CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

MASTER BUILDERS ASSOCIATION OF PIERCE COUNTY, TERRY L. BRINK, EDWARD ZENKER, ASSOCIATED GENERAL CONTRACTORS and TACOMP-PIERCE COUNTY CHAMBER OF COMMERCE – SOUTH COUNTY DIVISION,	)	**CPSGMHB Case No. 02-3-0010**
	)	**(*MBA*/*Brink*)**
Petitioners,	)	
v.	)	
PIERCE COUNTY,	)	**ORDER FINDING PARTIAL NONCOMPLIANCE AND CONTINUING INVALIDITY**
Respondent.	)	

I. Background

On February 4, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) issued its Final Decision and Order (**FDO**) in the above captioned case. The Board found portions of the Parkland Spanaway Midland Community Plan and implementing regulations noncompliant with the Act and issued a determination of invalidity for these noncompliant provisions of the PSMCP and implementing regulations. The FDO provided in relevant part:

> 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:
>
> Pierce County's enactment of Ordinance No. 2002-21s, adopting the Parkland Spanaway Midland Community Plan (PSMCP) was **clearly erroneous** with respect to the following provisions:
>
> - The adoption of the High Density Single Family (HSF) zone provisions, as

an amendment to the PSMCP, at the June 11, 2002 hearing, **does not comply** with the notice and public participation requirements of RCW 36.70A.035, .130 (2) and .140; and

- PSMCP Standard 24.4.2, regarding the locational criteria for applying the Single Family (SF) zone **is not guided by** and **does not comply** with RCW 36.70A.020(1) and (2).

Pierce County's enactment of Ordinance No. 2002-22s, adopting the PSMCP implementing, or zoning regulations was **clearly erroneous** with respect to the following provisions:

- The Residential Resource (RR) zoning designations for Area 1 (Midland/ North Fork Origin), Area 3 (North Fork Tributary), Area 4 (Historic Clover Creek Channel RR), Area 7 in its entirety (Military Road East RR), and Area 8 (14th Avenue East RR) are not appropriate urban densities and are **not guided by**, and **do not comply** with RCW 36.70A.020(1) and (2); and

- The Single Family (SF) zoning designation is not an appropriate urban density and is **not guided by**, and **does not comply** with RCW 36.70A.020(1) and (2).

In addition to finding these provisions of Ordinance Nos. 2002-21s and 2002-22s noncompliant with the noted goals and requirements of the Act, the Board has concluded these provisions substantially interfere with the fulfillment of goals 1, 2 and 11 of the GMA and enters a **determination of invalidity** for these noncompliant provisions of the PSMCP and implementing development regulations.

The Board **remands** Ordinance Nos. 2002-21s (the PSMCP) and 2002-22s (the IDRs – zoning regulations) to the County with the following directions:

1. By no later than **August 1, 2003**, the County shall take appropriate legislative action to bring the Parkland Spanaway Midland Community Plan and zoning regulations into compliance with the goals and requirements of the GMA, as interpreted and set forth in this Final Decision and Order (**FDO**).

2. By no later than **August 8, 2003**, the County shall file with the Board an original and four copies of a Statement of Action Taken to Comply (**SATC**) with the GMA, as interpreted and set forth in this FDO. The SATC shall attach copies of legislation enacted in order to comply. The County shall

simultaneously serve a copy of the SATC, with attachments, on Petitioners.

3. By no later than **August 21, 2003**, the Petitioners may file with the Board an original and four copies of Comments on the County's SATC. Petitioners shall simultaneously serve a copies of their Comments on the County's SATC on the County.

4. By no later than **September 4, 2003**, the County may file with the Board an original and four copies of the County's Reply to Comments. The County shall simultaneously serve a copy of such Reply on Petitioners.

Pursuant to RCW 36.70A.330(1), the Board hereby schedules the **Compliance Hearing** in this matter for **10:00 a.m. September 8, 2003** at the Board's offices. With the consent of the parties, the compliance hearing may be conducted telephonically.

