

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

	)	
CITIZENS FOR RESPONSIBLE	)	<b>Case No. 03-3-0013</b>
GROWTH, RUTH BRANDAL and	)	
JODY McVITTIE,	)	<i>(Citizens)</i>
	)	
Petitioners,	)	
	)	
v.	)	
	)	
SNOHOMISH COUNTY,	)	<b>FINAL DECISION and ORDER</b>
	)	
Respondent,	)	
	)	
CRESCENT CAPITAL X and	)	
MASTER BUILDERS	)	
ASSOCIATION OF KING AND	)	
SNOHOMISH COUNTIES and	)	
SNOHOMISH COUNTY-CAMANO	)	
ASSOCIATION OF REALTORS	)	
	)	
Intervenors.	)	

**I. Procedural Background**

**A. General**

On June 13, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Citizens for Responsible Growth, Ruth Brandall and Jody McVittie (**Petitioners** or **Citizens**). The matter was assigned Case No. 03-3-0013, and is captioned as *Citizens for Responsible Growth, et al., v. Snohomish County*. Petitioners challenge Snohomish County’s (**Respondent** or **County**) adoption of Ordinance Nos. 03-019, 03-020 and 03-021. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**) and State Environmental Policy Act (**SEPA**).

On June 19, 2003, the Board issued its “Notice of Hearing” and held the prehearing conference

on July 14, 2003.

On July 17, 2003 the Board issued its “Prehearing Order and Order on Intervention” (**PHO**). The PHO set the final schedule and Legal Issues to be addressed by the Board in this matter. The PHO also **granted** intervenor status to Crescent Capital X (**CCX**) and the Master Builders Association of King and Snohomish Counties and Snohomish County-Camano Association of Realtors (**MBA**).

On August 21, 2003, the Board received Petitioners’ “Motion Requesting Amendment to PFR.”

On September 3, 2003, the Board received: 1) Snohomish County’s Response to Motion to Amend PFR;” and “Master Builders Association and Snohomish County-Camano Association of Realtors Response to Petitioners’ Motion to Amend PFR.”

On September 9, 2003, the Board issued an “Order on Request to Amend PFR” (**PFR Order**). The PFR Order indicated that the Board would defer ruling on the proposed amendment to the PFR until either the hearing on the merits or the Final Decision and Order (**FDO**).

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

On July 14, 2003, the Board received “Snohomish County’s Index to the Record” (**Index**). The Index listed 122 items by Index Number.

The deadline for filing motions to supplement, as set forth in the PHO, was August 4, 2003. Both the Petitioners and the County moved, in a timely manner, to supplement the record.

On August 15, 2003, the Board issued an “Order on Motions” (**OoM**). The OoM addressed both motions to supplement the record and dispositive motions. That portion of the OoM dealing with the motions to supplement addressed 25 different items offered by the parties. The OoM admitted 12 items and assigned them Supplemental Exhibit Nos. 1-12.

On September 9, 2003, the Board received Snohomish County’s Revised Index and Core Documents (C-1 through C-7).

On October 13, 2003, the Board received an *untimely* filing entitled “Snohomish County’s Motion to Supplement the Record,” with 10 attached items - labeled A through J. The County also offered to supplement the record with two other items at the Board’s request. MBA also moved to supplement the record in a footnote of its October 13, 2003 Response Brief.

On October 17, 2003, the Board received Petitioners’ “Response to County’s Motion to Supplement, and Motion to Strike Portions of the County’s Brief (as it stands and as it is incorporated into other briefs).” In brief, Petitioners object to two of the items offered by the

County.

At the October 23, 2003 hearing on the merits, the presiding officer ruled on the items the County and MBA offered as supplemental exhibits and Petitioners' motion to strike. Those rulings are reflected in the Table under Preliminary Matters *infra*.

### C. Dispositive Motions

The deadline for filing motions to supplement, as set forth in the PHO, was August 4, 2003. The County and MBA filed timely dispositive motions; Petitioners filed a timely response, and a timely reply was received.

The Board did not hold a hearing on the dispositive motions.

