

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

MASTER BUILDERS	)	<b>CPSGMHB Case No. 01-3-0016</b>
ASSOCIATION, ET AL.,	)	
	)	
Petitioners,	)	<i>(Master Builders Association)</i>
	)	
v.	)	
	)	
SNOHOMISH COUNTY,	)	<b>FINAL DECISION and ORDER</b>
	)	
Respondent,	)	
	)	
and	)	
	)	
JODY L. McVITTIE,	)	
	)	
Intervenor.	)	
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**I. Procedural Background**

**A. General**

On June 28, 2001, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the Master Builders Association of King and Snohomish Counties, Snohomish County Camano Association of Realtors and Professional Consultants of Snohomish County (**Petitioners** or **MBA**). The matter was assigned Case No. 01-3-0016. Petitioners challenge Snohomish County’s (**Respondent** or **County**) adoption of Ordinance No. 01-005 (**Ordinance**). The Ordinance *amends* the County’s regulations governing planned residential developments (**PRDs**). The grounds for the challenge are noncompliance with several sections of the Growth Management Act (**GMA** or **Act**). Robert D. Johns and Duana T. Koloušková filed the PFR on behalf of MBA.

On July 18, 2001, the Board received a “Notice of Appearance” from Snohomish County. The notice indicated that Barbara J. Dykes and Courtney E. Flora would represent the County.

On July 9, 2001 the Board issued a “Notice of Hearing”; on July 30, 2001, the Board held a prehearing conference and issued a “Prehearing Order” (**PHO**) setting the schedule and establishing the Legal Issues for this case.

On August 6, 2001, the Board received “Motion to Grant Intervenor Status” from potential intervenor Jody L. McVittie.

On August 10, 2001, the Board issued an “Order on Intervention” **granting** Intervenor status to Jody L. McVittie. Intervenor is participating on behalf of Snohomish County.

On September 5, 2001, the Board received “Notice of Substitution of Counsel” attorney representing MBA. The notice indicated that Robert D. Johns and Michael P Monroe now represented MBA.

## **B. Motions to Supplement And amend index**

On July 30, 2001, the Board received “Snohomish County’s Index of the Record Re: Adoption of Amended Ordinance No. 01-005” (**Index**).

On August 8, 2001, the Board received the **core documents** requested by the Board.

The PHO established August 8, 2001 as the deadline for filing motions to supplement the record. The Board did not receive any motions to supplement the record within the deadline established in the PHO. Nonetheless, the Board did subsequently receive such a motion.

On September 19, 2001, the Board received MBAs “Motion to Permit New Evidence and Supporting Declaration of Robert D. Johns.” no exhibits were attached (**MBA Motion – Supp.**).

On September 28, 2001, the Board received “County Response to Petitioners’ Motion to Permit New Evidence” (**Co. Response – Supp.**).

On October 5, 2001, the Board received “Reply Brief of Petitioners Regarding Motion to Permit New Evidence” (**MBA Reply – Supp.**).

At the November 5, 2001 Hearing on the Merits, the Board heard argument regarding the new evidence offered by the MBA. The Board issued an oral order **granting** the motion to permit the proposed new evidence regarding the number of PDR applications filed since the effective date of the PDR amendments. The Board also **granted** a request from the County to provide updated information on the number of PDR applications from January through October 2001.

On November 9, 2001, the Board received from the County a list of “PRD Applications Received – January through October 2001.”

On November 12, 2001, the Board received a letter (**MBA Letter**) from MBA’s attorney indicating that the MBA had “no objection to the Board’s consideration of that [PDR Applications Received – January through October 2001] list.” MBA Letter, at 1.

On November 16, 2001, the Board received a letter from the County (**Co. Letter**) noting receipt of the MBA Letter. The County objected to the personal commentary in the final paragraph of that letter and urged the Board to disregard those comments. Co. Letter, at 1. The objection is noted; the Board will **disregard** the comments in the final paragraph of the MBA Letter.

## **C. Dispositive Motions**

The Board did not receive dispositive motions within the deadline established in the PHO.

## **D. Briefing and Hearing on the Merits**

On September 19, 2001, the Board received “Prehearing Brief of Petitioners,” with seven attached exhibits (**MBA PHB**).

On October 17, 2001, the Board received “Snohomish County’s Prehearing Brief,” with 12 attached exhibits” (**Co. Response**); and Jody McVittie’s “Intervenor’s Prehearing Brief,” that referenced 6 exhibits from core documents or exhibits submitted by the County (**McVittie Response**).

On October 29, 2001, the Board received “Petitioner’s Reply Brief,” with one attached exhibit (**MBA Reply**).

On November 5, 2001, the Board held a hearing on the merits (**HOM**) in Suite 1022 of the Financial Center, 1215 4th Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, Lois H. North and Joseph W. Tovar were present for the Board. Robert D. Johns represented Petitioner MBA. Courtney E. Flora and Barbara J. Dykes represented Respondent Snohomish County. Intervenor Jody L. McVittie appeared *pro se*. Scott Kindle of Mills and Lessard Inc. provided court-reporting services. The hearing convened at 10:00 a.m. and adjourned at approximately 12:15 p.m. A transcript of the HOM was ordered. (**HOM Transcript**).

On November 16, 2001, the Board received the HOM Transcript.

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

Petitioners challenge Snohomish County’s amendment to its PRD regulations, as adopted by Ordinance No. 01-005. Pursuant to RCW 36.70A.320(1), Snohomish County’s amendment to its PRD regulations is presumed valid upon adoption.

The burden is on Petitioners, MBA, to demonstrate that the actions taken by Snohomish County are not in compliance with the requirements of the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board “shall find compliance unless it determines that the action taken by [Snohomish County] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” For the Board to find 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).

Pursuant to RCW 36.70A.320(1) the Board will grant deference to Snohomish County in how it plans for growth, consistent with the goals and requirements of the GMA. However, as our State Supreme Court has stated, “Local discretion is bounded, however, by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board*, 142 Wn.2d 543, 561 (2000). Further, Division II of the Court of Appeals has stated, “Consistent with *King County*, and notwithstanding the ‘deference’ language of RCW 36.70A.320(1), the Board acts properly when it foregoes deference to a county’s plan that is not ‘consistent with the requirements and goals of the GMA.’” *Cooper Point Association v. Thurston County*, No. 26425-1-II (Court of Appeals, Div. II, September 14, 2001), \_\_ Wn. App. \_\_, \_\_ (2001).

### **iii. board jurisdiction, abandoned issues, preliminary matters and Prefatory note**

#### **A. Board Jurisdiction**

The Board finds that the MBA’s PFR was timely filed, pursuant to RCW 36.70A.290(2); MBA has standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged ordinance, which amends the County’s PRD regulations [GMA Plan implementing regulations], pursuant to RCW 36.70A.280(1)(a).

#### **B. Abandoned issues**

Legal Issue 2 in the PHO alleged the County’s noncompliance with 14 different Goals, Objectives and Policies in Snohomish County’s Plan. The MBA PHB only addresses eight of the noted provisions of the County’s Plan. The County notes that in MBA’s opening brief, certain provisions of Legal Issue 2 were not briefed and are abandoned. Co. Response, at 34, footnote 67. The Board agrees. Pursuant to WAC 242-02-570 and Section X of the PHO, issues

or portions of issues not briefed are deemed abandoned. Therefore, Petitioner MBA has **abandoned** its challenge to the following portions of Legal Issue 2: Goal HO 1, Policies HO 1.B.1, 1.B.4, 1.C.3, 1.C.7 and Objective HO 2.b.

### C. Preliminary matters – Supplemental Exhibits

At the HOM the Board took official notice of several provisions of Snohomish County’s Code, allowed two new exhibits and a demonstrative exhibit into the record. The following table indicates the items allowed into the record and notes exhibit numbers.