If the County takes legislative compliance actions prior to the August 1, 2003 deadline set forth in section 1 of this Order, it may file a motion with the Board requesting an adjustment to this compliance schedule.

FDO, at 33-35.

On July 24, 2003, the Board received a "Motion to Revise Date of Compliance Hearing and for Expedited Hearing Date." Petitioners agreed to a revised compliance hearing date, and on July 25, 2003, the Board issued an Order rescheduling the compliance hearing for August 18, 2003. The Order still required the County to provide a Statement of Actions Taken to Comply by August 18, 2003, but gave Petitioners until August 15, 2003 to comment.

On August 8, 2003, the Board received Pierce County's "Statement of Actions Taken to Comply" (**SATC**). Attached to the SATC was a copy of Ordinance No. 2003-49s, with attachments.

On August 15, 2003, the Board received "Petitioners' Response to Statement of Actions Taken to Comply" with six attachments (A-F) (**MBA Comment**). That same day, the Board also received, "Memorandum of Respondent Pierce County Re: Statement of Actions Taken to Comply" (**County Answer**).

On August 18, 2003, the Board conducted the compliance hearing. Present for the Board were Board Members Edward G. McGuire, Presiding Officer, and Joseph W. Tovar. Petitioners MBA/ Brink was represented by G. Richard Hill and Courtney A. Kaylor. Lloyd P. Fetterly represented

Pierce County. Lynette Meachum (Board Extern), Tiffany Spier (MBA) and Hugh Taylor (Pierce County) also attended the hearing.

At the compliance hearing, due to the accelerated date of the hearing, the Presiding Officer gave the parties until August 25, 2003 to file simultaneous post hearing briefs.

On August 25, 2003, the Board received "Petitioners' Post-Hearing Brief on Compliance" (**MBA Post-HB**), with a "Supplemental Declaration of Courtney Kaylor;" and "Supplemental Memorandum of Respondent Pierce County," with attached declarations of "Sean Gaffney" and "Joyce Glass."

On August 26, 2003, the Board received "Petitioners' Motion to Strike" (**MBA Motion to Strike**). MBA's Motion to Strike requests that the Board strike the Declaration of Sean Gaffney, including Exhibits A-D, and those portions of the County Post-HB that discuss the Gaffney Declaration. MBA Motion to Strike, at 1-3.

On September 2, 2003, the Board received "Respondent's Memorandum in Opposition to Petitioner's, Master Builders Association Motion to Strike" and "Motion to Supplement the Record and the Evidence." The County contends that the Gaffney Declaration merely explains reference to routine "work around" provisions for land use permits (site plan review, PDD and PUD provisions). Additionally, and alternatively, the County seeks to supplement the record with the Gaffney Declaration.

On September 4, 2003, the Board received "MBAs Reply to Opposition to Motion to Strike and Response to Motion to Supplement" and a "Third Declaration of Courtney A. Kaylor."

II. ORDER ON MOTION TO SUPPLEMENT THE RECORD AND STRIKE

The Board generally agrees with the County's assessment of the Gaffney Declaration, ignoring specific project references, it generally illustrates the County's existing land use permit options and procedures. Such general information is of substantial assistance to the Board in reaching its decision. The County's Motion to Supplement is **granted**. The Gaffney Declaration is admitted as **Post-Hearing Exhibit No. 1**.

The MBA Motion to Strike is **denied**. The Gaffney Declaration and reference to it in the County Post-HB will be accorded the weight merited, if any, in the Board's deliberations.

III. PREFATORY NOTE

The Board will first address the noncompliant High Density Single Family (**HSF**) zone and PSMCP Standard 24.4.2 of the PSMCP; then address the Residential Resource (**RR**) and Single Family (**SF**) zoning designation and provisions of the SF implementing regulations.

