

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

JODY L. McVITTIE)	
)	Case No. 01-3-0017
)	
Petitioner,)	<i>(McVittie VIII)</i>
)	
v.)	FINAL DECISION AND ORDER
)	
SNOHOMISH COUNTY,)	
)	
Respondent.)	

I. Background

On July 12, 2001, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Jody McVittie (**Petitioner or McVittie**). The matter was assigned Case No. 01-3-0017, and is hereafter referred to as *McVittie VIII v. Snohomish County*. The short case title is *McVittie VIII*. Petitioner alleges that Snohomish County Ordinance No. 01-040 failed to be guided by the goals of the Growth Management Act (the **GMA** or the **Act**) and does not comply with certain of the GMA’s requirements. Petitioner also asks that Board enter a finding of invalidity with respect to Ordinance No. 01-040.

On August 9, 2001, the Board received an “Amended Petition for Review” from Petitioner.

On August 13, 2001, the Board received “Snohomish County’s Index of the Record RE: County’s Adoption of Amended Ordinance No. 01-040.”

On August 16, 2001, the Board held the prehearing conference in this matter in the conference room on the 54th floor of Two Union Square in downtown Seattle. Present for the Board were members Edward G. McGuire, Lois H. North, and Joseph W. Tovar, presiding officer. Representing herself *pro se* was Petitioner Jody McVittie. Representing the County was Courtney Flora. Also present for the County was George Godley of the Snohomish County Public Works Department.

On August 22, 2001, the Board issued the Prehearing Order (the **PHO**) in this matter, setting the date for the hearing on the merits, the schedule for the submittal of briefs and motions, and set

forth the legal issues.

On October 4, 2001, the Board received “Stipulated Motion and Order to Modify Briefing Schedule” (the **Stipulated Motion**) which requested that the due date for the County’s Prehearing Brief be moved from November 1, 2001, to November 5, 2001, and that the due date for the Petitioner’s Reply be moved to November 12, 2001. Later this same day the Board issued an “Order Granting Motion to Modify Briefing Schedule” which granted the stipulated Motion.

On October 18, 2001, the Board received from Petitioner the “Prehearing Brief” (the **PHB**).

On November 5, 2001, the Board received “Respondent Snohomish County’s Prehearing Brief and Motion to Dismiss” (the **County Brief**).

On November 13, 2001, the Board received “Petitioner’s Reply Brief (the **Reply**).

The Board conducted the hearing on the merits beginning at 10:00 a.m. on November 15, 2001, in Suite 1022 of the Financial Center, 1215 Fourth Ave., Seattle, WA. Present for the Board were Lois H. North, Edward G. McGuire, and Joseph W. Tovar, presiding officer. Representing the County were Barbara Dykes and Courtney Flora. Also present for the County was George Godley of the Public Works Department. Petitioner Jody McVittie represented herself *pro se*. Court reporting services were provided by Scott Kindle of Mills & Lessard, Seattle. No witnesses testified. After oral argument, Petitioner made a motion to supplement the record with five County Council Motions. The County objected to late supplementation of the record. The presiding officer noted that the Board would rule on the motion in the Final Decision and Order. At the conclusion of the hearing, the Board ordered a Transcript (the **Transcript**).

II. FINDINGS OF FACT

1. On July 23, 1997, Snohomish County and the Washington State Department of Transportation signed an Interlocal Agreement, the title caption of which reads:

INTERLOCAL AGREEMENT BETWEEN SNOHOMISH COUNTY AND THE WASHINGTON STATE DEPARTMENT OF TRANSPORTATION RELATING TO POLICIES AND PROCEDURES FOR INTERJURISDICTIONAL REVIEW OF LAND DEVELOPMENT IMPACTS RELATED TO TRANSPORTATION, AND FOR RECIPROCAL IMPACT MITIGATION FOR INTERJURISDICTIONAL TRANSPORTATION SYSTEM IMPACTS.

Index No. 217.

2. On April 30, 2001, the Board issued an Order on Dispositive Motion in CPSGMHB Case No. 01-3-0004c, *Hensley IV v. Snohomish County*, which found that portions of Snohomish

County's adoption of the Transportation Element amendments contained in Ordinance No. 00-091 did not comply with the Act's public participation goal and requirements. The Order provided, in relevant part:

By no later than June 29, 2001, the County shall provide effective notice, consistent with this Order, conduct a public hearing on amendments to the County's GMA Comprehensive Plan Transportation Element, and take appropriate legislative action to repeal, modify or reenact the Transportation Element amendments contained in Ordinance No. 00-091, but found to be noncompliant with the GMA due to defective notice.

Hensley IV, Order on Dispositive Motions, at 4.

3. On April 26, 2001, the Executive Board of the Puget Sound Regional Council certified, pursuant to Chapter 47.80, that "the amendments made to Snohomish County's 2000 Transportation Element Amendments adequately conform to the requirements of the Growth Management Act." Index No. 401.

4. On May 30, 2001, the County published a "Notice of Public Hearing" (the **County's Notice**) in the *Everett Herald*, the title caption of which provided:

Notice is hereby given that on Monday, June 18, 2001 . . . the Snohomish County Council will hold a public hearing to consider proposed Ordinance No. 01-040, an ordinance that would amend the Transportation Element of the Snohomish County Growth Management Act Comprehensive Plan.

