomplete, misleading and inaccurate in several respects." PHB, at 29. She states:

The County failed to provide notice that could be reasonably calculated to notify the public that it was changing its level of service standards for park and recreation facilities, that it was abandoning the standards for local parks, that it was not meeting its previously established standards for facilities now defined as "not necessary for development" or "Non-GMA" facilities. PHB, at 30.

Petitioner points to the Notice that the County published for Ordinance 00-074 and complains that it makes no specific mention of changes to level of service standards such as the elimination of local parks from the capital facility planning process. *Id.* Moreover, she asserts that the County fails to disclose that it is not meeting previously established standards for courtrooms, some sheriff facilities, local parks and roads and instead, again without notice to the public, has relegated these facilities to a new category of "Non-GMA" services. PHB, at 31. While she also challenges the County's substantive authority to make such a distinction in Legal Issue 5, here the Petitioner argues that this approach committed two fatal public participation errors: (1) failure to engage the public in a discussion of what services are "necessary for development;" and (2) incorrectly implying that there were no alternatives to the proposed action. PHB, at 32.

McVittie's attack of the Notice for Ordinance 00-075 alleges sins both of commission and omission, each with fatal consequences for the GMA sufficiency of the Notice. Petitioner points to incorrect paragraph citations, incorrect underlining and strikethroughs and incorrect page numbers, and complains that:

It is difficult enough as an ordinary citizen to follow the capital facility planning process. To provide public notice that is confusing does not encourage public participation. It substantially thwarts Goal 11 of the Act and does not comply with the requirement to provide "reasonable" and "effective" notification (RCW 36.70A.035, .140). PHB, at 34.

Finally, Petitioner argues that the Notice did not apprise the public that Ordinance 00-075 was changing standards. McVittie states:

The County clearly has the prerogative to modify its plan. The missing piece here is

that the public needs to be notified on the change. Changing standards is a significant action. . . . It is true that the information [of the proposed change] could be obtained by reviewing the CFP and obtaining all the previous CFPs and the Henderson Young Report and carefully comparing the documents . . . [however] the public should not be expected to expend these heroic levels of energy just to understand what the County is intending to do. PHB, at 35.

The County responds that “the labor-intensive efforts of the activist community in GMA public process is testament to the sufficiency of the County’s notice procedures, codified at chapter 32.05 SCC, in apprising citizens of important growth management decisionmaking.” County’s Brief, at 15. The County further argues:

The public participation surrounding the enactment of Amended Ordinance 00-074 and Ordinance No. 00-075 clearly meets the requirements of the County’s public participation ordinance which, as the Board held in *Sky Valley*, is adequate to meet the GMA’s requirements for public participation and is ‘irrefutably valid’ under RCW 36.70A.170.” County’s Brief, at 21-22, footnotes omitted.

While the County acknowledges that “minor typographical errors” appeared in the published notice for the hearing on Ordinance 00-075, it contends that these were not of great consequence and that, at any rate, pursuant to the language of RCW 36.70A.140, “errors in exact compliance” should not be fatal to the notice. County’s Brief, at 26.

Regarding McVittie’s allegation that the notice does not describe changes and/or elimination of certain level of service standards, the County responds:

The [CFP Amendment] notice declares that updates are being considered for general government, parks and justice, surface water management and solid waste management, . . . water supply, sanitary sewer, and public schools . . . [the CIP Amendment] notice declares that updates are being considered for ‘all capital projects to be undertaken by Sno. Co. for all its facilities, including roads.’ *Id.* Emphasis added.

The County insists that its notices were reasonably calculated to alert the public to the general purpose of the hearings and that this is all that the GMA and the SCC demand.

In Reply, McVittie seizes upon the County’s statement that the changes wrought by Ordinance 00-074 to the CFP and the CIP are “comprehensive” and “fundamental”^[6] and argues that these changes constitute a “fundamental policy shift that took place without effective public notice.” Reply, at 2. She also challenges the County’s reliance on what it described as “general notice,”

stating:

The County argues that only “general” notice is required prior to GMA actions (CB at 10) and that “adequate public notice was given” CB at 22. The GMA, however, requires that public participation be “encouraged” RCW 36.70A.020(11), that notice be “reasonably calculated to provide notice . . . of proposed amendments to comprehensive plans . . .” RCW 36.70A.035, and for “broad dissemination of *proposals and alternatives*. . . [and] . . . public meetings after *effective notice*. RCW 36.70A.140. Reply, at 24-25. Italicized emphasis in original.