IV. DISCUSSION of REMAND ISSUES

A. HSF Zone and Standard 24.4.2 of the PSMCP

1. HSF Zone:

In its FDO, the Board concluded that the adoption of the High Density Single Family (HSF) zone provisions in the PSMCP, did not comply with the notice and public participation requirements of RCW 36.70A.035, .130(2) and .140. FDO, at 33. The Board invalidated this provision. FDO, at 33

In response, the County readopted the HSF zone provision after providing notice and opportunity for public comment. Affidavits of Publication (Ex. A and B to the SATC) indicate that notice was published on May 7, 2003 and June 18, 2003, indicating the County would have a public hearing on compliance issues, including the HSF zone, on July 8, 2003. A public hearing was held and Ordinance 2003-49s was passed on that date. County Answer, at 2-3.

Petitioners offer no comment or objection on the County's action related to the HSF zone. MBA Comment, at 1-23; MBA Post-HB, at 1-17.

The Board finds and concludes that the May 7 and June 18, 2003 notices and the County's public hearing on July 8, 2003, satisfies the requirements of RCW 36.70A.035, .130(2) and .140. The County's actions related to the HSF zoning provisions, **comply** with the notice and public participation requirements of the Act. Further, the County's action has removed the substantial interference with Goal 11. Therefore, the Board **rescinds** the Determination of Invalidity pertaining to the HSF zone provision.

2. Standard 24.4.2:

In its FDO, the Board concluded that the PSMCP Standard 24.4.2, regarding the locational criteria for applying the Single Family (SF) zone was not guided by and did not comply with RCW 36.70A.020(1) and (2). FDO, at 33. The Board invalidated this provision. FDO, at 33.

In response, the County eliminated reference in Standard 24.4.2 to maintaining "low densities in keeping with existing neighborhoods" and replaced this phrase with maintaining "a predominant pattern of single-family housing types." County Answer, at 4-5; and Ordinance No. 2003-49s, Exhibit A, at 7.

Petitioners offer no comment or objection on the County's action related to PSMCP Standard 24.4.2. MBA Comment, at 1-23; MBA Post-HB, at 1-17.

The Board finds and concludes that the County's amendatory language to PSMCP Standard 24.4.2 is guided by and complies with the provisions of RCW 36.70A.020(1) and (2). The County's actions related to PSMCP Standard 24.4.2, **complies** with the noted Goals of the Act. Further, the County's action has removed the substantial interference with Goal 1 and 2. Therefore, the Board **rescinds** the Determination of Invalidity pertaining to PSMCP Standard 24.4.2.

B. Residential Resource (RR) Zoning and Single Family (SF) Zoning and Regulation

1. Residential Resource (RR) Zoning:

In its FDO, the Board concluded that the Residential Resource (RR) zoning designations for Area 1 (Midland/North Fork Origin), Area 3 (North Fork Tributary), Area 4 (Historic Clover Creek Channel RR), Area 7 in its entirety (Military Road East RR), and Area 8 (14th Avenue East RR) are not appropriate urban densities and were **not guided by**, and did **not comply** with RCW 36.70A.020(1) and (2). The Board invalidated these Residential Resource zoning designations. FDO, at 33-34.

In response, the County redesignated the zoning for Areas 3, 4, 7, 8 and 602 acres of Area 1, as Single Family (SF). SATC, at 4-6; Ordinance No. 2003-49s, Exhibit C; and demonstrative maps and overlays for compliance hearing. However, the County chose to attempt to justify the designation as it applied to two areas totaling 127 acres within Area 1 and maintain the RR zoning. SATC, at 5; Ordinance No. 2003-49s, Exhibit C; County Answer, at 5-8; and demonstrative maps and overlays for compliance hearing.

Position of the Parties:

The County contends that it reevaluated the RR designation for portions of Area 1, with the belief that it could justify such designation based upon the Board's holding in *Litowitz*. [1] Upon completing its G.I.S. analysis the County concluded that the "analysis revealed that 127 acres

within the Midland portion of the Plan area [Area 1] meet the three criteria set forth by the Board's decision and thus should be retained within the RR zone." SATC, at 6.