Index No. 411.

5. The County's Notice was also published between May 30, 2001, and June 27, 2001, in twelve other newspapers, including the *Woodinville Weekly*, the *Mukilteo Beacon*, the *Mill Creek View*, the *Northshore Citizen*, the *Marysville Globe*, the *Arlington Times*, the *Monroe Monitor-Valley News*, the *Lake Stevens Journal*, the *Stanwood/Camano News*, the *Tribune* and the *Enterprise Newspapers*.

Index Nos. 412 to 423.

6. The County's Notice included the text of proposed Ordinance No. 01-040, Section 2.I of which reads:

This ordinance does not adopt or modify county level of service (LOS) standards, but rather documents LOS objectives approved by the Washington State Transportation Commission as a part of the County's efforts to discharge its responsibilities

regarding state-owned facilities under RCW 36.70A.070(6).

Index No. 411.

7. On June 27, 2001, the Snohomish County Council adopted Ordinance No. 01-040, the title caption of which reads:

AMENDED ORDINANCE NO. 01-040 RELATING TO THE TRANSPORTATION ELEMENT OF THE GROWTH MANAGEMENT ACT COMPREHENSIVE PLAN, ADOPTING MAP AND TEXT AMENDMENTS, AMENDING AMENDED ORDINANCE NO. 94-125 AND AMENDED ORDINANCE NO. 00-091, AND RATIFYING AND REENACTING THE TRANSPORTATION ELEMENT, W/ ATTACHED (1) EXHIBIT A-1 (AKA EXHIBIT C) PROPOSED TRANSPORTATION ELEMENT AMENDMENTS; AND (2) DECEMBER 2000, SNOHOMISH COUNTY GMA COMPREHENSIVE PLAN TRANSPORTATION ELEMENT.”

Index No. 432.

8. Ordinance No. 01-040 did four things: 1) it amended the County’s arterial circulation map; 2) it amended the County’s bikeway system map; 3) it updated the County’s high capacity transit alignment map; and 4) it adopted additions for state-owned highways (including an inventory, LOS objectives and impacts upon state roads).

Index No. 432.

III. STANDARD OF REVIEW/BURDEN OF PROOF

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

The Board “shall find compliance with the Act, unless it determines that the [County’s] action[s] are] **clearly erroneous** in view of the entire record before the Board and in light of the goals and requirements of the [GMA].” RCW 36.70A.320 (3). For the Board to find the County’s actions clearly erroneous, the Board must be “left with the firm and definite conviction that a mistake has been made.” *Dep’t of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

Pursuant to RCW 36.70A.3201 the Board will grant deference to the 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) (**King County**). Further, Division II of the Court of Appeals has stated, “Consistent with *King County*, and notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . 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).

IV. Petitioner’s MOTION to supplement the record

At the hearing on the merits, Petitioner handed to the Presiding Officer copies of five County Council motions, specifically 00-157, 00-159, 00-345, 01-002, and 01-010 and moved the Board to take official notice of these County actions. She offered these motions as evidence that the County continues to approve development permits on roads that have failing levels of service. Transcript, at 28. The County objected to Petitioner’s Motion to Supplement with these five motions, arguing that these materials could have been attached to the prehearing brief, but were not, and that it would be unfair to the County to have to respond to this material at this time. Transcript, at 62-63.

The Petitioner’s Motion to Supplement the Record with County Council Motions 00-157, 00-159, 00-345, 01-002, and 01-010 is **denied**.

V. LEGAL ISSUES

A. Prefatory Note

The Board will address the issues in the following order: first Legal Issues 1 and 2 combined, then Legal Issues 3, 4, 5, and 6.

B. Legal Issues 1 and 2

Did Snohomish County fail to be guided by and or fail to substantively comply with the requirements of RCW 36.70A.020(3) and (12) when it adopted Ordinance 01-040?

Did the County comply with the requirements of RCW 36.70A.070(6)(a)(iii)(C), (D) when it adopted Ordinance 01-040?

1. Applicable Law

With respect to Legal Issue 1, RCW 36.70A.020 provides in relevant part:

(3) Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.

....

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

With respect to Legal Issue 2, the GMA provision at issue is RCW 36.70A.070(6)(a)(iii)(C) and (D), which provides that Comprehensive plans are to include:

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

(a) The transportation element shall include the following subelements:

....

(iii) Facilities and services needs, including:

....

(C) For state-owned transportation facilities, level of service standards for highways, as prescribed in chapters 47.06 and 47.80 RCW, to gauge the performance of the system. The purposes of reflecting level of service standards for state highways in the local comprehensive plan are to monitor the performance of the system, to evaluate improvement strategies, and to facilitate coordination between the county's or city's six-year street, road, or transit program and the department of transportation's six-year investment program. The concurrency requirements of (b) of this subsection do not apply to transportation facilities and services of state-wide significance except for counties consisting of islands whose only connection to the mainland are state highways or ferry routes. In these island counties, state highways and ferry route capacity must be a factor in meeting the concurrency requirements in (b) of this subsection;

(D) Specific actions and requirements for bringing into compliance locally owned transportation facilities or services that are below an established level of service standard

2. Discussion

a. Positions of the Parties

In her opening brief, Petitioner presents many arguments alleging noncompliance with both RCW 36.70A.020(3) and (12) [Legal Issue 1] and with RCW 36.70A.070(6)(a)(iii)(C) and (D) [Legal Issue 2]. She states:

The County has failed to ensure that county arterials are adequate to serve the development at the time the development is available for occupancy (or within 6 years per RCW 36.70A.070(6)(b)) without decreasing current service levels below locally established minimum standards. Not only has Snohomish County allowed roads to fall below the locally established standard, it continues to fail to ensure that roads do not fall below this standard.