<b>Proposed Exhibit: Documents</b>	<b>Exhibit No.</b>
1. Project Activity Report through August 2001- MBA motion.	<b>Admitted:</b> HOM Ex.1.
2. Snohomish County Code (SCC) 18.42.080 – Lot size averaging. <a href="#">[1]</a>	<b>Board takes notice</b> – HOM Ex. 2.
3. SCC 18.42.085 – Minimum net density for residential development in UGAs.	<b>Board takes notice</b> – HOM Ex. 3.
4. McAllister declaration and Chapter 18.51 SCC, as it existed on June 28, 1995.	<b>Board takes notice</b> – HOM Ex. 4.
5. Comparison Table of PRD provisions – Demonstrable Exhibit based upon HOM Ex. 4, PRD regulations prior to Ordinance No. 01-005, and PRD regulations pursuant to Ordinance No. 01-005. <a href="#">[2]</a>	<b>Board takes notice</b> – HOM Ex. 5 [Demonstrative Exhibit]
6. Salmonid Habitat Management Plan Administrative Rule SCC 32.10.310 and .320.	<b>Board takes notice</b> – HOM Ex. 6.
7. PRD Applications Received January through October 2001 – County motion.	<b>Admitted:</b> HOM Ex.7.

### D. PREFATORY NOTE

The focus of this appeal is Snohomish County’s recent amendments to its Planned Residential Development (**PRD**) regulations. Basically, PRDs allow higher residential densities than the underlying zoning classifications would otherwise permit. In Snohomish County, the PRD regulations set the maximum number of dwelling units permitted in urban single family zones at 120 percent [\[3\]](#) of the maximum number of units permitted in the underlying zoning classification. In essence, a 20% density bonus is permitted for using the PRD approach. The crux of this challenge involves changes in the basis and methodology in calculating the unit yield and bonus, including a limitation on the maximum number of dwelling units allowed and a limitation on the minimum lot size to which the PRD regulations can be applied. The challenged Ordinance changed the basis of the calculations from a gross acreage to a net acreage, modified factors to be included in calculating the developable area, established a maximum density in certain zones and limited the application of PRDs to lots over a certain size.

The MBA contends that the undisputed cumulative impact of these changes is a reduction in the *quantity* of dwelling units that had previously been allowed in certain zones under the PRD approach. This reduction in the *quantity* of dwelling units [*i.e.* density] permitted by the new PRD regulations forms the foundation of MBA's challenge. However, the County seeks to justify these changes as being the product of debate and compromise that ultimately seeks to encourage *quality* construction of higher density development in the urban area while protecting open space, recreation and critical areas. Additionally, the County contends that these changes to the PRD regulations are not a violation of any of the challenged provisions of the GMA.

The Board's discussion of the Legal Issues begins with Legal Issue 3, and then combines Legal Issues 1 and 2.

#### iv. legal issues, analysis and discussion

##### A. Legal Issue No. 3

The Board's PHO set forth Legal Issue No. 3, as follows:

3. *Did Snohomish County (the **County**) fail to comply with the urban growth area requirements of RCW 36.70A.110 and WAC 365-195-335, when it adopted Ordinance No. 01-005 (the **Ordinance** or **PRD regulations**)? [Intended to cover PFR Issues 6, 7, 8, 9 and 10.]*

#### Applicable Law

##### GMA Requirements:

As applied to the present proceeding, the GMA required Snohomish County to adopt its Comprehensive Plan (**Plan**) and implementing development regulations by July 1, 1994.<sup>[4]</sup> RCW 36.70A.040(3). The adopted Plan was required to include its final, as opposed to interim, Urban Growth Area (**UGA**) designations. RCW 36.70A.110(6).

RCW 36.70A.110 set forth the procedures for designating UGAs. It provides in relevant part:

Each county that is required or chooses to plan under RCW 36.70A.040 shall designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature.

RCW 36.70A.110(1). Additionally, this section of the Act provides:

Based upon the growth management population projection made for the county by the office of financial management [**OFM**], the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period.

RCW 36.70A.110(2) and MBA PHB, at 31.

##### Procedural Criteria:

MBA also relies upon the Office of Community Development's (**OCD**) Procedural Criteria, specifically WAC 365-195-335, as a basis for its argument. OCD's Procedural Criteria reiterate the requirements of the Act and offer suggestions and recommendations for developing UGAs to guide local governments in their efforts to comply with the UGA designation requirements of RCW 36.70A.110. *See:* WAC 365-195-335. The Board notes that the

provisions of WAC 365-195-335 quoted by MBA in their brief reference OCD’s “Recommendations for meeting requirements.” MBA PHB, at 31-32.

While the Board is required to consider the criteria and standards adopted by OCD, in prior cases,<sup>[5]</sup> this Board has determined that the Procedural Criteria of Chapter 365-195 WAC are advisory only and that the GMA imposes no duty that local governments comply with the *recommendations* set forth in those guidelines. The Board has considered this procedural criterion (WAC 365-195-335) and continues to adhere to a determination that it imposes no duty upon Snohomish County to follow the recommendations therein.

#### Prior Board Cases - Show Your Work:

It is clear that the GMA requires the County to designate UGAs that include areas and densities sufficient to permit the OFM projected twenty-year population growth [i.e. the UGA must accommodate the projected urban growth]. Additionally, this Board has required a supporting record documenting these decisions.

Its review of challenges to initial UGA designations caused this Board to articulate a “show your work” requirement that compelled counties to demonstrate the analytical rigor and accounting that supported the sizing and designation of UGAs.<sup>[6]</sup> The “show your work” provision for sizing and designating UGAs has been applied to the four Puget Sound counties within this Board’s geographic jurisdiction.<sup>[7]</sup> Thus far, this Board has limited the application of the “show your work” requirement to the sizing of UGAs.<sup>[8]</sup>

### Discussion and Analysis

#### Position of the Parties:

It is undisputed that the County designated its UGAs when it adopted its Comprehensive Plan in 1995 and that Snohomish County conducted an “Urban Growth Residential Land Capacity Analysis” (RLCA) to support the sizing of its UGA designations (i.e. it “showed its work”).<sup>[9]</sup> MBA PHB, at 1-4 and 33; Co. Response, at 3-8; and McVittie Response, at 1-5.

However, MBA asserts:

The problem in this case is that the County, in its rush to appease a few anti-growth groups who are unhappy with the fact that compliance with the GMA has resulted in increased densities in their neighborhoods, abandoned its commitment to providing a sufficient supply of land to achieve the urban areas and densities necessary to absorb the growth expected within the twenty-year planning horizon of

GMA. *The County has not re-done its residential land capacity analysis as it promised to do.*<sup>[10]</sup>  
MBA PHB, at 33.

Although MBA questions the motives of the County Council and the intent of some citizens concerned about the prior PRD process, the MBA essentially contends that since the amendments to the PRD regulations allegedly reduce the allowable densities in certain low density residential zones, the GMA (RCW 36.70A.110 and WAC 365-195-335) and the County’s own promise require an updated RLCA – a new “showing of work” to ensure that the UGA is maintained at a size capable of accommodating the projected twenty-year population growth. This update, the MBA argues, the County did not do. MBA, at 1-4 and 31-35.

The County counters that RCW 36.70A.110 addresses the sizing and designation of UGAs, which was done by the County in prior years, therefore a challenge per .110 at this time is untimely. Additionally, the County contends that .110 governs UGA sizing and designations, not development regulations that may affect urban densities within an existing UGA. Also, the County points to this Board's decision in *Kelly v. Snohomish County (Kelly)*, CPSGMHB Case No. 97-3-0012, Final Decision and Order, (Jul. 30, 1997) for the proposition that the GMA does not require an update of the RLCA when the County amends its development regulations. The Buildable Land Review and Evaluation of RCW 36.70A.215 is also cited by the County to support its position. The County also claims that a policy disagreement between the MBA and the County does not constitute a violation of the GMA. Co. Response, at 21-28 and 39-42.