In response, MBA argues, "The GMHB has already considered and rejected the County's argument that the RR designation and zoning of the 127 acres within Area 1 complies with GMA. The GMHB should reject out of hand the County's attempt to relitigate this issue. MBA Comment, at 13. Petitioner quotes the Board's FDO, at 19, to illustrate that this issue has been decided:

> However, the Board does not reach the same conclusion for Area 1 (Midland/North Fork Origin). . . since the overlay maps show isolated, sporadic and scattered occurrences of flooding, wetlands, or priority habitats that can be appropriately addressed through existing critical areas regulations. Therefore the Board concludes the RR designations of Areas 1. . . are not appropriate urban densities and are not guided by, and do not comply with, Goals 1 and 2 of the Act.

MBA Comment, at 14, (underlining emphasis in MBA Comment).

Discussion

The large scale environmentally sensitive hydrologic system that provided the context for the Board's analysis in the FDO is the Clover Creek drainage. As noted in the MBA's quote from the Board's FDO, the 729 acres zoned RR in Area 1 contains "isolated, sporadic and scattered occurrences of flooding, wetlands or priority habitat that can be appropriately addressed through existing critical areas regulation." In essence, the Board concluded that Area 1 was not an integral and significant part of the large scale environmentally sensitive system at issue – Clover Creek. Nothing has changed.

In the County's proposal, the southernmost RR area appears to be at the source of an unnamed minor tributary located approximately 3 miles north of the North Fork of Clover Creek. The intervening land, between the southern RR proposal and the existing RR designation on the North Fork of Clover Creek, is designated for, and developed at, a variety of commercial uses, mixed uses and residential densities. Further, there is no indication that the northernmost proposal is even located within the Clover Creek drainage. These two areas (totaling 127 acres) within Area 1 continue the isolated, sporadic and scattered pattern of critical areas found noncompliant in the original action. The County has not persuaded the Board that these isolated areas cannot be appropriately addressed and protected through existing critical areas regulations.

Consequently, the 127 acres proposed as RR zoning within Area 1 are not justified under the *Litowitz* case and do not allow for appropriate urban densities. These designations are **not**

guided by, and **do not comply** with Goals 1 and 2 of the Act. Further, just as the original action was invalid, this action continues to be **invalid**. The Board will **remand** Ordinance 2003-49s with direction to the County to take appropriate legislative action to comply with the Act.

Conclusion:

The County's retention of 127 acres within Area 1 as RR does not allow for appropriate urban densities for these areas, and is **not guided by**, and **does not comply** with Goals 1 and 2 of the Act – RCW 36.70A.020(1) and (2).

2. Single Family (SF) Zoning and Regulations:

In its FDO, the Board concluded that the Single Family (SF) zoning designation is not an appropriate urban density and is **not guided by**, and **does not comply** with RCW 36.70A.020(1) and (2). The Board invalidated the Single Family zoning designations. FDO, at 33-34.

In response, the County amended the minimum and base densities within the Single Family (SF) zone from 2 – 4 du/ac to 4 du/acre. SATC, at 4, Ordinance No. 2003-49s, Exs. A and B; County Answer, at 4.

Position of the Parties:

MBA does not dispute that the County changed the minimum and base densities for the SF zone to 4 du/acre – an appropriate urban density. MBA Comment, at 1-23; MBA Post-HB, at 1-17. Instead MBA contends that the County's SF zone must "permit at least four dwelling units per acre on every property unless the property meets the *Litowitz* test." MBA Comment, at 9, (emphasis in original). MBA continues, "During the administrative proceedings on remand, MBA submitted evidence showing that the Regulations (including the lot area, lot width and lot coverage requirements) preclude the attainment of four dwelling units per acre on at least some SF zoned properties." *Id*.

MBA also stated, "While the minimum and base densities appear to permit urban densities, the Regulations actually preclude them on at least some properties. The County's refusal to even examine the effect of the Regulations on densities is a flagrant attempt to make an end-run around the density requirements of the GMA and FDO." *Id*., at 10. MBA discounted the County's claim that, if necessary, a planned development district (**PDD**) process could be used to achieve urban densities, because the PDD criteria do not include a statement that "a PDD must be granted if necessary to achieve urban densities on the site." *Id*., at 12.

The County contends that the request of MBA to "eliminate the SF zone 60 foot minimum lot width and 6,000 average lot size and eliminate the impervious surface restrictions from the SF zone" is a conclusory recommendation based upon analysis of a single site. County Answer, at 8.

