

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

	)	
	)	<b>Case No. 98-3-0008c</b>
GREEN VALLEY, et al.,	)	
	)	<i>[Green Valley]</i>
Petitioners,	)	
	)	
v.	)	<b>ORDER FINDING COMPLIANCE</b>
	)	<b>AND RESCINDING INVALIDITY</b>
KING COUNTY,	)	<b>PURSUANT TO</b>
	)	<b>SUPREME COURT REMAND</b>
Respondent,	)	<b><u>IN UPPER GREEN VALLEY</u></b>
	)	<b><u>PRESERVATION SOCIETY, ET</u></b>
and	)	<b><u>AL., V. KING COUNTY, CAUSE</u></b>
	)	<b><u>NO. 68284-4, AND SUPERIOR</u></b>
NOVELTY NEIGHBORS,	)	<b><u>COURT REMAND IN KING</u></b>
NORTHSHORE YOUTH SOCCER	)	<b><u>COUNTY V. CENTRAL PUGET</u></b>
ASSOCIATION, CITY OF	)	<b><u>SOUND GROWTH MANAGEMENT</u></b>
WOODINVILLE, PRO PARKS and	)	<b><u>HEARINGS BOARD, ET AL., CASE</u></b>
WOODINVILLE FIRE & LIFE	)	<b><u>NO. 98-2-20858-9 SEA</u></b>
SAFETY DISTRICT,	)	
	)	
Intervenors.	)	

**I. Procedural Background**

On July 29, 1999, the Central Puget Sound Growth Management Hearings Board (the **Board**) issued its Final Decision and Order (the **FDO**) in CPSGMHB Case No. 98-3-0008c *Green Valley, et al., v. King County*. The FDO found King County’s (the **County**) action adopting challenged Ordinances 12927 and 12930 in noncompliance with the requirements of the Growth Management Act (**GMA** or the **Act**) and further entered a Finding of Invalidity as to these ordinances.

Upon appeal by King County, King County Superior Court on June 17, 1999 issued a “Judgment on Administrative Procedure Act Appeal,” which provided in part:

The portions of the Central Puget Sound Growth Management Hearings Board at issue in this matter (Legal Issue 5, 6, 8, 9 and 15) are REVERSED based on the Board's erroneous interpretation and application of the law for the reasons set forth in the Court's May 14, 1999 letter decision . . .

Upon appeal by petitioners Upper Green Valley Preservation Society (**UGVPS**), the Supreme Court on December 14, 2000 issued its decision in King County v. Central Puget Sound Growth Management Hearing Board, et al. Docket No. 68284-4, which provided in part:

We hereby reverse the trial court and reinstate the Board's decision invalidating the challenged amendments.

On January 23, 2001, the Supreme Court issued an Amended Mandate terminating the Court's review and mandated the King County cause to the superior court from which the appeal was taken, i.e., King County Superior Court.

On October 8, 2001, the Superior Court signed an Order remanding this matter to the Board for further proceedings.

On October 18, 2001, the Board received correspondence from counsel for King County dated October 17, 2001. The correspondence transmitted the Superior Court's October 8, 2001 Order remanding the matter to the Board.

On October 19, 2001, the Board issued a "NOTICE OF COMPLIANCE HEARING PURSUANT TO SUPREME COURT REMAND IN UPPER GREEN VALLEY PRESERVATION SOCIETY, ET AL., V. KING COUNTY, CAUSE NO. 68284-4, AND SUPERIOR COURT REMAND IN KING COUNTY V. CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, ET AL., CASE NO. 98-2-20858-9 SEA" (the **Notice of Compliance Hearing**). The Notice of Compliance Hearing established a briefing schedule and established November 12, 2001 as the date for a compliance hearing in this matter.

On October 31, 2001, the Board received from the County a "Statement of Actions Taken to Comply with the Board's Final Decision and Order" (the **SATC**) together with six attachments.

[1] Later that same date, the Board issued an "ORDER MODIFYING DATE OF COMPLIANCE HEARING PURSUANT TO SUPREME COURT REMAND IN UPPER GREEN VALLEY PRESERVATION SOCIETY, ET AL., V. KING COUNTY, CAUSE NO. 68284-4, AND SUPERIOR COURT REMAND IN KING COUNTY V. CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, ET AL., CASE NO. 98-2-20858-9 SEA" (the **Order Modifying Date**). The Order Modifying Date moved the date for the

compliance hearing to November 14, 2001 at 10:00 a.m.