On September 9, 2003, the Board issued its "Order on Motions." The OoM addressed both motions to supplement the record and dispositive motions. The OoM: 1) **denied** MBA's motion to dismiss reference to Goals 1 and 12 from Legal Issue 1; 2) **denied** the County's motion to dismiss Petitioner Brandal's challenge to Ordinance Nos. 03-019 and 03-020; 3) **granted** the County's motion to dismiss Petitioner Brandal's challenges to Ordinance No. 03-021 for lack of GMA standing; and 4) **granted** the County's motion to dismiss Legal Issue 5 for lack of Petitioners' SEPA standing.

### D. Briefing and Hearing on the Merits

On September 15, 2003, the Board received "Petitioner's Prehearing Brief and Request to Take Notice" (**Citizens PHB**), with an Exhibit List and 28 attached exhibits.

On October 13, 2003, the Board received: 1) "Snohomish County's Prehearing Brief" (**County Response**), with 19 attached exhibits; 2) "Intervenor Crescent Capital X Prehearing Response Brief" (**CCX Response**), with three attached exhibits; and 3) "Intervenors Master Builders Association of King and Snohomish Counties and Snohomish County-Camano Association of Realtors Joint Prehearing Response Brief" (**MBA Response**), with four attached exhibits.

On October 17, 2003, the Board received "Petitioners' Reply Brief" (**Citizens Reply**), with one proposed exhibit.

On October 23, 2003, the Board held a hearing on the merits in the training room adjacent to the Board's Office at Suite 2470, 900 4th Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, and Joseph W. Tovar were present for the Board. Newly appointed

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Board Member Bruce Laing attended and observed the hearing. Ruth Brandal appeared *pro*

se; Jody McVittie appeared on behalf of Citizens and herself. Respondent Snohomish County was represented by Brent Lloyd. Tom Ehrlichman represented Intervenor MBA/Realtors, Duana Koloušková represented Intervenor CCX. Andrew Lane (Snohomish County), Richard Rawlings (CCX) and David Toyer (MBA/Realtors) also attended the hearing. Court reporting services were provided by Scott Kindle of Mills and Lessard Inc. The hearing convened at 10:00 a.m. and adjourned at approximately 12:30 p.m. The Board ordered a transcript of the proceedings.

On November 4, 2003 the Board received the transcript of the October 23, 2003 Hearing on the Merits (**HOM Transcript**).

## **II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF and STANDARD OF REVIEW**

Petitioners challenge Snohomish County's areawide rezone and amendments to its development regulations – development phasing overlay (**DPO**), as adopted by Ordinance Nos. 03-019, 03-020 and 03-021. Pursuant to RCW 36.70A.320(1), the County's Ordinances are presumed valid upon adoption.

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

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

Pursuant to RCW 36.70A.3201 the Board will grant deference to Snohomish County in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. As the State Supreme Court has stated, “Local discretion is bounded . . . by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board (King County)*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). Division II of the Court of Appeals further clarified, “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, 108 Wn.App. 429, 31 P.3d 28 (Wn.App. Div. II, 2001).

In affirming the *Cooper Point* court, the Supreme Court stated:

Although we review questions of law *de novo*, we give substantial weight to the Board's interpretation of the statute it administers. *See Redmond*, 136 Wn.2d at 46. Indeed "[I]t is well settled that deference [to the Board] is appropriate where an administrative agency's construction of statutes is within the agency's field of expertise . . .

*Thurston County v. Western Washington Growth Management Hearing Board*, Docket No. 71746-0, November 21, 2002, at 7.

**iii. board jurisdiction, PreLIMINARY MATTERS, prefatory note and ABANDONED ISSUES**

**A. Board Jurisdiction**

The Board finds that the Petitioners' PFR was timely filed, pursuant to RCW 36.70A.290(2);

[\[2\]](#)

Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged ordinances, which amends the County's implementing development regulations for the Lake Stevens UGA [subarea] Plan, pursuant to RCW 36.70A.280(1)(a).

**B. PreLIMINARY MATTERS**

Amendment to PFR re: Invalidity:

Petitioner's August 21, 2003 request to amend the PFR asked the Board to include a request for invalidity in the relief section of the PFR. The County and Intervenors objected since invalidity was not requested in the original PFR or included as a Legal Issue in the PHO. The Board deferred ruling on this matter until either the HOM or FDO. The Board orally granted this motion at the HOM. *See* HOM Transcript, at 5-6.