In its post hearing brief, MBA contends that outside the PSMCP area there are no County-wide impervious surface limitations, [2] while for the SF zone in the PSMCP area there are impervious surface limitations. MBA Post-HB, at 5. Additionally, MBA notes that instead of a single site analysis, MBA provided evidence of several examples [the hypothetical Brink Ranch Subdivision, Berkshire and Ridge at Sedona Subdivisions, and Golden Range and Melrose Station Subdivisions [3]] that would preclude 4 du/acre. *Id*., at 5-8. MBA then contends that the County's site plan review, planned unit development (**PUD**) and planned development district (**PDD**) processes are not available to developers to achieve four units per acre in the SF zone. *Id*., at 10-14.

In response, the County contends that by making different assumptions about the hypothetical Brink Subdivision, a density of 4 du/acre can be attained. County Post-HB, at 3-5. Additionally, the County contends that the site plan review and PDD processes "are available to allow a developer to deviate from the standards of a zone." *Id*., at 5-11.

Discussion

It is undisputed that the County's zoning requirements for the SF zone in the PSMCP area require: 1) a base and minimum density of 4 dwelling units per acre; 2) an average lot size of 6,000 square feet and no minimum lot size; and 3) a minimum lot width of 60 feet; and 4) a 25% maximum percent total impervious cover in open space corridors. [4] *See* PCC 18A.35.020(B)(2). On its face, the zoning provisions for the SF zone in the PSMCP area allow more than four dwelling units per acre – average lot sizes of 6,000 square feet yield over 7 lots per acre. Not only does this exceed the 4 units per acre threshold that the parties to this case agree is an appropriate urban density, it can exceed the density threshold that the Board has previously acknowledged supports transit objectives. [5] The 6000 square foot average lot size can yield an excellent urban density.

However, the Board recognizes that other restrictions and limitations may inevitably reduce the maximum gross yield of lots. But given the average lot size requirement of 6000 square feet, there appears to be ample area and opportunity to achieve an appropriate urban density of at least 4 du/acre. The County also seems to recognize this also since it discusses various flexibility

provisions in its code that allow for urban densities while permitting deviations from the prescribed standards of a zone. County Post HB, at 5-11, *see also* Gaffney Declaration.

Petitioners do not contend that the SF zoning restrictions preclude attainment of 4 du/acre within the SF zone throughout the entire PSMCP area; instead, they state, "While the minimum and base densities appear to permit urban densities, the Regulations actually preclude them *on at least some properties*." MBA Comment, at 10, (emphasis supplied). Nonetheless, relying upon *LMI/ Chevron v. Town of Woodway* (***LMI*/*Chevron***), CPSGMHB Case No. 98-3-0012, Final Decision and Order, (Jan. 8, 1999), MBA asserts that the SF zone must "permit at least four dwelling units per acre on every property. . ." *Id*., at 8-9. MBA misreads the *LMI/Chevron* case.

In *LMI/Chevron*, the Board held, "the GMA requires every city to *designate* all lands within its jurisdiction at appropriate urban densities." *LMI/Chevron*, FDO, at 23; (underlining in original, *italics* supplied). This concept of *designating* lands at appropriate urban densities within unincorporated UGAs was extended to counties and zoning designations in *Forster Woods Homeowners Association, et al., v. King County* (***Forster Woods***), CPSGMHB Case No. 01-3-008c, Final Decision and Order, (Nov. 6, 2001), at 32. Hence, designation of urban lands at urban densities, within city limits and UGAs, is what the GMA requires. This is the GMA requirement the County must meet.

Petitioners seem to assert that every parcel or property within the city-limits and within an unincorporated UGA must ultimately be developed at at least 4 du/acre. The GMA does not require this, nor has the Board ever said this. In reviewing the Future Land Use Map in the Litowitz and LMI/Chevron cases, the Board focused on the question of appropriate land use designations in an area-wide context, not a parcel-specific one. When translating densities from an area-wide FLUM to a localized parcel-specific zoning map it is expected that *de minimus* variations will occur. However, even in these limited situations jurisdictions can, and are encouraged to, attain urban densities through site design, cluster development, lot averaging, zero

[6]

lot line zoning, and other local innovative techniques.