Petitioner takes issue with the County’s reliance on the work of “activists” as proof of the sufficiency of its notice, and argues that these activists participated in spite of the County’s notice rather than because of it. Reply, at 25.

b. Analysis

At the heart of this issue is the question of whether the notices the County published told the general public what it needed to know about the pending County action to amend the standards in its CFP. The Board agrees with the County that capital facilities planning is a complex subject and that the notices it published did mention the general topics under discussion. The Board also presumes that the County has made a good faith attempt to engage the public in the capital facilities dialogue. However, a notice that is *reasonably calculated* to reach the intended public must be measured against something more than the good faith intent of the local government publishing it. Rather, it must also be measured against whether it is *effective* in alerting the public to the key questions in play. It is this latter bar that the County’s notices fail to clear.

It is important to begin by noting that the GMA identifies several different audiences for a local jurisdiction’s notice of proposed amendments to plans and regulations. The Act specifically lists “property owners and other affected and interested individuals, tribes, government agencies, businesses, school districts and organizations” and lists several examples of reasonable notice provisions, including the method at issue in this case:

Publishing notice in a newspaper of general circulation in the county, city or general area where the proposal is located or that will be affected by the proposal;

RCW 36.70A.035(1)(b)

Here, the method of notice relied upon by the County was published notice. McVittie’s argument therefore presumes that the intended audience is the *general public* rather than a “specific property owner, individual or organization” who could be alerted more directly by one of the

other methods listed at .035(1). Petitioner’s argument likewise presumes that the challenged action, (i.e., the revision or deletion of facilities or level of service standards), is of interest to the broadest of audiences, which again, is the general public. It is not reasonable to expect this general public to have the time, expertise or diligence of what the County characterizes as the “activist community.” To have a reasonable chance of alerting the “average citizen” to as fundamental and pervasive policy change as redefining what facilities are “necessary to support development” or revising an adopted level of service, a GMA-compliant notice must be more descriptive than “updates are being considered.”

The Board holds that effective notice of an amendment to a Capital Facilities Element involving the addition or subtraction of facilities deemed to be “necessary for development” or a change in a level of service (LOS) for a listed facility must clearly and concisely describe the nature or magnitude of modifications being considered. Likewise, if a jurisdiction wishes to consider amending a previously adopted standard, by increasing or decreasing a level of service, by revising the methods used to measure performance, or by deletion of the standard altogether, it must explicitly say so in its notice. It is not sufficient for a notice to simply say that the jurisdiction is considering updating or changing previously adopted facilities, standards or methods. It must give a clear indication of WHAT, HOW and, if applicable, HOW MUCH the facility, standard or method might be changed.

The County’s notice, while lengthy and exhaustively detailed in some ways, misses the mark by not clearly conveying to the average citizen that the County proposed to distinguish in its CFP between certain public facilities as “necessary to support development” and others that are not, and to categorize “parks” as one of the latter. Such changes are too fundamental and pervasive in their effect to be excused by the “errors in exact compliance” language of .140. By contrast, the typographical and numbering errors that the County admitted, while troubling, were probably not serious enough to warrant a finding of noncompliance. However, because the Board will remand the Ordinances to the County to cure the more serious notice deficiency, it should take the opportunity to also cure these lesser errors.

Conclusion

A jurisdiction must provide effective notice and the opportunity for the public to participate prior to adopting any GMA plan or any amendment to that plan, including revisions to the LOS standards, methods for calculating a LOS, or re-classification of public facilities as either “necessary to support development” or “not necessary to support development.” The Board finds that the County failed to provide effective notice because it did not explicitly alert the public to the proposed bifurcation of CFP facilities into those that are “necessary to support development” and those that are not, and that it further proposed to categorize parks as “not necessary to support

development.” However inadvertent, the notice did not alert the public to a fundamental and pervasive policy change, which in turn resulted in a failure to encourage the public to comment upon or otherwise participate in the consideration of the proposed change, contrary to Goal 11. The Board therefore concludes that the County’s action adopting Ordinance Nos. 00-74 and 00-75 was **clearly erroneous** and **failed to comply** with the requirements of RCW 36.70A.035 and .140.

legal issue 1

Did the adoption by Snohomish County (the County) of Ordinances 00-74 and 00-75 fail to be guided by RCW 36.70A.020(1), (9), (11), and (12)?

LEGAL ISSUE 3

Did the County’s adoption of Ordinances 00-74 and 00-75 fail to comply with the requirements of RCW 36.70A.070(3) and fail to be guided by RCW 36.70A.020(11) and (12)?