On November 7, 2001, the Board received from UGVPS a “Memorandum Regarding County’s Statement of Actions Taken to Comply with the Board’s Final Decision and Order” (the **UGVPS Memo**) together with Exhibit A which is a copy of an email dated August 31, 2001 from Judy Taylor to Anne Norris. Later on this same date, the Board received “Memorandum of HHA/PLAN Respecting King County’s Statement of Actions Taken to Comply with the Board’s Final Decision and Order” (the **HHA/PLAN Memo**) together with five attachments. [\[2\]](#)

On November 9, 2001, the Board received “Pro Parks’ and Little Leagues’ Reply to Upper Green Valley and HHA/PLAN Memoranda Re: King County Compliance with Board’s Final Decision and Order” (the **Pro Parks and Little Leagues’ Reply**).

On November 13, 2001, the Board received “Reply of HHA/PLAN Respecting King County’s Statement of Actions Taken to Comply with the Board’s Final Decision and Order” (the **HHA/PLAN Reply**) together with two attachments. [\[3\]](#)

On November 14, 2001, the Board held a telephonic compliance hearing in this matter beginning at 10:00 a.m. Participating at the Board’s office in Seattle were Board Members Lois H. North and Joseph W. Tovar. Also present in the Board’s office was Peter Eglick representing HHA/PLAN. Participating telephonically were Board member Edward G. McGuire; Kevin Wright representing King County; Judy Taylor for UGVPS; Hilary Franz representing UGVPS; and Jim Harris representing Pro Parks. No witnesses testified. At the conclusion of the hearing, the presiding officer asked the County to provide to the Board a copy of the post-adoption notice published by the County.

On November 14, 2001, the Board received a letter from Kevin Wright of the County with a number of attachments. [\[4\]](#)

On November 15, 2001, the Board received a letter from Peter Eglick, counsel for HHA/PLAN. Later this same date, the Board received a second letter from Mr. Eglick.

## **II. FINDINGS OF FACT**

1. In 1994, King County adopted its GMA comprehensive plan (the **1994 Plan**), which designated agricultural resource lands pursuant to RCW 36.70A.170. The 1994 Plan also included policy language regarding these lands, including the following:

Parks and farms are not necessarily good neighbors, since park users can trespass and damage crops, animals and farm equipment. Recreation near and within districts can

be planned to prevent trespass. For example, a park located across a river or ravine from an Agricultural Production District or a farm would have a pleasant view of farmland without encouraging trespass.

RL-308 Active recreational facilities should not be located within Agricultural Production Districts.

1994 Plan, at p. 106.

2. In 1994, King County also adopted its GMA development regulations, including an “Agricultural Production District” (**APD**) to conserve resource lands pursuant to RCW 36.70A.060.

3. On November 24, 1997, the County adopted Ordinance 12927, which amended the Plan, to permit, in certain circumstances, active recreational facilities in Agricultural Production Districts. Attachment A to Ordinance No. 12927, at 23.

4. On November 24, 1997, the County also adopted Ordinance 12930, to amend the County Code at KCC 21A.08.040(B)(1)(d) to implement the agricultural land amendments to the Plan adopted in Ordinance 12927. The code amendment added “active recreation” facilities as permitted uses in the Agricultural Production District zone, providing in part:

Active recreation facilities shall be limited to those properties within the Agricultural Production District (APD) that are acquired prior to designation of the APD, using voter-approved recreation funds, state funds mandated for recreation, or King County Board of Recreation Funds . . .

Ordinance 12930, at 3.

5. Ordinances 12927 and 12930 were appealed to the Board by the Upper Green Valley Preservation Society (**UGVPS**); the Hollywood Hills Association (**HHA**); Robert E. Tidball (d/b/a/ T&M Berry Farm); Preserve Land for Agriculture Now (**PLAN**); Puget Sound Farm Trust; and Jun and Shelley Akutsu. The case was numbered CPSGMHB Case No. 98-3-0008c and assigned the caption *Green Valley, et al., v. King County*.

6. On July 29, 1999, the Board issued the Final Decision and Order (the **FDO**) in the *Green Valley* case. That order provided in part:

1. The challenged agricultural lands amendments to King County’s Comprehensive Plan (Ordinance No. 12927), and development regulations (Ordinance No. 12930),

which allow active recreation on designated agricultural lands, **do not comply** with the requirements of RCW 36.70A.020(8), .060, .170 and .177, as set forth in this FDO, and are determined to be **invalid** because they substantially interfere with fulfillment of Goal 8.