The County has shown that the change of densities in the SF zone from 2-4 du/acre to 4 du/acre no longer substantially interferes with Goals 1 and 2 of the Act. Petitioners have not carried their burden of proof to demonstrate that the County's SF zoning designations, including SF zone requirements, in the PSMCP area do not allow for, and permit, appropriate urban densities. The Board concludes that the County's SF zoning designations, and SF zone requirements, for the PSMCP area permit appropriate urban densities, and **comply** with the goals and requirements of the GMA, specifically Goals 1 and 2 – RCW 36.70A.020(1) and (2).

Conclusion

The Board concludes that County's SF zoning designations and SF zone requirements for the PSMCP area permit appropriate urban densities, and **comply** with the goals and requirements of the GMA, specifically Goals 1 and 2. Further, the County's action has removed the substantial interference with Goal 1 and 2. Therefore, the Board **rescinds** the Determination of Invalidity pertaining to the SF zoning in the PSMCP area.

V. FINDINGS and CONCLUSIONS

Findings of Fact:

1. The Board's February 4, 2003 Final Decision and Order remanded Ordinance Nos. 2002-21s and 2002-22s, and directed Pierce County to take appropriate legislative action regarding the HSF zone, PSMCP Standard 24.4.2, the SF zoning and RR zoning to achieve compliance with the Act.

2. On July, 8 2003, the County adopted Ordinance No. 2003-49s, pursuant to the Board's remand.

3. On August 8, 2003, the County timely filed its SATC, with attached copies of Ordinance No. 2003-49s.

4. Comment, Answer and Post Hearing Briefs were all timely filed.

5. RCW 36.70A.330 requires the Board to conduct a compliance hearing. The Board conducted the compliance hearing on August 18, 2003.

6. Affidavits of Publication indicate that notice was published on May 7, 2003, and June 18, 2003, indicating the County would have a public hearing on compliance issues, including the HSF zone, on July 8, 2003. Ex. A and B to the SATC.

7. PSMCP Standard 24.4.2 was amended to delete references to maintaining "low densities in keeping with existing neighborhoods" and replaced this phrase with maintaining "a predominant pattern of single-family housing types." Ordinance No. 2003-49s, Exhibit A, at 7.

8. The zoning for Areas 3, 4, 7, 8 and 602 acres of Area 1, was redesignated by the County from Residential Resource (RR) to Single Family (SF). SATC, at 4-6; Ordinance No. 2003-49s, Exhibit C; and demonstrative maps and overlays for compliance hearing.

9. The zoning for two areas, totaling 127 acres within Area 1, retained the RR zoning. SATC, at 5; Ordinance No. 2003-49s, Exhibit C; County Answer, at 5-8; and

demonstrative maps and overlays for compliance hearing.

10. The two areas, totaling 127 acres within Area 1, which the County retained as RR, still indicate an isolated, sporadic and scattered pattern of critical areas. These areas are not an integral and significant part of the large scale environmentally sensitive system – Clover Creek drainage. Demonstrative maps and overlays for compliance hearing and HOM Exs. 3-11.

11. The County amended the minimum and base densities within the Single Family (SF) zone from 2 – 4 du/ac to 4 du/acre. SATC, at 4, Ordinance No. 2003-49s, Exs. A and B; County Answer, at 4.

12. The County's zoning requirements for the SF zone in the PSMCP area require: 1) a base and minimum density of 4 dwelling units per acre; 2) an average lot size of 6,000 square feet and no minimum lot size; 3) a minimum lot width of 60 feet; and 4) a 25% maximum percent total impervious cover in open space corridors. *See* PCC 18A.35.020(B)(2).