Applicable Law

a. Statutory Provisions

The statutory provisions relevant to Legal Issue 1 are RCW 36.70A.020(2), (9), (11), and (12).

[7] The statutory provisions relevant to Legal Issue 3 are RCW 36.70A.020(11) and (12) and .070(3) [8].

b. Prior Board Decisions

In prior cases, the Board has examined the statute’s goals and requirements regarding capital facilities, transportation facilities and concurrency. In *McVittie v. Snohomish County (McVittie)* CPSGMHB Case No. 99-3-0016c, Final Decision and Order (Feb. 9, 2000), the Board examined the interrelationship of Goal 12 (RCW 36.70A.020(12)) with other sections of the GMA. One of its fundamental conclusions was that Board review of a challenge to RCW 36.70A.070(3) or (6) must be done “in light of Goal 12, not in lieu of Goal 12.” *McVittie*, at 22.

The Board also reached four other basic conclusions about the cumulative effect of Goal 12 and the capital facilities requirements of the Act: (1) Goal 12 creates a duty beyond the capital facility planning that is required by RCW 36.70A.070(3) and requires substantive, as well a

procedural, compliance^[9]; (2) Goal 12 requires the designation of a locally established single Level of Service (LOS) standard for the facilities and services contained in the Capital Facilities Element, below which the jurisdiction will not allow service to fall;^[10] (3) Goal 12, operating through RCW 36.70A.070(3) and (6), requires an enforcement mechanism or “trigger” to compel either concurrency implementation or reevaluation of numerous options;^[11] and (4) Goal 12 does **not** require a development-prohibiting concurrency ordinance for non-transportation facilities and services, rather, it allows local governments to determine what facilities and services are necessary to support development and the enforcement mechanism for ensuring that identified necessary facilities and services for development are adequate and available.^[12]

Discussion

a. Positions of the Parties

In her opening brief, Petitioner groups her arguments on Legal Issues 1 and 3, making a number of attacks on the GMA compliance of the County’s actions. She contends that by adopting Ordinance 00-75 the County impermissibly revises capital facilities level of service standards and fundamentally changes its approach to standards without engaging the public process.^[13] PHB, at 6. She argues that by creating a definition of facilities “not necessary for development” the County abandons standards for certain facilities and changes the levels of service for others. PHB, at 7.

Petitioner alleges that the amended Capital Facilities Element does not comply with RCW 36.70A.070(3)(a) and (b) because it lacks a current, consistent and complete inventory and a forecast of future needs, respectively. PHB 11-16. McVittie further argues that the County violates RCW 36.780A.070(3)(d) because the County is not meeting its existing needs and does not identify funding to clearly remedy the problem. PHB, at 17. She also contends that the County violates RCW 36.70A.070(3)(e) because probably funding for facilities falls short of meeting existing needs yet the County avoids reassessing the land use element. PHB, at 18-19.

Petitioner further argues that the County has avoided the “trigger for reassessment,” specifically for road facilities, by abandoning standards for inadequate facilities and by identifying needs beyond the current planning period. PHB, at 18-21. She complains that the County is not enforcing its own concurrency requirements that it continues to approve development on roads that do not meet level of service standards, and that have been designated as operating at ultimate capacity. PHB, at 23-28.

The County begins its response by explaining that its re-organization of the CFP was an attempt

to respond to the Board's direction in *McVittie* and attempt to organize the document in sections to mirror the structure of RCW 36.70A.070(3)(a)-(e). The County states:

Petitioner's principal objections with the County's actions are centered upon the CFP's articulation of a standard for determining whether a facility is necessary for development and its determination, based on that standard, as to which specific facilities are necessary for development. Broken down into its most basic component pieces, Petitioner's argument is that, by adopting the new CFP, the County has abandoned previously adopted standards and adopted new standards without engaging the public. County's Brief, at 31.

The County maintains that it has the discretion to choose which facilities will be considered necessary for development, citing to the Board's conclusion in a prior case: "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." County's Brief, at 33, quoting *McVittie*, 28.

The County contends that Petitioner implies that the wide range of public services and facilities listed and analyzed in the CFP and CIP "must all be considered necessary for development." County's Brief, at 35. The County points out that under its Code, it is required to combine the CIP as required by the charter and the six-year financing program required by the GMA into a single document, but argues that this does not mean that all facilities listed therein must automatically be deemed "necessary for development." *Id.*

With respect to standards, the County states;

For those facilities necessary for development, the County has defined clear standards, as conceded by the Petitioner. For other facilities, the County has in most cases defined guidelines that operate as a LOS Standard. County's Brief, at 44.
Footnote omitted.