The Board's Rules of Practice and Procedure allow a PFR to be amended after 30-days of original filing with the approval of the presiding officer. WAC 242-02-260. The Board views its authority to enter a determination of invalidity as a remedy which it is empowered to impose if the Board finds noncompliance, remands and determines that the continuing validity of the noncompliant action substantially interferes with the fulfillment of the goals of the Act. Granting the amendment to the PFR will not impose any unreasonable or unavoidable hardship on the parties nor impede the orderly resolution of this matter. Petitioners' motion to amend the PFR to include invalidity within the relief requested section is **granted**.

Motions to Supplement:

At the HOM, the Board orally ruled on the various items offered by the County and MBA as supplemental evidence to the record. The table below reflects those items that the Board concluded may be necessary or of substantial assistance to the Board in rendering its decision. See HOM Transcript, at 6 and 7-11.

<b>Proposed Exhibit: Documents</b>	<b>Ruling</b>
<b>Snohomish County Items:</b>	
A. Memo to Planning Commission from Kamuron Gurol, dated January 19, 2001.	<i>Denied</i>
B. 8 ½ x 11 inch Display map showing DPO and areawide rezone area (Ord. No. 03-020).	<i>Admitted – HOM Ex. 1</i>
C. Memo to Snohomish County Council from Faith Lumsden, dated August 22, 2001.	<i>Denied</i>
D. Ordinance No. 01-074, Modifying Lake Stevens UGA.	<i>Board takes notice – HOM Ex. 2.</i>
E. Ordinance No. 01-077, adopting UGA-DPO provisions into the Snohomish County Code.	<i>Board takes notice – HOM Ex. 3.</i>
F. Ordinance No. 01-075, adopting areawide rezone to implement Lake Stevens UGA Plan.	<i>Board takes notice – HOM Ex. 4.</i>
G. Snohomish Count Code Chapter 30.33, with 2003 amendments included.	<i>Board takes notice – HOM Ex. 5.</i>
H. Ordinance No. 03-018, amending SCC regarding stormwater detention facilities.	<i>Board takes notice – HOM Ex. 6.</i>
I. County response to McVittie information requests, dated September 12, 2003.	<i>Admitted – HOM Ex. 7.</i>
J. Motion 01-371, adopting 2002-2007 TIP	<i>Board takes notice – HOM Ex. 8.</i>
<b>MBA Items – Pending County documents:</b>	

1. Addendum No. 39, related to the pending 2004-2009 Capital Improvement Program (CIP).	<i>Denied</i>
2. Executive Council approval form regarding the pending 2004-2009 TIP.	<i>Denied</i>
3. Unnumbered draft motion to adopt the pending TIP	<i>Denied</i>
4. 2003 Surface Water Management Annual Construction Program and Six Year Plan.	<i>Already in Record</i>
<b>Petitioner Item:</b>	
1. Ordinance No. 03-099, amending definitions in zoning code.	<i>Board takes notice – HOM Ex. 9.</i>

### Motion to Strike:

In the motion to strike, Petitioner identified several sentences and paragraphs to be struck since they referenced, or alluded to information from exhibits that were not in the record, but were part of the County’s motion to supplement the record.

At the HOM, the Board **denied** the motion to strike. However the Board noted that reference to exhibits not in the record, or argument based upon non-record evidence would not be considered by the Board in reaching its decision. *See* HOM Transcript, at 7.

### **C. PREFATORY NOTE**

The Lake Stevens UGA Plan (**LSUGA Plan**) includes a Capital Facilities Element. Within this element, the County states, “The following are key findings of the capital facilities plan *for the Lake Stevens UGA: There is a gap between the capital facility needs and the public funding*

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*available for surface water and transportation.* ” *See* Ex. C-1, LSUGA Plan, at 8-3 (emphasis supplied). When a “gap” or “revenue shortfall” between needed facilities and ability to finance them occurs, the GMA requires the jurisdiction to “reassess the land use element” to respond to such revenue shortfalls. *See* RCW 36.70A.070(3)(e). Reduction of the size of the UGA is one obvious response to address a revenue shortfall. However, in lieu of reducing the size of the UGA, there are several other accepted options available as part of the reassessment process. These options are recognized and set forth in the LSUGA Plan.