PHB, at 23.

Petitioner attacks the County's method of categorizing certain road segments as being "in arrears" without identifying a funding source and asserts that the County continues to approve developments on roads below the LOS but not officially listed as "in arrears." PHB, at 23-24. She also contends that, contrary to the Act's requirements, funding for needed road improvements is not keeping up, arguing:

. . . there is zero evidence to support the claim that [the County] is meeting its financial needs for capacity improvements on transportation facilities to ensure that the services are adequate as established by the LOS standards. The evidence is to the contrary. Projected funding is not available. Current funding is not keeping up. Roads that were predicted to be a problem by 2012 are already not meeting standards by 2001.

PHB, at 25.

While commending the County for the adoption of the ILA with WSDOT, one of her chief complaints in Legal Issue 2 is the manner in which the County adopted into its Comprehensive Plan the LOS for State roads within Snohomish County. She argues:

[T]his Petitioner agrees with the County that identifying a standard of LOS E for peak hour functioning (at least for urban roads) is significantly more practical and reasonable than the State's proposed peak hour of LOS D. It is important to note, however, that this LOS and its "measuring method" is established by the County for the state roads within Snohomish County. It is not merely a standard passed through from the state to the citizens of Snohomish County. It was adopted by the County for use within the County . . . with no public notice to alert the public and give them an opportunity to participate in the process.

PHB, at 9.

Another complaint stated by Petitioner is:

The County has not used the word “standard” in referring to the measurable objectives of need it established for determining adequacy of state roads; it has used the word “objective” . . . When the law calls for standards (as it does in RCW 36.70A.070(6)(a)(iii)(C), it means standards.

PHB, at 11.

Petitioner also argues:

At the time of the initial adoption of the Transportation Element [i.e., 1995] there were no roads not meeting the LOS standards and the County concurrency ordinance was in the process of being written. This element of the Transportation Element did not seem so important. What we as citizens have learned in the meantime is that our concurrency ordinance did not comply with the requirements (i.e., it continued to allow developments to be permitted if they caused a road to drop below the level of service standard, and allow permitting when the road was below the standard), has not been implemented well, and it has not been enforced.

PHB, at 11-12.

In response, the County moves for dismissal of both Issues 1 and 2. With respect to Issue 1, the County argues:

Legal Issue 1 should be dismissed out of hand. Petitioner McVittie blatantly ignores the most fundamental rules of Board practice in briefing this legal issue . . .

. . . .

Without citation to the record and unapparently [*sic*] related to any of the amendments actually enacted by the County, the Petitioner piles conclusory statement upon conclusory statement to come up with the conclusion that the County (in general, with relationship to transportation) has violated Goal 12 and Goal 3.

County’s Brief, at 39-40.

The County cites numerous excerpts from Petitioner’s PHB, and complains that the conclusory statements are unsupported by a citation to the record or evidentiary proof. County’s Brief, at 41-42. The County argues:

Through [these] conclusory statements, Petitioner McVittie seeks to pull down the County’s entire Transportation Element, concurrency management system, and

General Policy Plan policies regarding transportation under Legal Issue 1. She offers no advice on how these arguments relate to the limited scope 2001 amendments, nor does she offer any record substantiation to show that the County has committed the acts alleged.

County's Brief, at 42.

With respect to Legal Issue 2, the County points to page 6 of the PHB and argues:

The petitioner observes that the County complied with this provision by “adopt[ing] LOS standards for state route” when it amended its transportation element, but asserts that the County’s persistence in calling these standards “objectives” has resulted in a circumvention of GMA public participation requirements . . . because petitioner McVittie’s “argument” on the RCW 36.70A.070(6)(a)(iii)(C) claim consists of a background summary intended to illuminate her public participation argument, no response on this point is necessary.

County's Brief, at 13.

The County further argues that, to the extent that some of Petitioner’s arguments on this issue go to the transportation element itself, rather than the 2001 amendments, those arguments are time-barred. County's Brief, at 14.

b. Analysis

Certain of Petitioner’s arguments about the County’s compliance with the Act’s goals and requirements have a familiar ring to them. As the County points out, a number of these argument were made in earlier *McVittie* cases attacking prior County enactments. The Board agrees with the County that the Petitioner may not attack previously adopted provisions of the County’s Transportation Element at this time.

One of Petitioner’s new complaints here is that Ordinance 01-040 adopted *objectives* for state roads rather than *standards*. In prior cases this Board has admonished the County that the Act requires the adoption of standards, as opposed to guidelines or ranges.^[1] Petitioner’s concern about the use of the term “objectives” is therefore understandable. However, as the County points out, the word “objectives” is the language “approved by the Washington State Transportation Commission” and accurately conveyed by the County’s Notice. Finding of Fact 6.