The County argues that the same standards that applied in the 1999-2004 Capital Plan Detail still apply to those particular facilities, but that there have been some changes in the amendments at bar. The County states "The standards that have significantly changed are those for Courtrooms, Correctional Facilities, and Law Enforcement" but points out that the 1999-2004 Capital Plan anticipated those changes, calling for specific studies to be done, and the information from those studies has now been included in the CFP. ^[14] County's Brief, at 37.

The County denies that it has changed the level of service standards for surface water and that the LOS standards for Parks and Courtrooms comply with the GMA. County's Brief, at 40-42. With

respect to Parks, the County argues that the changes made were *de minimis* arguing:

[Petitioner] contends that the County changes its LOS annually to adjust it down to allow for zero park acquisition. The text and the numbers, however, do not bear out her claim . . . In comparing the existing LOS calculated for 2000, in all cases the LOS falls within the 1999 range, with one exception . . . While the LOS ranges did adjust slightly, four adjusted upward and three adjusted downward. None of the changes were significant; . . . County's Brief, at 40. Footnotes omitted.

With respect to local parks, the County further explained:

. . . Petitioner argues that there is data missing for "Local Parks." [A]s a result of the new (and still draft) Parks Comprehensive Plan, the focus has been shifted to the County's role as a regional, rather than local, parks provider . . . [A]s a result the local parks category was subsumed into the resource activity and resource conservancy categories for park land. An early draft of the CFP reflected the categories to be created in the new parks plan, but because the plan was not completed in time, it was decided to drop the new park categories from the CFP [and to] revising the wording of the CFP . . . by indicating that the resource activity and resource conservancy categories contained both regional and local park land. Thus the local parks inventory was not lost; it was simply re-categorized. The re-categorization does not constitute a violation of the GMA. County's Brief, at 43-44. Footnotes omitted.

With respect to courtrooms, corrections facilities and Sheriff's facilities, the County argues that these facilities need not be included in the CFE, but that their inclusion is compelled by the Code, Charter and sound planning practice.

In her reply brief, McVittie states that she does not dispute that "the County clearly defines standards for those facilities and services it deems necessary for development." Reply, at 5. She focuses on those facilities deemed "necessary for growth" but "not necessary for development" and clarifies that it is these facilities for which the County has not yet adopted a standard and a "trigger mechanism." She argues:

The confusion enters with those facilities deemed necessary for growth but not necessary for development. Here, the County uses the words "planning guidelines" and "standards" interchangeably. CB, at 44-45. It is clear that these "standards" are not meant to be an objective measure of need that might lead to any kind of trigger.
Id.

b. Analysis

The key organizing concept at issue in this dispute, and the Board’s touchstone in deciding this case, is the language of Goal 12 regarding “public facilities and services.” RCW 36.70A.020(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.

While the Act does not define “public facilities and services” as a discrete term, it does define both “public facilities”^[15] and “public services.”^[16] Hence, where RCW 36.70A.070(3) calls for an inventory of “existing capital facilities owned by *public* entities” and a six-year financing plan that “identifies sources of *public* money,” it is clear that the “public facilities and services” that must be included in the CFE are, at the least, those specifically named in the definition of public facilities.^[17]

Focusing on Goal 12’s phrase “those public facilities and services necessary to support development,” the County has chosen to differentiate between those facilities which it deems “necessary for development,” and those which it deems are not. While this differentiation was described in argument as a bifurcation of the CFE into “GMA” and “Non-GMA” facilities, the Board finds no such language in the challenged documents. Instead, the County’s CFP labels those facilities that it deems “necessary to support development” as such. Finding of Fact 5. While it does not include “parks” as a facilities “necessary to support development” the CFP does list them. Finding of Fact 6.

The Board agrees that, while the County must include the listed public facilities within the CFP, it does have the discretion to choose which of those it deems necessary for development. The CFE itself sets forth a clear and well-reasoned rationale for this distinction:

Many of the facilities provided by Snohomish County support the County’s function as a provider of regional services. Most of the County’s law and justice, general government, solid waste, and park facilities and services fall into this category. These facilities are provided by Snohomish County to serve the entire county (or large segments of it), and they are certainly necessary to support county growth. However, these are not facilities that need to be expanded with each subdivision or PRD approved in Snohomish County . . . *These facilities need not be included within the CFP, based on the planning parameters of the GMA.* Ex. 666, Ex. A., at 26. (Emphasis supplied).