Intervenor argues that the amended PRD regulations do not interfere with the County's implementation of its plan or its UGA sizing because the RLCA was based on more conservative density assumptions than the present amendment allows. Therefore the County has more residential capacity than predicted in the RLCA. McVittie Response, at 11.

### Discussion and Analysis:

Based upon the arguments presented, the Board construes the crux of the dispute in this Legal Issue to be a question of: whether the County had a GMA duty to update its RLCA (a new showing of work) when it adopted the amendments to the PRD regulations. In reviewing this question, the Board agrees with the County and affirms its prior holding in *Kelly*, that **the GMA creates no duty to continuously update UGA land capacity analysis every time development regulations are amended.**

First, the Board concurs with the County that .110 governs UGA sizing and designation, which is not at issue in this case. The challenged ordinance does not alter (expand or reduce) any of the County's designated UGA boundaries; [\[11\]](#) instead, it amends the PRD regulations.

Second, the County appropriately relies on the *Kelly* case to support its argument that updates (of land capacity analyses supporting UGA sizing and designations, *i.e.* RLCA) are not required whenever a development regulation is revised or modified. Although MBA offers the flip side of the argument [\[12\]](#) made by 1000 Friends of Snohomish County in *Kelly*, the Board concludes that its prior determination in *Kelly* - that continuous UGA review and revision is not required by the GMA - applies to the present circumstances.

In *Kelly*, the Board explained:

The legislature recognized the limitations on long-term planning and provided for periodic, but not continuous, review of UGAs. (*Citing* the "at least every ten-year" UGA review requirement of RCW 36.70A.130(3)) . . . If the Legislature had intended counties to engage in the continuous UGA review and revision urged by 1000 Friends, .130(3) would be unnecessary.

*Kelly*, at 16. The Board notes that RCW 36.70A.130(3) was amended in 1997 to provide: "The review required by this subsection *may be combined* with the review and evaluation required by RCW 36.70A.215." (Emphasis supplied.) RCW 36.70A.215 further supports the principle of *periodic* review and evaluation for UGA sizing and designation, *not continuous updates*.

RCW 36.70A.215, generally known as the "Buildable Lands Review and Evaluation Program" has the following stated purpose:

Determine whether a county and its cities are achieving urban densities within urban growth areas by comparing growth and development assumptions, targets and objectives contained in the county-wide planning policies and county and city comprehensive plans with actual growth and development that has occurred in its cities.

RCW 36.70A.215(1)(a). This section of the Act also requires the review and evaluation program to: “Provide for evaluation of the data collected . . . every five years as provided in subsection (3) of this section. *The first evaluation shall be completed not later than September 1, 2002.*” RCW 36.70A.215(2)(b) (emphasis supplied). <sup>[13]</sup> This section of the Act also supports the notion of periodic review.

Third, the “promise” to update that MBA points to is found in the Summary of Assumptions in the County’s RLCA. It is not a self-imposed duty contained in the County’s *Plan*. The Board has stated:

When a local government *includes a self-imposed duty in its plan*, such as a deadline, the consistency requirements of RCW 36.70A.070 and .120 [.040] oblige it to meet that duty; however, it retains the discretion to amend its plan, including the revision or deletion of such self-imposed duty, provided that it does so pursuant to the authority and requirements of RCW 36.70A.130.

*COPAC-Preston Mill Inc. v. King County*, CPSGMHB Case No. 96-3-0013c, Final Decision and Order, (Aug. 21, 1996), at 12-13, (emphasis supplied). The RLCA statement, characterized as a “promise” by MBA, is qualified by terms such as “possible” and “could.” It is not an unqualified commitment to revise the capacity analysis more frequently than required by the GMA timeframes. Nor is the “promise” found or reflected in the County’s *Plan*. Therefore, it does not amount to a self-imposed duty that falls within the consistency requirements of the Act.

Finally, at the HOM, MBA argued that not requiring the County to show its work when changes in regulations are made would set a “dangerous precedent.” Petitioner contended:

What the County is basically asking the Board to do is say once we pass the comprehensive plan, if you say its okay, we’ve got an adequately used [sized] UGA for at least five years, we can do anything we want. We can increase density dramatically. We can decrease density dramatically, but we do not have to account for that. We don’t have to do the accounting exercise. We don’t have to demonstrate that we are consistent with the Growth Management Act until the end of that five-year period when we say, “Whoops, we got it wrong. We’ll go back and fix it in a few days, get the Board’s blessing and then we’re off to do whatever we want.” I do not think that this is what the Board intended in the *Kelly* case. If it is what the Board intended, I think the result is that its going to severely impact the ability of local jurisdictions and this Board to enforce the Growth Management Act, and it’s going to produce pressure from interest groups on all sides of the equation to go to the counties once their comprehensive plans are passed and then say, “Okay. We’ve got five-years where the rules are not in effect. Let’s do whatever we want here, bring it back into compliance at the end of five-years.” I just don’t think that’s what this Board intended, but that’s effectively what the County is asking you to do.

HOM Transcript, at 23-24. The Board disagrees. The GMA provides protections against the scenario painted by Petitioners. If UGAs are altered and challenged, which is not the case here, this Board requires an accounting to support the alteration [*See*: footnote 9 *supra*]. Additionally, the Act itself provides specific requirements that development regulations, and amendments thereto, be consistent with and implement the *Plan*, including the UGAs. [*See*: RCW 36.70A.040, .120 and .130 – argued by MBA in Legal Issue 2, *infra*]. Thus, any changes, *at any time*, to development regulations that increase or decrease densities within a UGA are required to “be consistent with and implement the *Plan*.” Interested persons or groups would be free to challenge such amendments to development

regulations as they occurred, within the GMA appeal period.

Based on the reasoning discussed *supra*, the Board concludes that the GMA does not establish a duty for the County to continuously review and update its land capacity analysis (*i.e.* RLCA) supporting the sizing and designation of its UGAs whenever development regulations are amended. Absent an alteration to a UGA boundary, the GMA specifically requires periodic review and evaluation for UGAs as set forth in RCW 36.70A.130(3) and RCW 36.70A.215.

### **Conclusion Legal Issue 3**

The GMA does not establish a duty for the County to continuously review and update its land capacity analysis (*i.e.* RLCA) supporting the sizing and designation of its UGAs whenever development regulations are amended. Absent an alteration to a UGA boundary, the GMA specifically requires periodic review and evaluation for UGAs as set forth in RCW 36.70A.130(3) and RCW 36.70A.215.

### **B. Legal Issues No. 1 and 2**

In resolving Legal Issue 3, the Board determined that absent an alteration to a UGA boundary, the GMA only requires the County to conduct *periodic* reviews, evaluations and updates of its UGAs (accompanied by the necessary and associated land capacity analyses – “showing of work”). However, this conclusion does not insulate the County from a UGA challenge based upon whether development regulations implement the Plan and are consistent with the Plan and Goals of the Act, as set forth in Legal Issues 1 and 2.

The Board’s PHO set forth Legal Issues No. 1 and 2, as follows:

1. *Did Snohomish the County fail to be guided by, and comply with, the goals of the Act as stated in RCW 36.70A.020(1), (2) and (4), when it adopted the Ordinance? [Intended to cover PFR Issues 1, 2, 3, and 4.]*
2. *Did the County fail to comply with the consistent and conforming plan implementation requirements of RCW 36.70A.040(3), .120, and .130, when it adopted the Ordinance, because the Ordinance fails to conform to and implement the following provisions of Snohomish County’s Comprehensive Plan (the **Plan**): Objective LU 1.A, Policy LU 1.A.1, Goal LU 2, Objective LU 2.A, Policy LU 2.A.1, [~~Goal HO 1, Policies HO 1.B.1, 1.B.4, 1.C.3, 1.C.7, Objective HO 2.B~~], <sup>[14]</sup> Goal HO 3, and Policies HO 3.A.1 and 3.A.3? [Intended to cover PFR Issues 5a, b, 11, 12 and 13 a –n.]*

### **Applicable Law**

The three GMA Goals at issue in this case are:

- (1) Urban Growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
- (2) Reduce Sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development
- ...
- (4) Housing. Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage the preservation of existing housing stock.