The fact that the State has not yet adopted “standards” placed the County in a difficult situation,

in view the GMA mandate that the County adopt something by December of 2000. Relying upon the guidance of the PSRC to adopt the WSDOT “objectives” into the County Plan was not unreasonable. ^[2] In fact, for the County to have described as a standard that which the State described as an “objective” would have been more than misleading, it would have been flatly incorrect. When questioned by the Board, the County clarified that WSDOT intends to adopt “standards” when it complies with the mandate of HB 1487. Transcript, at 40-41.

The Board disagrees with Petitioner’s complaints that the County has added road projects without adding the necessary funding. The Board agrees with the County that adding certain road segments to the Transportation Element lists does not constitute addition of projects.

Finally, the essence of Petitioner’s concerns in her argument about Legal Issue 1 is that there appears to be a serious disconnect between the transportation plans and improvements done by the County and the State. She seems to believe that the spirit of Goals 3 and 12 would demand a better degree of coordination and consistency between the plans and actions of State and County government.

Even the County laments the timing of State improvements, to say nothing of the timing of the adoption of State LOS standards. Nevertheless, the Board must conclude that neither Goals 3 and 12, indeed **none** of the goals listed at RCW 36.70A.020 apply to the State because the preamble to that section unequivocally states that the goals “shall be used *exclusively* for the purpose of guiding the development of comprehensive plans and development regulations.” This is an unfortunate but inescapable conclusion, because to truly achieve managed growth there must be better linkage between local efforts and state efforts.

- 3. Conclusion

The Board concludes that Petitioner has failed to carried the burden of proof of showing that the County’s action failed to be guided by and substantively complied with RCW 36.70A.020(3)(12).

The Board further concludes that Petitioner has failed to carried the burden of proof showing that the County’s action did not comply with the requirements of RCW 36.70A.070(6)(a)(iii)(C) and (D).

C. Legal Issue 3

Did the County comply with the requirements of RCW 36.70A.070(6)(a)(iv)(A,B,C) when it adopted Ordinance 01-040?

1. Applicable Law

With respect to Legal Issue 3, RCW 36.70A.070(6)(a)(iv)(A,B,C) provides:

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

(a) The transportation element shall include the following subelements:

.....

(iv) Finance, including:

(A) An analysis of funding capability to judge needs against probable funding resources;

(B) A multiyear financing plan based on the needs identified in the comprehensive plan, the appropriate parts of which shall serve as the basis for the six-year street, road, or transit program required by RCW 35.77.010 for cities, RCW 36.81,121 for counties, and RCW 35.58.2795 for public transportation systems. The multiyear financing plan should be coordinated with the six-year improvement program developed by the department of transportation as required by RCW 47.05.030;

(C) If probable funding falls short of meeting identified needs, a discussion of how additional funding will be raised, or how land use assumptions will be reassessed to ensure that level of service standards will be met;

2. Discussion

a. Positions of the Parties

In her opening brief, Petitioner argues that Ordinance 01-040 is not in compliance with the finance requirements for transportation elements because it adds costs and ignores funding. She asserts that 01-040 adds four new projects to a transportation element that already includes insufficiently funded improvement plans, but it does not include a multi-year financing plan, address probable funding, or set priorities for cutting projects if funding falls short. Petitioner notes that under the 1995 transportation element, more than 10% of funding for the years 2000-2012 relied on a gas tax that has not been implemented. Meanwhile, she says, the Transportation Element (TE) documents an increasing number of below-standard roads for which there is no designated funding for improvement.

Citing *McVittie IV*, ^[3] at 21, for the proposition that needs identified in a 20-year plan must be addressed at some point during the original 20-year life of the plan, Petitioner asserts that the GMA does not permit the County to add projects and rely on future reassessment to work out the funding details and priorities. She contends that there must be at least an outline of probable funding. PHB, at 13-16.

In response, the County argues:

Petitioner McVittie attempts to again challenge the 1995 Transportation Element through the limited window of the 2001 TE amendments. Her arguments are not limited to the state facilities perspective, but rather seek to attack the 1995 Transportation Element's compliance with RCW 36.70A.070(6)(a)(iv) generally. Essentially, she argues that the County has failed to implement the funding portion of the plan, that there is no multi-year financing plan, and that the plan fails to discuss a funding shortfall . . .

County Brief, at 15.

The County contends therefore that the challenge is untimely, and argues that the only "tenable" basis for the present challenge is Petitioner's assertion that the County has added "projects" without specifying funding for those projects. The County asserts that these are not projects, and cites to the TE itself:

These changes to the Arterial circulation map do not present specific project proposals at this time. Project-level analysis and recommendations will be part of a more detailed set of amendments required by the Growth Management Act (RCW 36.70A.130(1)) and to be completed by September 2002.