The LSUGA Plan’s key findings continue:

[This Plan] describes a number of options as a *response to the revenue shortfall*, including:

- Reducing the LOS [level of service standards].
- Increasing the revenues available to pay for the necessary facilities.
- Reducing the average cost of facilities.
- *Reducing demand by timing development* or redistributing growth to other areas.
- Reducing demand for services through conservation programs

*Id.* (emphasis supplied.), *see also Id.*, at 5-47. Thus, one means of addressing a revenue shortfall is to time or phase development to reduce demand. This is the approach Snohomish County undertook in relation to the Lake Stevens UGA in relation to its revenue shortfall for transportation and surface water.

When Snohomish County adopted the LSUGA Plan, it included provisions for a Development

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Phasing Overlay (**DPO**). *See* Ex. C-1, LSUGA Plan, at 8-23 through 8-28. A DPO map appears in the LSUGA Plan, and the LSUGA Plan also includes a zoning map denoting the DPO overlay area. *Id.*, at Figures 8-4 and 3-2, respectively. The DPO applies within the unincorporated area of the Lake Stevens UGA. The Plan's DPO map indicates "Green" and "Red" areas. *Id.*, at Figure 8-4 and Appendix 8-A. The "Green" area is that "portion of the Lake Stevens UGA where capital project costs match the available financial capacity of the UGA. In other words, it is the area where the total expected revenues from the UGA over the lifetime of

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the Plan are equal to the capital needs identified within that area." *Id.*, at 8-25. The "Red" area is that portion of the Lake Stevens UGA area where "there are insufficient funds available to pay for necessary capital facilities. . . .In the Red areas, urban development would be deferred until financing of the requisite capital facilities is assured." *Id.*, at 8-26. In essence the "Red" area is the area identified by the DPO. Figure 3-2, in the LSUGA Plan shows the implementing zoning map for the LSUGA and essentially indicates the "Red" area as crosshatched and noted with the DPO suffix.

It is important to note that this case does not involve the size of the Lake Stevens UGA, nor *whether* the area within the Lake Stevens UGA will be urban, nor *whether* it will be provided with adequate urban facilities and services within the planning period (2012), nor *whether* it will be developed at urban intensities and densities. Since the land is within the Lake Stevens UGA, the GMA requires these outcomes to occur within the planning period - by 2012. The question posed by the DPO is *when* (*i.e.*, the timing and phasing of) the financing of the requisite capital facilities and services is assured to allow development to proceed. More specifically, at issue in this case are the amended procedures to be employed by the County to remove a "Red" area [the DPO] designation, and the County's subsequent removal of an area from the DPO or "Red" area.

Petitioners challenge three Ordinances adopted by the County, the first two of which amend the County's implementing development regulations as they relate to the County's procedures for [\[6\]](#)

removing the DPO (Ordinance Nos. 03-019 and 03-021). Ordinance No. 03-019 amends the provisions for the County Hearing Examiner to remove the DPO and rezone areas; Ordinance No. 03-021 amends the procedures for the County Council to remove the DPO and approve areawide rezones. The third Ordinance (No. 03-020) is an areawide rezone adopted by the County Council that removes the DPO per the provisions of Ordinance No. 03-021. Ordinance No. 03-021 was enacted prior to, and became effective before, the enactment of Ordinance No. 03-020. (*See* Appendix A, Findings of Fact (**FoF**) 14-17.)

Petitioners allege that all three Ordinances fail to comply with the UGA requirements, the consistency and implementation requirements, and certain goals of the GMA. Petitioners also allege that one Ordinance – Ordinance No. 03-019 – was enacted in violation of the state review and submittal requirements of the Act (review by the Department of Community, Trade and Economic Development (**CTED**)).

The Board will first address the three Legal Issues that the three Ordinances have in common, then address whether the adoption of the one Ordinance complied with the CTED review and submittal requirements of the GMA.

The Board addresses the Legal Issues in the following order: first, Legal Issue 3 (UGA requirements); next, Legal Issue 4 (consistency and implementation requirements); third, Legal Issue 1 (goals) are addressed; and finally, Legal Issue 2 (CTED review).