The Board disagrees with the emphasized portion of the preceding excerpt from the CFE because the “park facilities” are explicitly listed at RCW 36.70A.030(12) and therefore **must** be included in the CFE. Nevertheless, the County has included parks, as well as other facilities in its CFE, beyond those listed at .030(12).

The Board holds that a Capital Facilities Element must include all facilities that meet the definition of public facilities set forth at RCW 36.70A.030(12). All facilities included in the CFE must have a minimum standard (LOS) clearly labeled as such (i.e., not “guidelines” or “criteria”), must include an inventory and needs assessment and include or reference the location and capacity of needed, expanded or new facilities. (RCW 36.70A.070(3)(a), (b) and (c)). In addition, the CFE must explicitly state which of the listed public facilities are determined to be “necessary to support development” and each of the facilities so designated must have either a “concurrency mechanism” or an “adequacy mechanism” to [\[18\]](#) trigger appropriate reassessment if service falls below the baseline minimum standard. Transportation facilities are the only facilities required to have a concurrency mechanism, although a local government may choose to adopt a concurrency mechanism for other facilities.

Having reviewed the facts in the record, the arguments of the parties, and the relevant provisions of the GMA, as interpreted and summarized in the above cited holding, the Board finds that the Petitioner has failed to carry her burden to persuade the Board that the County’s action in adoption of amendments to the County’s CFE and GPP, by Ordinance Nos. 00-74 and 00-75 was clearly erroneous.

Conclusion

The Board concludes that the Petitioner has failed to carry the burden of proof to persuade the Board that the County acted clearly erroneously with regard to the provisions of RCW 36.70A.020(12) and .070(3).

Legal Issue 4 [\[19\]](#)

Is the County’s Transportation Improvement Program (TIP), adopted by Motion 00-364, inconsistent with the transportation element of the comprehensive plan and does it thereby fail to comply with the requirements of RCW 36.70A.120 and RCW 36.70A.070(6)(a)(iv)(B)?

Applicable Law

Statutory provisions

RCW 36.70A.120 provides:

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

RCW 36.70A.070 provides in part:

6) A transportation element that implements, and is consistent with, the land use element.

a) The transportation element shall include the following sub elements: . . iv)

Finance, including: . . . (B) A multiyear financing plan based on the needs identified in the comprehensive plan, the appropriate parts of which shall serve as the basis for the six-year street, road, or transit program required by RCW 35.77.010 for cities, RCW 36.81.121 for counties, and RCW 35.58.2795 for public transportation systems. The multiyear financing plan should be coordinated with the six-year improvement program developed by the department of transportation as required by RCW 47.05.030 . . .

Positions of the Parties

Petitioner McVittie argues that the County funding is clearly not adequate because the County themselves have acknowledged that five roads are not meeting LOS standards and that they also acknowledge that there is no funding to return them to their minimum service level. PHB, at 21. She complains that the minimum standards are clearly defined in SCC 26B.52.60 and in the Transportation Element (the **TE**), but the enforcement system is not effective for transportation because while the County claims that it restricts new development if LOS drops below minimum standards (exhibit 604), it actually continues to approve developments when roads are not meeting minimum standards and when there is no funding to bring them up within six years. PHB, at 22.

McVittie argues that the County funding is clearly not adequate because the County themselves have acknowledged that five roads are not meeting LOS standards and that they also acknowledge that there is no funding to return them to their minimum service level. PHB, at 21. She contends that if the “regulatory mechanism” were effective there would be “no additional roads that would fall below” the established standards (with exceptions for miscalculation) unless there was funding “identified” that would improve the function of the

road. PHB, at 27.

The County responds that McVittie has not demonstrated any inconsistencies between the TIP and the TE. County's Brief, at 72. The County complains that the Petitioner "seeks to deprive county government of needed flexibility in setting priorities for transportation spending" and decries the Petitioner's complaining about "figurative 'nickel and dime' discrepancies between the TE, which only purports to make recommendations, and the specific expenditures set forth in the TIP is insufficient to support Petitioner's consistency challenge." County's Brief, at 74. "The GMA requires that the TIP be 'based on the needs identified' in the TE, not dictated by them." *Id.*

The County cites to an earlier case for the proposition that the County's TE is justified in taking the longer view:

[T]he choice of what projects are funded during a six-year financing plan cycle is a discretionary choice of the County. It is not for Petitioner to decide which projects are to be funded in a six-year cycle. So long as the capacity needs (growth induced needs) identified in the TE are ultimately included in the TIP, the implementation schedule decision, including a decision to delay a project to later years, is a discretionary choice of the County. County Brief, at 72, quoting *McVittie IV* FDO, at 21.