Conclusions of Law:

1. Based on the Board's discussion and Findings of Fact 1-8 and 11-12, *supra*, the Board concludes that Pierce County's enactment of Ordinance No. 2003-49s **complies** with the goals and requirements of the Growth Management Act, as set forth and interpreted in the Board's February 4, 2003 FDO. Specifically the Board finds compliance as it relates to: 1) the HFS zone; 2) PSMCP Standard 24.4.2; 3) the redesignation of lands from RR to SF in Areas 3, 4, 7, 8 and 602 acres in Area 1; and 4) the designation of the SF zoning density designation to 4 du/acre, including the SF zone requirements.

2. Based on the Board's discussion and Findings of Fact 9-10, *supra*, the Board concludes, that Pierce County's enactment of Ordinance No. 2003-49s was again **clearly erroneous** and **does not comply** with the goals and requirements of the GMA, as set forth and interpreted in the Board's February 4, 2003 FDO as it relates to the Residential Resource (RR) zone for the two areas totaling 127 acres in Area 1 (Midland/North Fork Origin).

VI. FINDING OF PARTIAL NONCOMPLIANCE

Based upon review of the Board's February 4, 2003, Final Decision and Order, the County's SATC, Ordinance No. 2003-49s, the briefing provided, comments and argument offered at the compliance hearing, Findings of Fact 1-12 and the conclusions of law, *supra*, the Board finds:

- In adopting Ordinance No. 2003-49s, Pierce County has **complied** with the goals and

requirements of the GMA as set forth in the aforementioned Board Order, relating to: 1) the HSF zone; 2) PSMCP Standard 24.4.2; 3) the redesignation of Areas 3, 4 7, 8 and 602 acres in Area 1 from RR to SF zoning; and 4) modifying the densities for the SF zone to be a base and minimum density of 4 du/acre, and SF zone requirements. The Board therefore enters a **Finding of Compliance** for Pierce County regarding these provisions. Additionally, for these provisions, the Determination of Invalidity is **rescinded**.

- In adopting Ordinance No. 2003-49s, Pierce County has **not complied** with the goals and requirements of the GMA, as set forth in the aforementioned Board Order [Goals 1 and 2 – RCW 36.70A.020(1) and (2)], relating to the County's retention of the RR zone for 127 acres in Area 1. The Board therefore enters a **Finding of Continuing Noncompliance** for Pierce County regarding this provision.

VII. CONTINUING INVALIDITY

The Board's FDO provided:

> In addition to finding these provisions of Ordinance Nos. 2002-21s and 2002-22s noncompliant with the noted goals and requirements of the Act, the Board has concluded these provisions substantially interfere with the fulfillment of goals 1, 2 and 11 of the GMA and enters a **determination of invalidity** for these noncompliant provisions of the PSMCP and implementing development regulations.

Pursuant to its deliberations following the compliance hearing, the Board now finds that the County's adoption of Ordinance No 2003-49s removes the substantial interference with the fulfillment of Goal 1, 2 and 11 as it relates to: 1) the HSF zone; 2) PSMCP Standard 24.4.2; 3) the redesignation of Areas 3, 4, 7, 8 and 602 acres of Area 1 from RR to SF; and 4) adjusting the densities in the SF zone to 4 du/acre and SF zoning requirements. Consequently, the Board hereby **rescinds** the **Determination of Invalidity** entered in that Order as it relates to these provisions.

However, the Board enters a **Continuing Determination of Invalidity** on the adoption of Ordinances No. 2003-49s, as it relates to the Residential Resource (RR) zone for the two areas totaling 127 acres in Area 1, since the County's action on this issue continues to substantially interfere with the fulfillment of Goal 1 and 2 of the Act - RCW 36.70A.020(1) and (2).

VIII. ORDER

Based upon review of the FDO, the SATC, Ordinance No. 2003-49s, the pre and post hearing briefing and exhibits submitted by the parties, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

Pierce County's enactment of Ordinance No. 2003-49s, amending the Parkland Spanaway Midland Community Plan and implementing regulations, was **clearly erroneous** with respect to the following provision:

- The two areas totaling 127 acres of Residential Resource (RR) zoning designations within Area 1 (Midland/North Fork Origin) are not appropriate urban densities and are **not guided by**, and **do not comply** with, RCW 36.70A.020(1) and (2).