RCW 36.70A.020(1), (2) and (4). In previous cases where a petitioner has challenged whether a local government's action has been guided by and complies with a GMA goal, the Board has explained:

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

*Forster Woods, et al., v. King County*, CPSGMHB Case No.01-3-0008c, Final Decision and Order, (Nov. 6, 2001), at 30. (Citing previous Board cases).

Goals 1 and 2 will be addressed in the Land Use Issues discussion *infra*; Goal 4 will be addressed in the Housing Issue discussion *infra*.

RCW 36.70A.040(3), .120, and .130 each require a jurisdiction's implementing development regulations to be consistent with and implement its Plan. These provisions provide, in relevant part, as follows:

Any county . . . that is initially required to conform with all the requirements of this chapter under subsection (1) of this section shall take actions under this chapter as follows: . . . (d) if the county has a population of fifty thousand or more, *the county . . . shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan . . .*

RCW 36.70A.040(3) (emphasis supplied).

Each county . . . 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.120 (emphasis supplied).

*[A]ny change to development regulations shall be consistent with and implement the comprehensive plan.*

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

MBA challenges whether the County's amendments to its PRD regulations are consistent with and implement the following Snohomish County GMA Comprehensive Plan [Ex. 348] provisions: [\[15\]](#)

Objective LU 1.A - Establish UGAs with sufficient capacity to accommodate the majority of the county's projected population and employment growth over the next 20 years.

Policy LU 1.A.1 - UGAs shall contain sufficient land capacity for a variety of land uses and densities, including green belts and open space, in suitable locations to accommodate the county's 20-year population projection allocated to the urban area. The total additional population capacity within the Snohomish County composite UGA as documented by both City and County comprehensive plans shall not exceed the total 20-year forecasted UGA population growth by more than 15 percent. Following the initial establishment of UGAs in the General Policy Plan, subsequent recalculation of the percent by which additional population capacity exceeds the 20-year forecasted population growth shall occur following adoption of all UGA plans or at the time of the mandatory 5-year comprehensive re-evaluation of UGA remaining capacity as required by LU 1.A.9.

Ex. 348, GMA Plan, at LU-2.

Goal LU 2 – Establish development patterns that use land more efficiently.

Objective LU 2.A – Increase residential densities within UGAs by concentrating and intensifying development in appropriate locations.

Policy LU 2.A.1 – Within UGAs, development regulations shall be adopted which will require that new residential subdivisions achieve a minimum net density of 4-6 dwelling units per acre in all unincorporated UGAs, except (1) in the UGAs of Darrington, Index and Gold Bar as long as those cities do not have sanitary sewer systems and (2) in areas without sanitary sewers which the sewer purveyor with jurisdiction, or in nearest reasonable servicing proximity will certify are either an unsewerable urban enclave or are not capable of being connected to public sewers via annexation within the next six years or by the improvements provided pursuant to its adopted six year capital facilities plan, or where regulations for development on steep slopes require reduced lot or dwelling unit yields. Lot size averaging planned residential developments, sewerage regulations and other techniques may be used to maintain minimum density or to insure later development at minimum densities is not inhibited when [sanitary] sewers become available. The county shall not support any proposed annexation by a city unless and until an annexation agreement has been signed by the county and said city ensuring the continued implementation of this policy for the area to be annexed.

Ex. 348, GMA Plan, at LU-8.

Goal HO 3 – Land use policies and regulations should contribute as little as possible to the cost of housing.

Policy HO 3.A.1 – The economic implications of proposed building and land use regulations shall be evaluated to ensure that the intent of the regulations is achieved in a manner which imposes the least amount of additional costs to the development or renovation of housing.

Policy HO 3.A.3 – Cluster housing shall be encouraged in order to minimize land and infrastructure costs.

Ex. 348, GMA Plan, at HO-6-7.

Plan provisions LU 1.A, LU 1.A.1, LU 2, LU 2.A and LU 2.A.1 will be addressed in the Land Use Issues discussion *infra*; Plan provisions HO 3, HO 3.A.1 and HO 3.A.3 will be addressed in the Housing Issue discussion *infra*.

## Discussion and Analysis

### **Land Use Issues**

#### Position of the Parties:

MBA argues that the significant amendments to the PRD regulations: 1) restrict the size of properties eligible for PRDs (now only 5 acre sites or larger); 2) increase the open space required (from 15% to 25% - thereby reducing the amount of buildable land); 3) add new perimeter landscaping requirements (increasing from 10 to 20 or 30 feet – thereby reducing the amount of buildable land); 4) eliminate a minimum density and impose a maximum density (7 dwelling unit maximum density); and 5) change the basis of calculation for units from gross acreage to net acreage. MBA PHB, at 5-11; HOM Ex. 5. MBA contends that these changes reduce the allowable dwelling unit density in certain single-family zones.

The County does not dispute that the PRD amendments reduce the allowable dwelling unit density in certain single-family zones. In fact, it notes that prior to the recent amendments, “the PRD ordinance resulted in densities as high as 11.9 units/acre in land designated as 4-6 units per acre, many of which abutted significant critical areas.” Co. Response, at 10. Numerous developments at these higher densities apparently caused concern among citizens and prompted review of the PRD regulations. Co. Response, at 10-11. The County contends that the amendments “allow creativity in lot design, and will ensure that PRDs can achieve a maximum density of 7 units per developable acre.” The County also responds that the PRD revisions “do not ‘eliminate’ the minimum density requirement. PRD developments remain subject to the minimum density requirement of 4 units per net acre imposed by SCC 18.42.085.” Co. Response, at 12-13; HOM Ex. 5. Although the County does not dispute that the new PRD regulations reduce the allowable dwelling unit density, it contends that it still allows 4-7 dwelling units per acre on land designated for 4-6 units per acre, and, therefore, complies with the requirements of the Act. Co. Response, at 29. MBA also argues that according to the County’s 2000 Growth Monitoring Report, which monitors the County’s progress in implementing its Plan, the gross density for all new units in the County’s UGA is 3.71 units per acre. MBA continues, asserting that even with PRDs, the gross density within the UGA is 3.94 units per acre. MBA contends these densities are below the minimum of 4.0 units per acre the Board established in *LMI/Chevron v. Town of Woodway (LMI/Chevron)*, CPSGMHB Case No. 98-3-0012, Final Decision and Order, (Jan. 8, 1999). MBA PHB, at 16-21. The County counters that the MBA reliance on *LMI/Chevron* is misplaced and the assertions of MBA regarding densities cited by MBA are in gross densities, not net densities, as required by SCC 18.42.085 and the Board. Co. Response, at 26-28.

MBA also challenges the County’s land capacity analysis that was used to designate the County’s UGAs. MBA’s argument is essentially as follows: 1) The densities allowed under the County’s PRD regulations (*i.e.* density bonus and transfers) were a significant factor for calculating the RLCA that was used to justify the County’s UGA designations; 2) Ordinance No. 01-005 reduced the allowable densities for the PRD regulations; 3) These changes make it more costly and difficult to build since less land is available (HOM Ex. 1); 4) Therefore, without the PRD incentives, densities will not be achieved in the unincorporated UGAs, urban growth will not be accommodated within the UGAs; the UGA will be undersized and sprawl will be encouraged – thereby violating the goals and requirements of the GMA and County Plan Policies. MBA PHB, at 12-21, 24-29, 31-35.