County Brief, at 16, citing Index No. 404, at 10.

b. Analysis

The Board begins by noting that the only challenged actions in the present case are amendments to the County's Transportation Element, not the County's Transportation Improvement Program and not Capital Facilities Elements. The Board agrees with the County that it has not added new road projects that would require funding. Rather, the County has simply made certain corrections to the circulation map. Therefore, an essential premise of Petitioner's arguments under Legal Issue 3, namely that the County has added "projects," is faulty. If and when the County does add projects to the TIP, CIP (and/or its CFE) it may then be possible for these issues to be raised. However, with the present facts, the Board must **dismiss** Legal Issue 3.

3. Conclusion

The Board concludes that Petitioner has failed to carry the burden of proof showing that the County's action failed to comply with RCW 36.70A.070(6)(a)(iv)(A,B,C).

D. Legal Issue 4

Did the County comply with the requirements of RCW 36.70A.070(6)(c) when it adopted Ordinance 01-040?

1. Applicable Law

RCW 36.70A.070(6)(c) provides that a comprehensive plan shall include:

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

.....

(c) The transportation element described in this subsection (6), and the six-year plans required by RCW 35.77.010 for cities, RCW 36.81.121 for counties, RCW 35.58.2795 for public transportation systems, and RCW 47.05.030 for the state, must be consistent.

2. Discussion

a. Positions of the Parties

Petitioner simply asserts here that the county's phasing plan regarding the timing of state road improvements does not coincide with the expected completion dates set forth in the state's plan. Additionally, McVittie contends that the "inconsistent" tables (Table 10) illustrate that the County's "bad habit of promising that things will be done before they actually will be done is not an appropriate planning move." McVittie PHB, at 17-18.

The County responds that the "staging table is not intended as a replacement for the State's prioritization process, but as an important input that reflects local needs. Consequently, Table 10 does not represent a "promise" by the County that these improvements will be performed on time; it simply lets the State know which improvements the County has prioritized in order to provide a basis for interjurisdictional negotiation and cooperation." County Response, at 24.

In reply McVittie contends that the County's identification of critical projects for completion in 2006 versus the State's identification of projects for completion in 2010 is inconsistent, and that "It is time for the County (and the State) to come clean with the citizens of Snohomish County." McVittie Reply, at 14.

b. Analysis

The Board notes that the County's six-year transportation funding scheme, its Transportation Improvement Program (TIP), was not amended by Ordinance No. 01-040. Thus, the TIP is not before the Board. Notwithstanding this deficiency, the Board proceeds. Petitioner's challenge regarding the consistency requirements of RCW 36.70A.070(6)(c) must be understood in the context of the requirement for including state LOS in local plans. Petitioner misunderstands the GMA's purpose of having the local plan reflect the level of service standards set for state highways. RCW 36.70A.070(6)(a)(iii)(C) states:

The purpose of reflecting level of service standards for state highways in the local comprehensive plan are to monitor the performance of the system, to evaluate improvement strategies, and to facilitate coordination between the county's or city's six-year street, road, or transit program and the department of transportation's six-year investment program. The concurrency requirements of (b) of this subsection do not apply to transportation facilities and services of state-wide significance...

As provided in the statute, the purpose for including state LOS standards at the local level is for monitoring, evaluating and facilitating coordination between the state and local plans. Providing information to the state for its further analysis and assessment is the driver behind this section of the GMA. As discussed in Legal Issues 1 and 2, there is no financing or implementation "hook" for binding the state to undertake any given state road project, critical or otherwise. Given this statutory context, McVittie's challenge must fail. As the County indicated, Table 10 is one of its means for conveying its priorities and concerns to the state to facilitate further coordination and reevaluation by the state. Petitioner's challenge pertaining to consistency with RCW 36.70A.070(6)(c) is **dismissed**.

3. Conclusion

The Board concludes that the County's inclusion of Table 10 in its amendatory Ordinance is one of its means for the County to convey its priorities and concerns to the state thereby facilitating further coordination and reevaluation of priorities by the state. Petitioner's challenge pertaining to consistency with RCW 36.70A.070(6)(c) is **dismissed**.

E. Legal Issue 5

Did the County fail to comply with the County-wide Planning Policies consistency requirements of RCW 36.70A.210 (CPP TR7, TR8) and the internal consistency requirements of .070 (preamble) and .070(6) (as applied to CF 1, language in the transportation section of the GPP, TR 5, TR 8, TR 9, Capital Facility Plan, Transportation Element) when it adopted Ordinance 01-040 amending the Transportation Element of the Comprehensive Plan?

1. Applicable Law

Issues not briefed will be deemed to have been abandoned and cannot be resurrected in Reply Briefs or in oral argument at the Hearing on the Merits. August 22, 2001 PHO, WAC 242-02-570 (1). The only challenge briefed under Legal Issue 5 relates to consistency with CPP TR 8(b) and (e). Petitioner McVittie failed to brief the challenges to consistency with CPP TR-7, General Plan Policies TR 5, TR 8 and TR 9. Therefore, Petitioner's consistency challenge with CPP TR 7, GPP 5, 8 and 9 are **abandoned**.

The Board has stated that "Comprehensive plans must be consistent with county-wide planning policies." See: *Vashon Maury v. King County*, CPSGMHB Case No. 95-3-0008c, Final Decision and Order, (Oct. 23, 1995), at 34; *Association to Protect Anderson Creek v. City of Bremerton*, CPSGMHB Case No. 95-3-0053, Final Decision and Order, (Dec. 26, 1995), at 22.