The County argues that there are many reasons, apart from funding shortfalls that account for decisions to delay transportation projects. It argues:

Even cursory comparison of the TIP and the TE shows that, contrary to Petitioner's assertions, the County's funding decisions have closely followed the TE as required by RCW 36.70A.070(6)(iv)(B). Petitioner has failed to demonstrate how specific decisions to deviate from the recommendations set forth in the TE by delaying certain projects to another six-year cycle constitutes nonconformance with the GMA's consistency requirement. County's Brief, at 76.

Discussion and Conclusion

Having reviewed the facts in the record, the arguments of the parties, and the relevant provisions of the GMA, the Board finds that the Petitioner has failed to carry her burden to persuade the Board that the County's action in adoption of Motion 00-364 was clearly erroneous.

VI. INVALIDITY

Applicable Law

RCW 36.70A.302 provides:(1) A board may determine that part or all of a comprehensive plan or development regulations are invalid if the board:

(a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;

(b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and...

Positions of the Parties

Petitioner asks that the Board enter a finding of invalidity, arguing that the continued validity of the County's amendments would "substantially interfere" with the fulfillment of goals 1, 9, 11, and 12. She argues:

Goal 1 encourages development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner. The Capital Facilities Plan and finance plan totally undermine ("substantially interfere") with the accomplishment of this Goal . . . The County's fostering of these development patterns, especially the congested roads, does not serve to "encourage" development in urban areas; . . . [and] what growth does occur in urban areas is not served by "adequate" public facilities and services but inadequate and deteriorating public facilities and services.

.....

Goal 9 read in conjunction with the capital facilities requirements of the Act (Goal 12 and section .070(3)) clearly indicate that parks are "necessary for development," but this County has chosen to define parks a non-GMA facility . . . The County's actions substantially interfere and thwart Goal 9's objectives.

.....

The County also is substantially frustrating the citizen participation provisions of goal 11. The County has silently and out of public view watered down its service standards . . . The County failed to engage the citizens in a discussion of what services are necessary for development and instead made it appear that compliance with the Act and the changes...were a requirement established by a legal case. The

County also discourages the involvement of citizens in the planning process by making the Capital Facility planning process so complicated, so contradictory, so piecemeal that no ordinary citizen can possibly follow the County's gyrations.

.....

The County's actions and inaction are substantially interfering with Goal 12. . . the County has not "ensure[d]" that appropriate public facilities and services are adequate. The County has not assured that new development will not "decreas[e] current service levels below locally established minimum standards."

County's Brief, at 44-45.

The County maintains that it has complied with all GMA and Snohomish County Code requirements for public participation. County Brief, at 29. In the eventuality that the Board finds noncompliance, the County asks that the Board not hold that the County has substantially interfered with RCW 36.70A.020(11), stating:

. . . the County has complied with the requirements of chapter 32.05 SCC, and that ordinance must be considered "irrefutably valid" by the Board. The errors that did occur were, as described above, ministerial in nature and thus insufficient support for a finding of noncompliance with Goal 11. *Id.* Case citations omitted.

The County also argues:

. . . the County has shown that the challenged enactments are supported by sound planning decisions that were subject to debate and discussion during the process of public participation that preceded their adoption by the County Council. Accordingly, the County respectfully asks that the Board reject Petitioner's request to enter an order of invalidity. County's Brief, at 77.

Findings of Fact and Conclusions of Law

As noted above, the Board has found that the challenged Ordinances are in compliance with the substantive requirements of RCW 36.70A.070(3). However, the Board has determined that the County's notice fails to comply with RCW 36.70A.035 and .140 and failed to be guided by RCW 36.70A.020(11).

The Board sees no evidence in the record to suggest that the County's error was willful or that it has or will act in bad faith. The Board is not persuaded that the continued validity of Ordinances

00-074 and 00-075 during the period of remand will substantially interfere with RCW 36.70A.020 (11). Therefore, the proper remedy in this instance is to remand the ordinances for further County action and to review the County's compliance at a subsequent hearing. If, at that time, the Petitioner wishes to have the Board revisit the question of invalidity, pursuant to RCW 36.70A.330(4), she must so indicate in her pre-compliance hearing pleading.