In response to this argument the County and Intervenor contend: 1) Ordinance No. 01-005 had no effect on the land capacity assumptions and calculations in the 1995 RLCA; 2) The effect of PRD development in developing the RLCA was negligible; 3) The PRD densities permitted in 1995 when the RLCA was undertaken were more restrictive than those allowed under Ordinance No. 01-005; 4) PRDs still contain incentives through the density bonus, and lot size averaging also will allow density transfers (HOM Ex. 7); 5) The new PRDs allow between 4-7 du/ac which is an appropriate urban density; 6) Therefore, urban growth is being accommodated and the UGA is appropriately sized. Co. Response, at 17-20, 27-29, 34-37; McVittie Response, at 3-11.

### Discussion and Analysis

Although not directly at issue in this case, the Board notes that the County’s land use policies identified by MBA have been guided by and are consistent with Goals 1 and 2. Goal 1 requires the County to encourage development in urban areas and Goal 2 requires the reduction of sprawling low-density development. The identified land use policies require the County to: have sufficient land capacity to accommodate growth within the UGA (*See*: LU 1.A and LU 1.A.1); and use urban land efficiently by increasing residential densities and have development regulations that require a minimum net density of 4-6 dwelling units per acre within unincorporated UGAs. (*See*: LU 2, LU 2.A and LU 2.A.1).

Therefore, in this case, <sup>[16]</sup> if the amendments to the PRD regulations are found by the Board to be consistent with and implement these Plan land use policies, the Board will likewise find that the amendments to the PRD regulations have been guided by and are consistent with Goals 1 and 2.

### Density - LU 2, LU 2.A and LU 2.A.1 and Goals 1 and 2:

Fundamental to complying with the Act's land use and UGA requirements and Goals 1 and 2 is that the jurisdiction's land use element, including its Future Land Use Map (**FLUM**), permit appropriate urban densities throughout the designated urban areas.<sup>[17]</sup> Likewise, a jurisdiction's zoning designations must be consistent with and implement the Plan policies and FLUM by permitting appropriate urban densities in these areas. Here it is undisputed that the Plan's FLUM indicates one general Urban Low Density Residential (**ULDR**) designation that allows 4-6 dwelling units per acre. Ex. 348, FLUM; HOM Transcript, at 56; FOF 5. It is also undisputed that the zoning classifications that implement the Plan's FLUM 'ULDR' designation are R-9600 (approximately 4.5 du/ac), R-8400 (approximately 5.2 du/ac) and R-7200 (approximately 6.0 du/ac). HOM Transcript, at 56; FOF 6. On their face, the County's FLUM and zoning designations, allowing 4-6 dwelling units per acre, permit appropriate urban densities.<sup>[18]</sup> Here, these zoning designations implement the Plan.<sup>[19]</sup> But how, if at all, do the PRD amendments affect these allowable and appropriate urban densities?

It is undisputed that the County's amendments to the PRD regulations have the effect of reducing the allowable density within the R-9600, R-8400 and R-7200 zoning designations. However, the principle feature of the PRD regulations is that they allow density bonuses above that allowed by existing zoning designations. By using the PRD approach developers may achieve higher densities than those otherwise permitted by the regular zoning designations. Plan Policy LU 2.A.1 specifically states, "development regulations shall be adopted which will require that new residential subdivisions achieve a minimum net density of 4-6 dwelling units per acre in all unincorporated UGAs." The Snohomish County Code requires "A minimum density of 4 dwelling units per net acre shall be required in all UGAs (noting exceptions not relevant here)." SCC 18.42.085, HOM Ex. 3. The County's zoning designations (R-9600, R-8400 and R-7200), coupled with the PRD regulations and SCC 18.42.085, allow for between 4 and 7 dwelling units per net acre. These densities are consistent with the Plan Policies and fall within the bounds of appropriate urban densities.<sup>[20]</sup>

The MBA assertion that the County's development pattern within the unincorporated UGA only permits 3.71 du/gross acre is unpersuasive. As noted *supra*, Snohomish County's Code specifically requires a minimum density of 4 dwelling units per *net* acre within the unincorporated UGA. The County's 2000 Growth Monitoring Report indicates *net* residential densities of 7.11-du/net acre in the unincorporated UGA (1999).<sup>[21]</sup> Ex 362, at 217. The Board finds that this density is an appropriate urban density for unincorporated UGAs in Snohomish County.

### Conclusion

Regarding the question of *densities* in the unincorporated UGA, the Board concludes that the County's amendments to its PRD regulations were guided by Goals 1 and 2, and are consistent with and implement Plan Policies LU 2, LU 2.A and LU 2.A.1. Therefore, the County's action was **not clearly erroneous** and **complies** with the land use goals and implementation requirements of the Act.

### Residential Land Capacity – LU 1.A, LU 1.A.1 and Goals 1 and 2:

The MBA challenge does not end with a challenge to urban densities; a capacity challenge is also raised. MBA questions whether the amendments to the PRD regulations undermine Plan Policies LU 1.A, LU 1.A.1 and thereby fail to comply with Goals 1 and 2.

Review of the RLCA indicates that PRDs were not the significant contributing factor in the analysis that MBA contends they were. The Introduction of the RLCA explains how the theoretical holding capacity was developed and outlines the reduction factors to be subtracted from the theoretical holding capacity. These reduction factors include: market availability, public purpose land reduction; critical areas land reduction; right-of-way reduction and under-building reduction. <sup>[22]</sup> Ex. 354, RLCA, at 8-10. The critical areas reduction was established by calculating the percent of total land area within wetlands, streams and buffers, geologically hazardous areas and frequently flooded areas; this calculation yielded an “encumbrance percentage.” It is within the discussion of this encumbrance percentage that PRDs and lot size averaging are mentioned.

The use of an encumbrance percentage in this analysis is based on the recognition that density transfer from critical areas to other buildable areas within plats is allowed by the county, through such density enhancing techniques as lot size averaging and PRD subdivisions.

Ex. 354, RLCA, at 10. The Board agrees with the County, PRDs were a negligible, not significant part of the County’s calculations in the RLCA.

Next, in reviewing the PRD comparison table (comparing the Pre-1995 PRD, 1995 – 1999 PRD, and Ordinance No. 01-005 PRD amendments – HOM Ex. 5), the Board notes that the PRD regulations in effect when the RLCA was calculated (Pre-1995 PRD) are not the same PRD regulations amended by Ordinance No. 01-005 (Ordinance No. 01-005 amended the 1995 – 1999 PRD). *See*: HOM Ex. 5, Co. Response, at 8-9, McVittie Response, at 5-6. It is true that the PRD regulations in effect prior to the amendments of Ordinance No. 01-005 (*i.e.* the 1995 – 1999 PRD)

permitted more density than the Pre-1995 PRD regulations in existence when the RLCA was conducted. <sup>[23]</sup> However, the PRD regulations resulting from Ordinance No. 01-005 are less restrictive than those in existence when the RLCA was done (*i.e.* Pre-1995 PRD). While both versions (Pre-1995 PRD and Ordinance No. 01-005 amendments) calculate density based upon net acreage, the new PRD regulations allow roadways to be included in the net acreage calculation. The Board agrees with the County, the Pre-1995 PRD regulations were more restrictive than those resulting from Ordinance No. 01-005; as a result, though negligible, the County would have more, not less, residential capacity than that predicted in the RLCA.

The Board also acknowledges that the new PRD regulations still provide for density bonuses, which is certainly more of an incentive to builders than developing under the basic *compliant* zoning designations. Additionally, the Board notes that the changes to the PRD regulations have in no way altered the ability of builders to take advantage of the County’s lot size averaging provisions found at SCC 18.42.080. HOM Ex. 2. Additionally, as noted *supra*, the County is providing for appropriate urban densities in the unincorporated UGA and urban growth is being accommodated. The Board finds that the County’s adoption of Ordinance No. 01-005 has not altered the basis for the County’s RLCA analysis, which supports its 1995 UGA designations. <sup>[24]</sup>

## Conclusion

Regarding the question of *residential land capacity*, the Board concludes that the County’s amendments to its PRD regulations were guided by Goals 1 and 2, and are consistent with and implement Plan Policies LU 1.A, LU 1.A.1. Therefore, the County’s action was **not clearly erroneous** and **complies** with the land use goals and implementation requirements of the Act.