CPP TR 8, provides in relevant part:

Achieve concurrency requirements for land development by considering transportation levels of service and available financial resources to make needed transportation improvements.

...

(b) Level of service will be used as a growth management tool to limit development in rural areas and offer incentives for more intense development within urban areas.

...

(e) The county and cities will reconsider land use designations where it is evident transportation facilities and services cannot be financed or provided in sufficient time to maintain concurrency with land development.

2. Discussion

a. Positions of the Parties

Petitioner asserts that "The County has not used level of service as a growth management tool. The county continues to approve development that impacts roads that are already below the established LOS standard." McVittie PHB, at 18. Petitioner also contends that "The county has not 'reconsidered land use designations where it is evident transportation facilities and services cannot be financed or provided in sufficient time to maintain concurrency with land development.'" McVittie PHB, at 18-19.

The County responds that Petitioner “fails to relate her argument, which is identical to argument made in previous cases, to any of the amendments at issue in this case. As such, there is no basis for attack of the County’s amendments. Furthermore, she resorts to facts unsubstantiated in the record to attack the County’s compliance with TR 8.” County Response, at 24. Nonetheless, the County contends that a LOS of C for rural areas, as opposed to a LOS of E for urban areas, makes it more difficult to develop more intensive land uses in rural areas. Therefore growth will be concentrated in the urban area. County Response, at 25.

In reply, McVittie agrees that the “County set the LOS standard for rural areas at LOS C and that the concept of discouraging growth in the rural area is appropriate.” However, McVittie still takes issue with the County’s practice of declaring roads “in arrears” or “at risk for concurrency”. McVittie Reply, at 15.

b. Analysis

The Board agrees with the County with respect to this issue. Even in reply, McVittie fails to relate her arguments to the amendments accomplished by Ordinance No. 01-040. Further, as the Board determined in answering Legal Issue 3, the County has not added new projects to its Transportation Element by the amendments of Ordinance No. 01-040. Petitioners’ arguments are unsubstantiated and untimely. Petitioner’s challenge regarding Legal Issue 5 is **dismissed**.

3. Conclusion

The Board concludes that the Petitioner has abandoned her challenge to the internal consistency requirements of RCW 36.70A.070(preamble) and .060. Further, Petitioner has failed to carry the burden of proof showing that the County failed to comply with the consistency requirements of RCW 36.70A.210, relating to CPP TR 8. The challenge presented in Legal Issue 5 is **dismissed**.

F. Legal Issue 6

Did the County fail to comply with the public participation requirements of RCW 36.70A.020 (11), .035, .070 (preamble) and .140 when it adopted Ordinance 01-040?

1. Applicable Law

The challenged public participation provisions of the GMA are RCW 36.70A.020(11), .035, .070 (preamble), and .140. ^[4]

2. Discussion

a. Positions of the Parties

Petitioner claims that serious defects in the County's published notice interfered with public participation in the amendment of the transportation element, and that the Board should find Ordinance 01-040 not to be in compliance with RCW 36.70A.020(11) (citizen participation and coordination planning goal); .035 (notice reasonably calculated to provide notice of proposed amendments to comprehensive plans); and .140 (ensure public participation through broad dissemination of proposals and providing opportunity for comment). Citing *McVittie VI*, the Petitioner argues that the County had an obligation to "clearly and concisely describe the nature" of the actions being considered. *McVittie IV*, at 9.]

The public notice says that the proposed changes to the transportation element include "the inclusion of state highways and other state transportation facilities," and that the ordinance does not adopt new LOS standards, but instead "documents" state LOS "objectives." Contrary to this language, however, Petitioner asserts that the County adopted new Level of Service (LOS) standards for state roads when it passed Ordinance 01-040 on June 29. HB 1487 amended GMA to require that county comprehensive plan transportation elements include standards for state roads by December 2001; therefore, the County was required to adopt standards. As argued under Issue #2, the LOS "objectives" are "objective measures of need" and "benchmarks for determining adequacy," and therefore they *are standards*. According to *McVittie*, these standards were adopted as part of the plan's transportation element when the County incorporated them by reference, and the public had no notice of such an amendment.

Petitioner asserts further that the notice given not only fails the "clear and concise description" test but also "grossly misrepresents" the nature of the actions by implying that the County is merely incorporating objectives handed down by the state. *McVittie* asserts that some of the standards adopted were actually created by the County because "[t]he methods used for measuring were entirely a decision of the County." The County, she says, is merely claiming to "document" state objectives in order to avoid accountability. *McVittie PHB*, at 20-22.

The County responds that the State of Washington has not established LOS standards for State highways, so the County could not have adopted "Standards" its transportation element. It also insists that the petitioner has failed to acknowledge that the WSDOT has yet to establish LOS standards for highways of statewide significance. However, the County may be consulted by the WSDOT in reference to these standards, and the WSDOT has the ultimate discretion to establish the standards. Snohomish County also explains that when the GMA was amended in 1998, it required local comprehensive plans to reflect State established LOS standards for State highways. RCW 36.70A.070(6)(iii)(C). Moreover, the public notice for the Amended Ordinance No. 01-040 stated that the transportation element would be amended to "document LOS objectives approved by the Washington State Transportation Commission." County's Brief, at 30. The

County asserts that this statement accurately described the nature of the enactment and provided effective public notice as required by RCW 36.70A.140.