VII. ORDER

Having reviewed and considered the above-referenced documents, having considered the arguments of the parties, and having deliberated on the matter, the Board orders:

Snohomish County's adoption of Ordinance Nos. 00-074 and 00-075 was **clearly erroneous** and **does not comply** with the public participation requirements of .035, and .140, and fails to be guided by RCW 36.70A.020(11), as set forth and interpreted in the Final Decision and Order (**FDO**).

The Board therefore, **remands** Ordinance Nos. 00-074 and 00-75 to the County with the following directions:

In order to comply with the provisions of RCW 36.70A.020(11) .035, and .140. as set forth in this FDO, the Board directs Snohomish County as follows:

(1) The County shall provide effective notice, set a public hearing date and provide the opportunity for public participation regarding the Plan amendments and zoning designations proposed in the two Ordinances. *By no later than 4:00 p.m. Monday – October 2, 2001*, the County shall take appropriate legislative action to repeal, modify or readopt the subject matter addressed in the two Ordinances.

(2) Within ten days of taking the legislative action(s) set forth in Paragraph (1) of this Order, the County shall file with the Board an original and four copies of a Statement of Actions to Comply (**SATC**) with the GMA, as set forth in this FDO. The County shall simultaneously serve a copy of the SATC on Petitioner McVittie.

(3) Within ten days of service of the SATC, Petitioner McVittie *may* file with the Board an original and four copies of Comments on the SATC. If she wishes to ask the Board to revisit the question of invalidity, pursuant to RCW 36.70A.330(4), she must so indicate in her pleading.

(4) Petitioner shall simultaneously serve a copy of such Comments on the SATC on

the County.

Pursuant to RCW 36.70A.330(1), upon receipt of the County's SATC and Comments on the SATC, if any, the Board will schedule a Compliance Hearing and, if necessary, establish a date for a County Response to Comments on the SATC.

So ORDERED this 25th day of July, 2001

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

Lois H. North
Board Member

Joseph W. Tovar, AICP
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration.

[1] RCW 36.70A.020(11) provides:
Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

[2] RCW 36.70A.035 provides:
(1) The public participation requirements of this chapter shall include notice procedures that are reasonably calculated to provide notice to property owners and other affected and interested individuals, tribes, government agencies, businesses, school districts, and organizations of proposed amendments to comprehensive plans and development regulation. Examples of reasonable notice provisions include:
(a) Posting the property for site-specific proposals;
(b) Publishing notice in a newspaper of general circulation in the county, city, or general area where the proposal is located or that will be affected by the proposal;
(c) Notifying public or private groups with known interest in a certain proposal or in the type of proposal being considered;
(d) Placing notices in appropriate regional, neighborhood, ethnic, or trade journals; and
(e) Publishing notice in agency newsletters or sending notice to agency mailing lists, including general lists or

lists for specific proposals or subject areas.

(2) (a) Except as otherwise provided in (b) of this subsection, if the legislative body for a county or city chooses to consider a change to an amendment to a comprehensive plan or development regulation, and the change is proposed after the opportunity for review and comment has passed under the county's or city's procedures, an opportunity for review and comment on the proposed change shall be provided before the local legislative body votes on the proposed change.

(b) An additional opportunity for public review and comment is not required under (a) of this subsection if:

(i) An environmental impact statement has been prepared under chapter 43.21C RCW for the pending resolution or ordinance and the proposed change is within the range of alternatives considered in the environmental impact statement;

(ii) The proposed change is within the scope of the alternatives available for public comment;

(iii) The proposed change only corrects typographical errors, corrects cross-references, makes address or name changes, or clarifies language of a proposed ordinance or resolution without changing its effect;

(iv) The proposed change is to a resolution or ordinance making a capital budget decision as provided in RCW 36.70A.120; or

(v) The proposed change is to a resolution or ordinance enacting a moratorium or interim control adopted under RCW 36.70A.390.

(3) This section is prospective in effect and does not apply to a comprehensive plan, development regulation, or amendment adopted before July 27, 1997.

[3] RCW 36.70A.070(preamble) provides in relevant part:

The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140. Emphasis added.

[4] RCW 36.70A.140 provides:

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments. In enacting legislation in response to the board's decision pursuant to RCW 36.70A.300 declaring part or all of a comprehensive plan or development regulation invalid, the county or city shall provide for public participation that is appropriate and effective under the circumstances presented by the board's order. Errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed.