## **Housing Issues**

### Position of the Parties

- Although challenging compliance with Goal 4, “Petitioners, in this case, acknowledge that, at this point in time, there is no concrete evidence in the record which establishes the extent of the impact on housing affordability which will occur as the result of the reduction in urban housing development that will inevitably occur as the result of the passage of Ordinance No. 01-005.” MBA PHB, at 22. Petitioners then ask the Board to re-examine its burden of proof that “virtually preclude[s] any party from ever successfully raising an issue regarding Goal 4 and housing affordability.” MBA PHB, at 22. MBA asks the Board to require the County to demonstrate that it has adequately evaluated the impact of proposed Plan or development regulation changes on housing affordability before they are adopted. MBA PHB, at 21-24.

To support this request, and in relation to the Housing Policies, MBA notes that County Plan Policy HO 3.A.1 requires the economic implications of proposed development regulation changes to be evaluated to ensure that the change imposes the least amount of additional cost on housing. This, MBA contends, the County did not do when it adopted Ordinance No. 01-005 which, among other things, eliminated PRD applicability to parcels less than 5 acres and increased open space requirements. Additionally, MBA asserts, the elimination of PRDs for less than 5-acre lots will not encourage clustering, as required by Plan Policy HO 3.A.3. MBA PHB, at 30-31.

The County and McVittie note MBA’s admission of no evidence in the record to support a Goal 4 challenge. Further, the County argues that MBA’s statement that it is “obvious that significant reductions in development in the County’s UGAs will occur as the result of the restrictions on PRDs” is not supported by the record. The County contends that this statement is conclusory and lacks common sense appeal. The County also asserts that the new PRD regulations, which permit residential densities of up to 7 du/ac, encourage a far greater density than that allowed under the basic zoning designations. Co. Response, at 31-33, McVittie Response, at 11.

Further, in response to the Housing Policy challenge, the County asserts that several letters in the record [not cited or referenced] and the purpose section of the Ordinance itself is evidence that the Council considered housing affordability in deliberating on the PRD amendments. However, the County notes that it balanced numerous purposes in adopting this Ordinance, including: design flexibility, protection of critical areas, variety of housing types and styles, promotion of efficient use of land, housing affordability, preservation of character and integrity of surrounding areas, preservation of existing amenities, and creation of usable and commonly owned open space for recreation. The County also asserts that cluster development will continue to be encouraged by another density enhancing tool - lot size averaging. Co. Response, at 37-38.

In reply to the County, MBA attached an exhibit from the record (Ex. 87) to illustrate that lots created through the PRD regulations (allowing smaller lots) reduce the cost of building homes from that of non-PRD subdivisions. MBA then contends, “The new PRD ordinance significantly impacts the housing affordability by eliminating the density transfer achievable under the prior regulations. If the Council did indeed consider the economic implications of the new PRD regulations, then it did so erroneously by nevertheless enacting the more restrictive regulation.” MBA Reply, at 5-6.

- Discussion and Analysis

Just as is noted above under the discussion of land use issues, the Board acknowledges that the County’s housing policies, as identified by MBA, have been guided by and are consistent with Goal 4. Goal 4 requires the County to encourage the availability of affordable housing to all economic segments of the population. The identified housing policies require that the County’s development regulations minimize their impact on the cost of housing (HO 3, HO 3.A.1 and HO 3.A.3). Therefore, just as is stated above for land use issues, if the amendments to the PRD regulations are found by the Board to be consistent with and implement these Plan housing policies, the Board will likewise find the amendments to the PRD regulations have been guided by and are consistent with Goal 4.

First, the Board notes that evidence, such as Ex. 87 offered by MBA, independently provides a basis for support of a Goal 4 challenge. Next, the Board notes that the MBA's Ex. 87 illustrates the benefits to housing affordability that accrue from use of the PRD approach compared to not having the benefits of PRD regulations (or lot size averaging). However, MBA's concern about the impact on affordable housing is one of degree. While the housing affordability statistics are likely to be different under the new PRD regulations than they were under the prior PRD regulations, those statistics will be still be better under the new PRD regulations than under a development scheme with no PRD option. This difference in degree of benefit is not sufficient to find that the County's action was in error.

Further, the purpose statements of the PRD regulations evidence the versatility the PRD regulations are trying to serve. Achieving density is not the sole purpose of the PRD process (nor the GMA). Instead, as the County states, the PRD regulations "seek to encourage the construction of *quality*, high-density development while protecting open space, recreation areas, and natural site amenities." Co. Response, at 13, (emphasis added). The Board agrees. The Board finds that in adopting Ordinance No. 01-005, the County considered and evaluated, among other important factors, the economic implications of the proposed PRD regulation changes and their additional cost on housing. Additionally, the County's PRD regulations and lot size averaging continue to encourage density transfers and clustering of development. Therefore, the Board concludes that the PRD regulations are consistent with and implement Plan Policies HO 3, HO 3.A.1 and HO 3.A.3.

Having found that the new PRD regulations are consistent with and implement the relevant Plan Policies, the Board concludes the new PRD regulations were guided by and comply with Goal 4.

The Board notes in passing that the County's decision to limit the applicability of its PRD regulations to lots of a certain size is within the County's discretion, and the Board defers to the County. Frankly, the County's reasoning for limiting the application of the PRD approach was not apparent from the record. The Board also notes that such a limitation on smaller lots within the urban area would seem to discourage the smaller scale projects that would seem to be desirable from a *quality* point of view. A review and evaluation of this change on infill potential would be appropriate to consider in the County's pending 2002 buildable lands review.

## Conclusion

Regarding the question of *housing affordability*, the Board concludes that the County's amendments to its PRD regulations were guided by Goal 4, and are consistent with and implement Plan Policies HO 3, HO 3.A.1 and HO 3.A.3. Therefore, the County's action was **not clearly erroneous** and **complies** with the housing goal and implementation requirements of the Act.

## Conclusions – Legal Issues 1 and 2

Regarding the question of *densities* in the unincorporated UGA, the Board concludes that the County's amendments to its PRD regulations were guided by Goals 1 and 2, and are consistent with and implement Plan Policies LU 2, LU 2.A and LU 2.A.1. Therefore, the County's action was **not clearly erroneous** and **complies** with the land use goals and implementation requirements of the Act.

Regarding the question of *residential land capacity*, the Board concludes that the County's amendments to its PRD regulations were guided by Goals 1 and 2, and are consistent with and implement Plan Policies LU 1.A, LU 1.A.1. Therefore, the County's action was **not clearly erroneous** and **complies** with the land use goals and implementation requirements of the Act.

Regarding the question of *housing affordability*, the Board concludes that the County's amendments to its PRD regulations were guided by Goal 4, and are consistent with and implement Plan Policies HO 3, HO 3.A.1 and HO 3.

A.3. Therefore, the County's action was **not clearly erroneous** and **complies** with the housing goal and implementation requirements of the Act.

#### V. INVALIDITY request

MBA asserts that the County's adoption of amendments to the PRD regulations, pursuant to Ordinance No. 01-005, fail to comply with the goals and requirements of the Act and substantially interfere with Goals 1, 2 and 4. MBA consequently urges the Board to enter a determination of invalidity. PFR, at 8, and MBA PHB, at 35.

RCW 36.70A.302 provides, in relevant part:

- (1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
  - (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
  - (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
  - (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

#### Conclusion:

The Board has found that Snohomish County's adoption of Ordinance No. 01-005, amending its PRD regulations, was guided by the goals and **complies** with the challenged consistency and implementation requirements of the Act. Therefore, there is no basis or need to consider a determination of invalidity.

#### Vi. ORDER

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

The requirements of RCW 36.70A.110 are not applicable to the County's adoption of Ordinance No. 01-005, since the Ordinance did not alter or modify a UGA designation.