Respondent maintains that the interlocal agreement only establishes LOS conditions at which the State may request mitigation. Thus, it argues that the Petitioner's belief is based on a perception that the transportation element amendments included LOS standards created by the County without encouraging public involvement in the adoption of such standards. County's Brief, at 30. The interlocal agreement does not establish LOS standards; it only establishes LOS conditions below which mitigation may be requested by the state. Further, if there is no other improvement that can be made to a state owned intersection that receives a "LOS F condition," the state will not object to a development that impacts the state owned intersection.

The County also argues that the legislature stressed that the County's only role with respect to state highways is to assist in monitoring the performance of state facilities, evaluating improvement strategies, and assessing the impact of land use decisions on state facilities. Neither of these provisions indicate that the County is to include these standards for the purpose of ensuring state transportation facilities are adequate for development. The inclusion of state LOS standards provides the County with methods to monitor and evaluate the performance of state facilities for the purpose of assisting the state in planning land use and needed improvements. The County contends that the action-forcing requirement articulated by the Board in *McVittie I* cannot be applied to state facilities because Goal 12 applied by its terms to locally established LOS standards. RCW 36.70A.020(12). County's Brief, at page 35. Under direction of the legislature, the County will use state established LOS standards to monitor the performance of state highways. Due to these reasons, the County submits that it cannot be required to use state established LOS standards as a tool for ensuring adequacy is met.

The County suggests that in considering changes to classifications affecting locally established LOS standards in Ordinance No. 01-040, this does not represent a change in GMA policy. County Brief, at 38. In enacting these amendments, the Council neither adopted, nor considered adopting, increases or decreases in LOS standards, revisions to the methods used to measure performance, or deletions of existing standards.

In regard to whether the County should have included in the public notice an explicit statement of the transportation elements amendments describing the terms of the 1997 mitigation interlocal agreement between the County and the State, the County argues that the GMA does not require notice for two reasons. The County maintains that because the description of the mitigation thresholds did not effect an actual change or revision, but actually provides a picture of the County's transportation plan, then this does not meet the definition of a legislative action, or as they state, "a fundamental policy change." It next supports the claim by stating that the interlocal agreement is an independent and binding contract between the County and State that was open for public comment in 1997. County's Brief, at 39. The County also asserts that even if there was public comment, it would have "served no purpose" as the County is not able to unilaterally alter or amend the agreement.

b. Analysis

The Board concludes that the County's Notice was reasonably calculated to reach the affected and interested individuals. Not only was the Notice extensive and widely distributed (*see* Findings of Fact 5 and 6) the Board concludes that it was also accurate. As detailed in the Board's discussion of Issues 1 and 2, *supra*, the County Notice accurately conveyed that the LOS objectives provided by WSDOT and recommended by PSRC were not standards. *See* Finding of Fact 6. While the County did commit minor clerical errors in the Notice, ^[5] whatever confusion that might have been caused was cured by reading the larger context of the Notice and the Ordinance itself. Importantly, the Board concludes that these clerical errors do not suggest that there was any intent or effect of misleading the public. Therefore, these errors are not fatal to the "reasonably calculated" standard of RCW 36.70A.035.

3. Conclusion

Petitioner has failed to carry the burden of proof showing that the County failed to comply with the public participation requirements of RCW 36.70A.020(11), .035, .070 (preamble) and .140. The challenge presented in Legal Issue 6 is **dismissed**.

VI. INVALIDITY

1. Applicable Law

RCW 36.70A.302 provides in relevant part:

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

2. Discussion and Conclusion

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A finding of noncompliance with the requirements of the GMA is a necessary precedent for the

Board to consider a finding of invalidity. As noted above, the Board has not found the County in noncompliance. Therefore, Board concludes that it must reject Petitioner's request for a finding of invalidity.

VI. ORDER

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

The County's amendments to the Transportation Element of the County's GMA Comprehensive Plan, as adopted by Ordinance No. 01-040, and challenged by Petitioner, were **not clearly erroneous** and **comply** with the requirements of RCW 36.70A.020(3), (11) and (12), .035, .140, .070(preamble), .210 and the challenged provisions of RCW 36.70A.070(6).

So ORDERED this 8th day of January, 2002

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

Lois H. North
Board Member

Joseph W. Tovar, AICP
Board Member (Board Member Tovar also files a concurring opinion below)

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

Board Member Tovar's Concurring Opinion

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For reasons with which I concur, the Board dismisses Legal Issues 1 and 2 ^[6] without reaching the merits of Petitioner's arguments. This has the consequence that the Board will not address

the serious public policy questions and concerns which Ms. McVittie raises about the GMA relationship between local and state transportation planning. Nevertheless, I am compelled to offer several observations.

Petitioner and the County seem to agree that the phenomenon of County roads operating beyond capacity is due at least in part to the fact that portions of the State road network (e.g., SR 9) are failing. Where Petitioner and the County part ways is on the legal effect that a failing State road network has on the GMA adequacy of the linked County road network.