2. The County's Plan and development regulations are **remanded** and the County is directed to remove the substantial interference with RCW 36.70A.020(8) and bring its Plan and development regulations into compliance with the Act by **repealing** the challenged agricultural land amendments adopted by the County in Ordinance Nos. 12927 and 12930.

*Green Valley* FDO, at 22-23 (Bold emphasis in original).

7. On June 17, 1999, in response to an appeal by King County, the King County Superior Court entered an order reversing the Board's FDO.

8. On December 14, 2000, in response to appeals from HHA/PLAN and UGVPS, the Washington State Supreme Court issued a decision in King County v. Central Puget Sound Growth Management Hearings Board. Wn 2d 161, 979 P.2d 374 (2000). The Supreme Court reversed the King County Superior Court and reinstated the Board's *Green Valley* FDO.

9. On July 30, 2001, the County adopted Ordinance 14185. This Ordinance repealed the Agricultural Lands amendments made by Ordinances 12927 (as to the Plan) and Ordinance 12930 (as to the Zoning Code). Because Ordinance 14185 was adopted as an emergency ordinance, its provisions were adopted as interim measures.

10. Section 2 of Ordinance 14185 deletes text from the County Code, which permitted "active recreation facilities" in APDs. Ordinance No. 14185, Sec. 2, at p. 5-7. SATC, Attachment 3.

11. Section 3, paragraph Y of Ordinance 14185 provides:

The amendments to the King County Comprehensive Plan 2000 contained in Attachment A to this ordinance are hereby adopted as amendments to the King County Comprehensive Plan in order to comply with the order of the Central Puget Sound Growth Management Hearings Board in *Green Valley, et al, v. King County*, CPSGMHB Case No. 98-3-0008c, Final Decision and Order (1998) and the order of the Washington Supreme Court in *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 14 P.3d 133 (2000).

SATC, Attachment 3.

12. Attachment A to Ordinance 14185 provides:

On pages 3-33 and 3-34: amend text and Policy R-545 as follows:

Parks (~~((especially those with active recreation facilities)))~~) and farms are not necessarily good neighbors, since park users can trespass and damage crops, animals and farm equipment. Recreation near and within districts can be planned to prevent trespass. For example, a park located across a river or ravine from an Agricultural Production District (~~((APD)))~~) or a farm would have a pleasant view of farmland without encouraging trespass.

~~There are a small number of instances in which APD property has been purchased, using recreation funds, prior to APD designation. Under these circumstances, active recreational uses should be allowed on such APD property. Furthermore, active recreational uses permitted on an APD property may be transferred to other properties within the same APD provided that the properties from which such active recreation use is transferred permanently remains limited to open space or agricultural uses.))~~

**R-545**      **Active recreational facilities (~~((shall))~~) should not be located within Agricultural Production Districts. When new parks or trails are planned for areas within or adjacent to Agricultural Production Districts, King County should work with farmers to minimize impacts to farmland and agricultural operations. (~~((except under the following circumstances:~~**

**~~a. The property within the APD has been purchased with funds that were earmarked for recreation, and the purchase pre-dates designation of the APD; or~~**

**~~b. There is a transfer of uses between a property purchased consistent with subsection a and other properties within the same APD.~~**

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~~Under the limited circumstances in which active recreational facilities are allowed in the APD, activities and site improvements shall be limited in order to allow the future use of the property for agricultural purposes when the recreational use is abandoned)).~~

SATC, Attachment 3.

13. On September 4, 2001, the County adopted Ordinance 14200, which repealed Ordinance 14185 and made permanent the Plan Amendment and Zoning Amendments that had been adopted as interim measures. SATC, Attachment 4.

### **iii. APPLICABLE LAW AND DISCUSSION**

#### **A. Noncompliance and Invalidity**

RCW 36.70A.330 provides, in relevant part:

- (1) After the time set for complying with the requirements of this chapter under RW 36.70A.300(3)(b) has expired, or at an earlier time upon the motion of a county . . . subject to a determination of invalidity under RCW 36.70A.300 [now RCW 36.70A.302], the board shall set a hearing for the purpose of determining whether the county . . . is in compliance with the requirements of this chapter.
- (2) The board shall conduct a hearing and issue a finding of compliance or noncompliance with the requirements of this chapter and with any compliance schedule established by the board in its final order . . .

#### **B. Pleadings of the Parties**

##### **1. King County and Intervenor Pro Parks**

The County states:

King County has complied with the Board's Final Decision and Order in this case. The Board ordered King County to repeal the 1997 Agricultural Lands Amendments. King County has adopted legislation repealing these Amendments. King County respectfully requests that the Board enter a finding of compliance in this case, at this

time.