The County's amendments to its PRD regulations, as adopted by Ordinance No. 01-005, were guided by Goals 1, 2 and 4, and are consistent with and implement Plan Policies LU 1.A, LU 1.A.1, LU 2, LU 2.A, LU 2.A.1, HO 3, HO 3.A.1 and HO 3.A.3. Therefore, the County's action was **not clearly erroneous** and **complies** with the Goals and implementation requirements of RCW 36.70A.020(1), (2), (4) and RCW 36.70A.040(3), .120 and .130(1).

Having found the County adoption of Ordinance No. 01-005 to be in compliance with the challenged provisions of the Act, it is unnecessary for the Board to, address MBA's request for a determination of invalidity.

So ORDERED this 13<sup>th</sup> day of December 2001.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Edward G. McGuire, AICP  
Board Member

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Lois H. North  
Board Member

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Joseph W. Tovar, AICP  
Board Member

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

### **appendix a**

#### **Findings of Fact**

1. The Urban Growth Area Residential Land Capacity Analysis, dated summer 1995, contains the information considered by the Snohomish County Council when it adopted its UGA boundaries within its GMA Comprehensive Plan in June of 1995. Ex. 354, at 1.
2. Snohomish County adopted its GMA Comprehensive Plan General Policy Plan via Ordinance No. 94-125, on June 28, 1995. Ex. 348, at 1-19.
3. The County's GMA Comprehensive Plan adopted final UGAs for the County. The adopted Future Land Use Map (**FLUM**) identifies the UGAs and land use designations. Ex. 348, at 5-7.
4. The County's UGA designations, although challenged, were ultimately upheld by the Board in *Sky Valley, et al., v. Snohomish County (Sky Valley)*, CPSGMHB Case No. 95-3-0068c, Order on Compliance, (Oct. 2, 1997).
5. Within the County's unincorporated UGAs, the FLUM indicates one general Urban Low Density Residential designation that allows 4-6 DU/Acre. The FLUM also indicates two specific Urban Low Density Residential – Limited designations. Both of these designations are limited to the Marysville UGA; one allows 4-5 DU/Acre and the other permits 5-6 DU/Acre. Ex. 348 – FLUM, HOM Transcript, at 56.
6. Zoning classifications that implement the Urban Low Density Residential designation include R-9600 (approximately 4.5 du/ac), R-8400 (approximately 5.2 du/ac) and R-7200 (approximately 6.0 du/ac). Ex. 179, Ordinance No. 01-005, HOM Transcript, at 56-57.
7. Snohomish County had development regulations governing Planned Residential Developments (**PRDs**) prior to adopting its GMA Comprehensive Plan in 1995 [Pre-September 1995 PRD Code for purposes of HOM Ex. 5]. HOM Ex. 4 and Chapter 18.51 Snohomish County Code (**SCC**).
8. PRDs allow higher residential densities than the underlying zoning classifications. Generally, for PRDs, the

maximum number of dwelling units permitted is 120 percent of the maximum number of units permitted in the underlying zoning classification. Ex. 179 and HOM Ex. 5.

9. In 1995, the County adopted Ordinance No. 95-061, which amended its PRD regulations [1995 September through 1999 PRD Code for purposes of HOM Ex. 5]. Ex. 179, Co. Response, at 9.

10. During 1998 and 1999 the volume of PRD applications received and approved by the County was high. These approved PRDs allowed higher density development than would have been permitted according to the underlying zoning. A number of these PRDs were administratively or judicially appealed. Ex. 179, Section 1.

11. In 1999, the County created a Stakeholder Committee to review the quality of the PRD regulations and make recommendations for improvements. The Stakeholder Committee included diverse interests and membership, including the parties to this proceeding. Ex. 179, Section 1.

12. Among other things, the Stakeholder Committee recommended amendments to the PRD regulation's provisions for usable open space, perimeter landscaping and minimum lot size. Ex. 179, Section 1.

13. In May of 1999, the County enacted Emergency Ordinance No. 99-035, which amended provisions in the PRD regulations regarding usable open space, perimeter landscaping and minimum lot size. The Emergency Ordinance also directed the Stakeholders Committee to conduct a comprehensive review of the entire PRD regulations. Ex. 179, Section 1.

14. Between late 1999 and May 2001, the County implemented the emergency ordinance. Ex. 179, Section 1. [Emergency Ordinance No. 99-035 is not at issue in this proceeding.]

15. In May of 2001, in response to recommendations of the Stakeholder Committee, Planning Commission and County Executive, the County Council enacted Ordinance No 01-005, [PRD Ordinance adopted May 2, 2001 for purposes of HOM Ex. 5]. Ex. 179.

16. The County's PRD regulations are part of its zoning code and therefore are GMA development regulations. Ex. 179, Section 1.

17. The PRD regulations in place prior to September 1995: 1) calculated unit yield/density using a *net area* method (Density bonus for total area less unbuildable lands and roadways); 2) allowed a 20% bonus applied to the net area; 3) provided no density caps; 4) required no minimum acreage size for a PRD site; 5) required 20% of the net development area to be in open space; 6) provided that an unspecified portion of the open space be used for specific recreational uses when unbuildable land counts toward open space; 7) did not provide for active recreation; and 8) did not require the landscaping of perimeter buffers. HOM Ex. 4 and HOM Ex. 5.

18. The PRD regulations in place between September 1995 and 1999: 1) calculated unit yield/density using a *gross area* method (Density bonus for entire site); 2) allowed a 20% bonus applied to the gross area; 3) provided no density caps; 4) required no minimum acreage size for a PRD site; 5) required 15% of the gross development area to be in open space; 6) did not require that open space be used for recreational uses; 7) did not provide for active recreation; and 8) did not require the landscaping of perimeter buffers. Ex. 179 and HOM Ex. 5.

19. The new PRD regulations, as amended by Ordinance No. 01-005, effective in May 2001: 1) calculate unit yield/density using a *net area* method (Density bonus for total area less critical areas and buffers, but roadways are included in development area); 2) allow a 20% bonus applied to the net area; 3) include a density cap of 7 du/net acre in single family zones; 4) include a 5 acre minimum acreage site size for a PRD; 5) require 25% of the gross development area to be in open space; 6) require 700 sq. ft. per unit on sites of 10 acres or less and 600 sq. ft per unit on sites of greater than 10 acres be useable for recreation; 7) require 30% of the useable open space for PRDs

greater than 10 units to be for active recreation; and 8) require a 20' to 30' landscaping perimeter buffer. Ex 179 and HOM Ex. 5.

20. The focus of this appeal, as reflected in the MBA briefing, is the application of the new PRD regulations to the County's single-family designations, its Urban Low Density Residential classifications – R-9600, R-8400 and R-7200. MBA PHB, at 1-33.

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[1] SCC 18.42.080 provides:

In subdivisions and short subdivisions approved subsequent to the effective date of this section, the minimum lot area of the zone in which the subdivision or short subdivisions is located shall be deemed to have been met if the area in lots plus areas dedicated for permanent and generally usable common open space or recreational uses, if any, divided by the total number of lots is not less than the minimum lot area in the zone in which the property is located. [Specific provisos follow.]

[2] This Comparison Table (HOM Ex. 5) illustrates the differences between the provisions of the three different PRD regulations discussed in this case. It compares the Pre-1995 PRD code, the PRD code in effect between 1995 and 1999, and the new PRD code adopted by Ordinance No. 01-005. *See also*, Findings of Fact (FOF) 17 – 19.

[3] Retirement housing PRDs allow a 220% bonus and retirement apartments PRDs allow a 154% bonus.

[4] The Act also allowed phasing and extensions to the required adoption dates. RCW 36.70A.040 and .045.