[5] *McVittie v. Snohomish County (McVittie V)* CPSGMHB Case No. 01-3-0016, Final Decision and Order (Apr. 12, 2001)

[6] The relevant portion of the County's Brief provides:

The CFP and CIP at issue in this appeal, adopted by Ordinance No. 00-074, include changes that are both more comprehensive and more fundamental than either of the two previous updates to the County's CFE. County's Brief, at 8. Footnote omitted.

[7] The preamble of RCW 36.70A.020 provides:

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

Goals (1), (9), (11) and (12) provide:

(1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.

....

(9) Open space and recreation. Encourage the retention of open space and development of recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks.

....

(11) Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

(12) 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

[8]

RCW 36.70A.070(3) provides that a comprehensive plan must include:

A capital facilities plan element consisting of: (a) An inventory of existing capital facilities owned by public entities, showing the 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 plan element are coordinated and consistent.

[9]

The Board answered the first question:

Does Goal 12 create a duty beyond the capital facility planning that is required by RCW 36.70A.070(3)? – **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 (6). Goal 12 also requires substantive compliance. Other plan or development regulation provisions of the local government may not thwart its provisions. *McVittie*, at 23.

[10]

The Board answered the second question:

Does Goal 12 require the designation of a single Level of Service (LOS) standard for the facilities and services contained in the CFE? – **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. *McVittie*, at 25.

[11]

The Board answered the third question:

Does Goal 12 require an enforcement mechanism or “trigger” that forces a reassessment action or implement concurrency by a jurisdiction? – **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 reassessment action is “triggered” the responsive action must occur in compliance with the public participation provisions of the GMA. *McVittie*, at 27.

[12] The Board answered the fourth question:

Does Goal 12 require “concurrency” for all public facilities and services, beyond the explicit concurrency requirement of RCW 36.70A.070(6)(b) for transportation? - **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. *McVittie*, at 30.

[13] The Board has concluded above, under Legal Issue 2, that the County has failed to comply with the Act’s public participation requirements and failed to be guided by goal 11. While the Petitioner repeats the allegation of a Goal 11 violation again in Legal Issues 1 and 3, together with a Goal 12 violation, the Board’s discussion and analysis here will focus on the allegations of violation with the GMA’s substantive requirements.

[14] For example, the County quotes from the CFP which provides in part:

These studies have been conducted to evaluate the possible creation of a “regional justice center” as a means to address the growing deficiencies in correctional space, the impending shortfall in courtroom space, and demands for future growth. These studies have projected future facility needs out to the year 2020 and provide the source for the summary information that follows on future needs for facility expansion in the County’s law and justice operations. County’s Brief, at 37, quoting CFP, at 28.

[15] RCW 36.70A.030(12) provides:

“Public facilities” include streets, roads, highways, sidewalks, street and road lighting systems, traffic signals, domestic water systems, storm and sanitary sewer systems, parks and recreational facilities, and schools.

[16] RCW 36.70A.030(13) provides:

“Public services” include fire protection and suppression, law enforcement, public health, education, recreation, environmental protection, and other governmental services. Emphasis added.

[17] The Board does not here definitively state the totality of the ‘facilities’ that the Act requires be included in the CFE. For example, many of the ‘public services’ listed in RCW 36.70A.030(13) have facilities associated with them, such as fire stations, public health offices and law enforcement facilities. Because the County has included several of these “public services facilities” (i.e., courtrooms, jails, sheriff facilities) in its CFE, they are subject to the goals and requirements of the GMA.

[18] Note that this baseline standard may be modified or adjusted, as discussed in *McVittie*, at 25-27. Also the Board recognizes that a jurisdiction is not required to include a six-year financing plan for facilities or services it does not own or operate. See generally: *Sky Valley v. Snohomish County*, CPSGMHB Case No. 95-3-0068c, Final Decision and Order (Mar. 12, 1996). However, if a short-fall in funding occurs, at a minimum, verification of the short-fall can focus the debate on the appropriate funding entity; or the jurisdiction must take other actions, on behalf of its citizens, as discussed in *McVittie*, at 25-27.

[\[19\]](#) The Legal Issue heading of Petitioner’s opening brief reads “V. CONSISTENCY LEGAL ISSUES 4,5.” “Legal Issue 5” is listed in the heading as: “The County’s comprehensive plan as amended by the adoption of Ordinance 00-74 and 00-75 internally inconsistent and thereby fails to comply with the requirements of RCW 36.70A.070 (preamble) and (3).” PHB, at 35. As a review of the PHO shows, there is no legal issue 5. Accordingly, the Board herein addresses only Legal Issue 4