SATC, at 1.

Intervenor agrees with the County that it is now in full compliance with the *Green Valley* FDO. Intervenor disagrees with the arguments advanced by Petitioners regarding the compliance of the County's comprehensive plan language, and argues:

The prior Comprehensive Plan and Code language was never timely challenged and was not, and could not have been, challenged by petitioners in this proceeding. RCW 36.70A.290. Nor did Upper Green Valley or HHA/Plan timely challenge the County's action last August to comply with this Board's order. *Id.* They are time-barred from doing so now . . . [they] simply seek to accomplish here what they are clearly time-barred from doing – challenging the longstanding . . . Policy which was reinstated because of the Board's invalidation of the amendment to it.

Pro Parks and Little Leagues' Reply, at 1.

## 2. UGVPS and HHA/PLAN

UGVPS contends that both the County's regulations and its plan provisions must reflect the Supreme Court's clear direction that active recreation is not permitted on designated agricultural resource lands. Unless the Plan reflects this prohibition, UGVPS argues, it will result in an inconsistency between the Plan and the regulations, and inappropriately imply that the County retains discretion to locate active recreation on agricultural lands:

Following the Court's decision, it is clear that Comprehensive Plans are not in compliance with the GMA if they allow active recreation on designated agricultural land. As the County and the Intervenor have argued, use of the word "should," instead of "shall," in the Comprehensive Plan agricultural provision leaves open the interpretation that active recreation is discretionary on designated agricultural land. Unless the Comprehensive Plan clearly prohibits active recreation on designated agricultural land, the Comprehensive Plan is not in compliance with the GMA and is invalid.

UGVPS Memo, at 5. (Emphasis in original).

HHA/PLAN echoes this argument. It rejects the County's claim that the repeal of Ordinance 12927 achieves compliance with the *Green Valley* FDO because:

. . . the comprehensive plans restriction on active recreation uses on designated agricultural lands could be interpreted as discretionary – rather than mandatory – and therefore is inconsistent with both the GMA as interpreted by the Washington Supreme Court in this case and the County’s amended zoning code development regulations.

HHA/PLAN Reply, at 3. (Emphasis in original).

HHA/PLAN characterizes the 1997 Plan and Code amendments as creating loopholes in the protection of agricultural resource lands. After citing the text of the 1997 amendment to Policy RL-308, HHA/PLAN states:

The amendment went on to create loopholes in the form of a list of several circumstances in which active recreation could be permitted in the APDs. It was this loophole that the Board, and subsequently the Supreme Court, found inconsistent with the GMA mandate to conserve and enhance agricultural lands. The substitution of “shall” for “should” in the first clause was not an issue and, indeed, was necessary to clarify the Comprehensive Plan restrictions and ensure consistency with the GMA (absent the loophole).

HHA/PLAN Reply, at 4. (Emphasis in original.)

Lastly, HHA/PLAN argue that the County’s notice and therefore its public participation procedures were inadequate:

The County’s public hearing was held without adequate notice to allow for public participation by all interested parties, pursuant to the GMA. HHA/PLAN objected to the lack of adequate notice in a letter to the County Prosecuting Attorney dated August 30, 2001, and reserves all rights in this respect.

HHA/PLAN, *Id.*

### **C. Discussion**

It is undisputed that the County has complied with the Board’s FDO as to the APD development regulations. Plainly, the County has deleted the language of KCC 21A.08.040(d) that permitted active recreation on designated resource lands. *See*: Finding of Fact 10 and 13. The remaining dispute between the parties is whether the County’s action resurrecting the Plan’s prior policy statement (i.e., renumbered Policy R-545), does not comply with the GMA as construed by the Supreme Court in the *King County* decision, and the Board in the *Green Valley* FDO.

[5]

A review of R-545 on its face, does not suggest the glaring noncompliance that Petitioners decry. The only thing that this policy says about “active recreation” is to provide direction that it “should not be located within Agricultural Production Districts.” The following sentence, which addresses “new parks and trails . . . within Agricultural Production Districts,” can easily be read to describe *passive* recreation (e.g., trailheads). Indeed, this reading of R-545 comports with the Supreme Court’s direction.

Petitioners seem to suggest that the phrase “should not” in this policy statement carries with it an unspoken but implicit modifier “unless.” While “should not” is arguably less directive than “shall not,” both phrases impart the same broad policy direction that must be implemented in development regulations – namely, that active recreation *is not to be* located within agricultural production districts. The Board sees no inconsistency between the Plan statement that “active recreation should not be located within agricultural production districts” and implementing development regulations that clearly do not permit active recreation within agricultural production districts.