[5] *See: The Children's Alliance and Low Income Housing Institute v. City of Bellevue*, CPSGMHB Case No. 95-3-0011, Order Partially Granting Bellevue's Dispositive Motion, (May 17, 1995), at 12; and *Cole, et al., v. Pierce County*, CPSGMHB Case No. 96-3-009c, Final Decision and Order, (Jul. 31, 1996), at 22.

[6] *See: Association of Rural Residents v. Kitsap County (Rural Residents)*, CPSGPHB Case NO. 93-3-0019, Final Decision and Order, (Jun. 3, 1994); *City of Tacoma, et al., v. Pierce County (Tacoma)*, CPSGMHB Case No. 94-3-0001, Final Decision and Order, (Jul. 5, 1994).

[7] *See: Vashon-Maury, et al., v. King County (Vashon-Maury)*, CPSGMHB Case No. 95-3-0008c, Final decision and Order, (Oct. 23, 1995); *City of Gig Harbor, et al., v. Pierce County (Gig Harbor)*, CPSGMHB Case No. 95-3-0016c, Final Decision and Order, (Oct. 31, 1995); *Bremerton, et al., v. Kitsap County (Bremerton)*, CPSGMHB Case No. 95-3-0039c, Final Decision and Order, (Oct. 6, 1995); and *Sky Valley, et al., v. Snohomish County (Sky Valley)*, CPSGMHB Case No. 95-3-0068c, Final Decision and Order, (Mar. 12, 1996).

[8] *See: MacAngus Ranches Inc., et al., v. Snohomish County (Mac Angus)*, CPSGMHB Case No. 99-3-0017, Final Decision and Order, (Mar. 23, 2000).

[9] The Board ultimately found the County's UGA designations to comply with the requirements of the Act. *See: Sky Valley*, Order on Compliance, (Oct. 2, 1997).

[10] The alleged "promise" made by the County is found in the RLCA, which provides under "Summary of Key Assumptions":

The estimates of UGA residential holding capacity contained in this report reflect the outcome of the city and county GMA planning efforts as of the date of GPP [General Policy Plan – the County's GMA Comprehensive Plan] adoption (June 28, 1995). It is possible that the results of subsequent phase II planning efforts will require revisions to the land capacity analysis to reflect the outcome of more detailed land use plans and policies within unincorporated UGAs. Such outcomes could include an assessment of additional capacity created by centers and other land use strategies such as mixed use development, higher allowable densities, lifting of rezone limits below existing comprehensive plan potential for areas in southwest county, minimum net residential density requirements which reduce developer under-building without changes to maximum allowable density, etc. Conversely, development regulations, which potentially reduce capacity, would also need to be incorporated into the land capacity analysis. In addition, future revisions to the UGA residential land capacity analysis could also result from changes to city comprehensive plans or development regulations.

RLCA, at 3; (underlined emphasis in MBA PHB, at 3).

[11] The Board has been clear that Counties must show their work when *altering* UGA boundaries. *See: Kitsap Citizens et al., v. Kitsap County*, CPSGMHB Case No. 00-3-0019c, Final Decision and Order, (May 29, 2001), at 12-16; and *Hensley (IV) v. Snohomish County*, CPSGMHB Case No. 01-3-0004c, Final Decision and Order, (Aug. 15, 2001), at 29-34.

[12] In *Kelly*, 1000 Friends of Snohomish County argued that the County's change in zoning designation allowed an *increase* in density within the UGA and therefore *increased* capacity; which, in turn, violated RCW 36.70A.110(2). *See: Kelly*, at 15-16. Here, MBA argues that the change in PRD regulations *reduces* the density within the UGA and therefore *reduced* capacity, which, in turn, violates RCW 36.70A.110(2). *Supra*.

[13] The Board notes that a capacity challenge such as that made by MBA in this case may be timely upon completion of this review and evaluation.

[14] The **abandoned** portions of Legal Issue 2 are indicated in [~~strikeout~~]; *See* Section III B, *supra*.

[15] As noted in Section III B of this Order, MBA **abandoned** its challenge regarding several plan provisions set forth in the Legal Issue.

[16] The Board notes that while Plan provisions must be guided by and be consistent with the Goals of the Act, it is conceivable that an unchallenged plan policy (now time barred from challenge) may not be guided by a goal. Consequently, in that situation, a challenge to an implementing regulation (which must also be consistent with the goals as well as implement the Plan) could be consistent with one and not the other.

[17] *See: LMI/Chevron*, FDO, at 28.

[18] Generally, when urban densities for Plan designations have been challenged the Board has indicated whether the challenged density is, or is not, an *appropriate urban density*. *See: Litowitz, et al., v. City of Federal Way*, CPSGMHB Case No. 96-3-0005, Final Decision and Order, (Jul. 22, 1996), at 12; *Benaroya, et al., v. City of Redmond*, CPSGMHB Case No. 95-3-0072c, Finding of Compliance, (Mar. 13, 1997), at 13; and *LMI/Chevron*, FDO, at 23-24; where urban densities for zoning designations have been challenged, *see: Forster Woods Homeowners Association, et al., v. King County*, CPSGMHB Case No. 01-3-0008c, Final Decision and Order, (Nov. 6, 2001), at 31. However, in some early cases where plan designations were challenged, this Board has stated that 4 dwelling units per acre is an appropriate urban density, and indicated that this is a *net residential density*. *See: Bremerton v. Kitsap County*, CPSGMHB Case No. 95-3-0039c, Final Decision and Order, (Oct. 6, 1995), at 55-56; *Hensley v. Snohomish County*, CPSGMHB Case No. 96-3-0031, Final Decision and Order, (Feb. 25, 1997), at 9; and *Association of Rural Residents v. Kitsap County*, CPSGMHB Case No. 93-3-0010, Final Decision and Order, (Jun. 3, 1994), at 36.

[19] However, if for example, a jurisdiction's Plan indicated an area was within a UGA and had a Plan designation of Urban Industrial, but the zoning was Rural or Urban Residential, or a Rural area in the Plan was zoned for Urban Commercial uses, these zoning designations would not comply with .040, .120 or .130, since they are not consistent with, and do not implement, the Plan.

[20] The Board agrees with the County that MBA mischaracterizes the Board's decision in *LMI/Chevron*. The primary issue in that case was the Town of Woodway's attempt to use a low-density residential *Plan* designation to protect critical areas. The Board found that the critical areas to be protected by the Plan designation were not large, high rank order value critical areas with complex structure and function that would justify the use of the low-density residential Plan designation. *LMI/Chevron*, FDO, at 25. The Board also held that the GMA requires every city to designate all lands within its jurisdiction at *appropriate* urban densities. *LMI/Chevron*, FDO, at 23; *See also* footnote 16. The parties agreed that a Plan designation permitting 4 du/ac was an appropriate urban density. *LMI/Chevron*, FDO, at 24. The Board also found the urban densities allowed under Woodway's designation (Urban Restricted - allowing approximately 30 homes on 60 acres, or 1 du/2 acres – *LMI/Chevron*, FDO, at 24.) was not an appropriate urban density and noncompliant and remanded with direction to "permit *appropriate* urban densities consistent with the goals and requirements of the GMA." *LMI/Chevron*, FDO, at 56.

[21] The Board notes that the County's 1999 Growth Monitoring Report indicates the unincorporated UGA accommodate: 6.24 du/net acre in 1995; 5.18 du/acre in 1996; 6.28 du/net acre in 1997 and 6.58 du/acre in 1998. Ex. 305, at 91, 87, 83 and 80 respectively.

[22] Once these reductions were calculated, there were adjustments made for accessory dwelling units, duplexes, occupancy rate and average household size. Ex. 354, RLCA, at 11.

[23] Simply calculating density based on gross acreage (pre-Ordinance No. 01-005) yields more density than calculating density based on net acreage (PRD in effect when RLCA conducted).

[24] The Board notes that the County is presently conducting its buildable lands review (pursuant to RCW 36.70A.215), which is due to be completed by September 1, 2002. This review will involve a thorough assessment of the status of the County's buildable lands within its UGAs.