In addition to finding this provision of Ordinance Nos. 2003-49s noncompliant with Goals 1 and 2 of the Act, the Board has concluded this provision continues to substantially interfere with the fulfillment of Goals 1 and 2 of the GMA and enters a **Continuing Determination of Invalidity** for this noncompliant provision of the PSMCP implementing development regulations.

The Board **remands** Ordinance No. 2003-49s to the County with the following directions:

1. By no later than **December 9, 2003**, the County shall take appropriate legislative action to bring the Parkland Spanaway Midland Community zoning regulations (RR zone), as applied to 127 acres in Area 1, into compliance with the goals and requirements of the GMA, as interpreted and set forth in the February 4, 2003 FDO and this Order.

2. By no later than **December 16, 2003**, the County shall file with the Board an original and four copies of a Statement of Action Taken to Comply (**SATC**) with the GMA, as interpreted and set forth in the FDO and this Order. The SATC shall attach copies of legislation enacted in order to comply. The County shall simultaneously serve a copy of the SATC, with attachments, on Petitioners.

3. By no later than **January 5, 2004**, the Petitioners may file with the Board an original and four copies of Comments on the County's SATC. Petitioners shall simultaneously serve copies of their Comments on the County's SATC on the County.

4. By no later than **January 8, 2004**, the County may file with the Board an original and four copies of the County's Reply to Comments. The County shall simultaneously serve a copy of such Reply on Petitioners.

Pursuant to RCW 36.70A.330(1), the Board hereby schedules the **Second Compliance Hearing** in this matter for **10:00 a.m. January 15, 2004,** at the Board's offices. With the consent of the

parties, the compliance hearing may be conducted telephonically.

If the County takes legislative compliance actions prior to the December 9, 2003 deadline set forth in section 1 of this Order, it may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 4th day of September 2003.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Edward G. McGuire, AICP
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.

[1]

"When environmentally sensitive systems are large in scope (*e.g.* watershed or drainage sub-basin), their structure and functions are complex and their rank order value is high, a local government may choose to afford a higher level of protection [than achieved by critical areas regulations] by means of land use plan designations [on the FLUM] lower than 4 du/acre." *See Litowitz v. City of Federal Way*, CPSGMHB Case No. 96-3-0005, Final Decision and Order, (Jul. 22, 1997), at 12.

[2]

MBA does acknowledge that for the Gig Harbor Peninsula Community Plan there is a 40% impervious cover limitation. MBA Post HB, at 5.

[3]

The Board notes that from the briefing provided, it is not clear whether other than the "hypothetical Brink subdivision" the "subdivisions" are proposed, approved or existing subdivisions.

[4]

The Board notes that this provision of Pierce County's Code deals with "impervious cover *in open space corridors*," yet this limiting factor is not distinguished or argued in any of the briefing provided by the parties.

[5]

In an early case, the Board stated

> The Board takes official notice of *Public Transportation and Land Use Policy*, Boris Pushkarev and Jeffrey Zupan, Indiana University Press, Bloomington, Indiana, 1977. This work concludes that public transit usage is minimal below a net residential density of seven dwelling units per acre.

Bremerton v. Kitsap County, CPSGMHB Case No. 95-3-0039, Final Decision and Order, (Oct. 9, 1995), at 50, fn. 32.

[6]

It should be the exception, rather than the rule, that lands within UGAs do not yield a minimum density of 4 du/acre. In such exceptions, a variety of flexible regulatory mechanisms are available to local governments to accommodate new development when challenged by difficult topography, parcel shapes or other localized constraints. Nevertheless, the Board cautions against reliance on certain pre-GMA tools, such as planned unit development permits and site specific rezones, as the primary mechanism to enable developers to reach the GMA-mandated minimum urban densities. The growth accommodation mandate of RCW 36.70A.110 and the permit processing guidance of RCW 36.70A.020(7) would be thwarted if, in order to meet these mandates, an applicant would also be required to show "changed circumstances" (pre-GMA rezone criteria) or "public benefit" (classic PUD criteria).