The Board understands Petitioners’ concern about the unspoken “unless” in R-545, particularly in light of the County’s suggestion that this language somehow reserves discretion for the County to revisit the matter of placing active recreation uses on designated resource land. However, the County’s perception, and the Petitioners’ concerns about such a perception, are misplaced. The Board reads the Supreme Court’s decision as clear and unequivocal – the County’s development regulations **shall not** permit active recreation on designated resource lands with prime soils for agriculture. Attempts to carve out loopholes, under the aegis of RCW 36.70A.177, are flatly prohibited by the Supreme Court’s decision, notwithstanding **any** reading that the County chooses to give to Policy R-545.

As to the notice and public participation matter raised by HHA/PLAN, the Board notes that this case is now in the compliance proceeding phase rather than a review of an action on the merits. The Board has a scant record and a dearth of detailed briefing on the question of the adequacy of the County’s notice and public participation process in adoption of Ordinance 14185. Absent a complete record and sufficient briefing, the Board will not address this question. If petitioners wish to pursue the question of the County’s compliance with the public participation goals and requirements of the Act with respect to Ordinance 14185, they must do so in the context of a new petition for review.

**IV. CONCLUSIONS OF LAW**

The Board concludes that the County has complied with the requirements of the Growth Management Act as interpreted by the Board in the *Green Valley* FDO. The Board therefore issues the County a **Finding of Compliance** and **rescinds its prior Determination of Invalidity**.

v. **ORDER**

Based upon the above referenced documents, the argument and briefing by the parties, the Findings of Fact and Conclusions of Law set forth herein, the Board ORDERS:

1. The Board issues a **Finding of Compliance** to King County with respect to Ordinance No. 14200.
2. The Board **rescinds its prior Determination of Invalidity**.

So ORDERED this 21st day of November, 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.

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[\[1\]](#)

The attachments to the SATC were identified as follows: Attachment 1 is an excerpt from County Ordinance 12927, consisting of an amendment to County Plan Policy RL-308; Attachment 2 is an excerpt from Ordinance 12930, consisting of an amendment to KCC 21A.08.040(B)(1)(d); Attachment 3 is a copy of Ordinance 14185; Attachment 4 is a copy of Ordinance 14200; Attachment 5 is an excerpt from the 2000 Update to the County Plan,

sowing that former Policy RL-308 was renumbered R-545 and that the last text sentence preceding this policy was deleted; and Attachment 6 is an excerpt from Ordinance 14045 showing language changes to KCC 21A.08.040(B)(1) (d).

[2] The attachments to the HHA/PLAN Memo were: a letter dated August 30, 2001 from Jane S. Kiker to H. Kevin Wright; the cover sheet and pages 6 and 7 of the Brief of Respondent King County before the Supreme Court; the cover sheet and page 7 of the Brief of the Northshore Soccer Association before the Supreme Court; the cover sheet and pages 46-47 of the Brief of Pro Parks and Little Leagues before the Supreme Court; and a cover sheet and pages 10-11 of the Reply Brief of Puget Sound Farm Trust before the Supreme Court.

[3] The attachments the HHA/PLAN Reply were: a Memorandum dated March 8, 1995 from Paul Adams to Councilmember Louise Miller and a letter dated November 24, 1997 from Don Eklund, County Auditor, to Councilmember Ken Pullen.

[4] The attachments to the County's November 14, 2001 letter were: an Affidavit of Publication showing publication on September 26, 2001, of notice of enactment of Ordinance 14200; an Affidavit of Posting showing posting on September 26, 2001 of notice of enactment of Ordinance 14200; a September 20, 2001 letter from the Clerk of the County Council providing notice of enactment of Ordinance 14200 to the Washington State Office Community Development; an Affidavit of publication showing publication of August 3, 2001 notice of a public hearing before the County Council on September 4, 2001 regarding proposed Ordinance 2001-0406 (which became Ordinance 14200 when adopted); and an Affidavit of Posting on August 3, 2001 of notice of a public hearing before the King County Council on September 4, 2001 regarding proposed Ordinance 2001-0406 (which became Ordinance 14200 when adopted).

[5] R-545 provides:

Active recreational facilities should not be located within Agricultural Production Districts. When new parks or trails are planned for areas within or adjacent to Agricultural Production Districts, King County should work with farmers to minimize impacts to farmland and agricultural operations.