The County acknowledges that the State does have a GMA obligation to adopt levels of service for certain state facilities. However, the County contends that the Act's concurrency and adequacy mechanisms do not apply to WSDOT, that the County is powerless to compel WSDOT to do more than it has committed to in the ILA, and that the GMA does not create a County consequence for "spillover traffic" from the State system.

The premise that underlies Petitioner's arguments on these issues is that the GMA generally, and RCW 36.70A.020 (3) and (12) in particular, create a seamless planning regime that ultimately links the County's ability to issue development permits to the performance of the State-owned portions of the regional road network. Such linkage could be described in theory as: (a) the County's ability to issue land use permits is governed by (b) development regulations, including the County's concurrency ordinances, which in turn are governed by provisions of the GMA as well as (c) the provisions of the County comprehensive plan land use, transportation and capital facilities elements, which in turn are governed by provisions of the GMA and which set road "levels of service" that are affected by and therefore linked to (d) the "levels of service" being achieved (or not being achieved) on state road facilities.

There is great appeal in a vision of the GMA as a "seamless regime" which coordinates the land use/capital facilities/transportation plans and implementation efforts of local government with State transportation plans and transportation improvements. Unfortunately, such a vision of unified transportation planning under the GMA comes apart at the seam between (c) and (d) above. While there are threads in the Act to suggest that the State possibly could be compelled to

do more,^[7] I agree with my colleagues that the GMA's goals do not apply to the State because RCW 36.70A.020 says that the goals "shall be used *exclusively* for the purpose of guiding the development of comprehensive plans and development regulations."

Amendments to the Act to clarify that the GMA's goals should also provide direction to State agencies^[8] can only be achieved by the legislature. Likewise, addressing the documented infrastructure deficiencies in the State's road network can only be achieved by legislative action. Without better coordination between the State and local governments and serious investments in the State's road network, there is a serious risk that the promise of growth management in this region will unravel.

[1] In *McVittie v. Snohomish County*, (*McVittie VI*), CPSGMHB Case No. 01-3-0002, Final Decision and Order, July 25, 2001, the Board held:

[A]ll facilities included within a Capital Facilities Element [including Transportation Facilities] must have a minimum standard (LOS) clearly labeled as such (i.e., not “guidelines” or “criteria”).

McVittie VI, at 17.

[2] Exhibit J to the County Brief is a May 1, 2000, letter from the Puget Sound Regional Council to the County.

[3] *McVittie v. Snohomish County*, (*McVittie IV*), CPSGMHB Case No. 00-3-0006c, Final Decision and Order.

[4] RCW 36.70A.020(11) provides:

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

RCW 36.70A.035 provides in part:

(1) The public participation requirements of this chapter shall include notice procedures that are reasonably calculated to provide notice to property owners and other affected and interested individuals, tribes, government agencies, businesses, school districts, and organizations of proposed amendments to comprehensive plans and development regulation. Examples of reasonable notice provisions include:

- (a) Posting the property for site-specific proposals;
- (b) Publishing notice in a newspaper of general circulation in the county, city, or general area where the proposal is located or that will be affected by the proposal;
- (c) Notifying public or private groups with known interest in a certain proposal or in the type of proposal being considered;
- (d) Placing notices in appropriate regional, neighborhood, ethnic, or trade journals; and
- (e) Publishing notice in agency newsletters or sending notice to agency mailing lists, including general lists or lists for specific proposals or subject areas.

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

RCW 36.70A.070(preamble) provides:

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

RCW 36.70A.140 provides:

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services,

and consideration of and response to public comments. In enacting legislation in response to the board's decision pursuant to RCW 36.70A.300 declaring part or all of a comprehensive plan or development regulation invalid, the county or city shall provide for public participation that is appropriate and effective under the circumstances presented by the board's order. Errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed.

[5] For example, the Notice includes reference to House Bill 1497, which in fact was House Bill 1487. Section 2. A.4. Also, the Notice makes reference to the GMA's language about LOS for state-owned facilities as RCW 36.70A.060(6). The correct reference is RCW 36.70A.070.

[6] Issue 1 alleges that the County did not comply with the substantive effect of the GMA's transportation facilities goals. RCW 36.70A.020 (3) and (12). Issue 2 alleges that the County did not comply with the Act's requirement to reflect in its comprehensive plan level of service standards for state highways. RCW 36.70A.070(6)(a)(iii)(C).

[7] For example, RCW 36.70A.103 provides:

State agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter except as otherwise provided in RCW 71.09.250 (1) through (3) and 72.09.333.

The provisions of chapter 12, Laws of 2001 2nd sp. sess. do not affect the state's authority to site any other essential public facility under RCW 36.70A.200 in conformance with local comprehensive plans and development regulations adopted pursuant to chapter 36.70A.RCW.

[8] RCW 36.70A.020 applies only to cities and counties. If the legislature wished to have the GMA goals provide direction to state agencies as well, it would have to amend the Act. For example, adding a phrase to the preamble to .020 could help clarify the duty of state agencies under RCW 36.70A.103:

The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040 and to guide state agencies in meeting the requirement of RCW 36.70A.103 that they "shall comply with [city and county] comprehensive plans and development regulations adopted pursuant to this chapter."