#### **D. ABANDONED ISSUES**

The Board's Rules of Practice and Procedure provide:

A petitioner . . . shall submit a brief on each legal issue it expects a board to determine. *Failure by such a party to brief an issue shall constitute abandonment of the unbriefed issues.* Briefs shall enumerate and set for the legal issue(s) as specified in the prehearing order if one has been entered.

WAC 242-02-570(1), (emphasis supplied). Additionally, the Board's July 17, 2003 PHO state, "Legal issues, or portions of legal issues, not briefed in the Prehearing Brief will be deemed to have been abandoned and cannot be resurrected in Reply Briefs or in oral argument at the Hearing on the Merits." PHO, at 8.

Petitioners state, “Legal Issue 3 with regard to Ordinances 03-020 and 03-021 is abandoned.” Citizens PHB, at 29. Consequently, the challenge to Ordinance Nos. 03-020 and 03-021’s compliance with the requirements of RCW 36.70A.110(3) is **abandoned**.

Likewise, in Legal Issue 1, Petitioner fails to brief whether the Ordinances comply with RCW 36.70A.020(6). Citizens PHB, at 30-43. Consequently, this portion of Legal Issue 1 is **abandoned**.

#### **iv. legal issues and discussion**

##### **A. Legal Issue No. 3 – UGA**

The Board’s PHO set forth Legal Issue No. 3

*3. Has Snohomish County (the County) failed to comply with the requirements of RCW 36.70A.110(3), in adopting Ordinance Nos. 03-019, 03-020 and 03-03-021 (the Ordinances)?*

#### **Applicable Law**

RCW 36.70A.110(3) provides:

Urban growth should be located first in areas already characterized by urban growth that have adequate existing public facilities and service capacities to serve such development, second in areas already characterized by urban growth that will be served adequately by a combination of existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources, and third in the remaining portions of the urban growth areas. Urban growth may also be located in designated fully contained communities as defined by RCW 36.70A.350.

In *Forster Woods Homeowners Association, et al., v. King County (Forster Woods)*, CPSGMHB Case No. 01-3-0008c, Final Decision and Order, (Nov. 6, 2001), a case raising a RCW 36.70A.110(3) compliance challenge to a rezone; the Board stated, “These GMA requirements [including RCW 36.70A.110(3)] apply to comprehensive plans and UGA designations, they do not apply to development regulations – i.e. rezones.” *Forster Woods*, at 28-29.

## Discussion

### Position of the parties:

As noted *supra*, Petitioner has abandoned this issue as it relates to Ordinance Nos. 03-020 and 03-021; however, Petitioner still argues Ordinance No. 03-019 does not comply with this GMA provision.

Citizens' assert that contrary to the provisions of RCW 36.70A.110(3), "Ordinance No. 03-019 permits urban development where existing facilities have been determined to be inadequate." Citizens PHB, at 29. Petitioners continue, "The [LSUGA Plan] calls for 'precluding new urban level development in areas without adequate capital facilities.' Ordinance No. 03-019 however, allows vesting of urban development in areas without adequate capital facilities." *Id.*, citing LSUGA Plan at 8-24.

Noting that Ordinance No. 03-019 amends a development regulation, not a plan, the County replies, "[T]he Board has held in no uncertain terms that RCW 36.70A.110(3) applies solely to comprehensive plans and UGA designations, not development regulations." County Response, at 29, citing *Forster Woods*, at 29.

Realtors concur with the County's argument that .110 does not apply to development regulations, and add that "[T]here is nothing in Section .110 of the GMA that mandates use of a moratorium on a portion of an urban growth area. . . . [the DPO] is an optional land management technique." MBA Response, at 17-18.

In reply, Citizens notes that the language of .110(3) is contained in the adopting ordinance for the Lake Stevens UGA Plan (*See* FoF 1); and argues "It is evident that the County recognized and identified the DPO as the mechanism to maintain compliance with RCW 36.70A.110, not just in sizing the UGA but in adopting the Lake Stevens Comprehensive Plan. The County's adoption of Ordinance No. 03-019 effectively eliminates the DPO." Citizens Reply, at 16.

### Board Discussion:

The Board notes that RCW 36.70A.110(3) does not impose a mandatory requirement on planning jurisdictions, it provides that urban growth *should*, not *shall*, be located . . . . RCW 36.70A.110(3) urges local jurisdictions to locate urban growth within the UGA in a rational, efficient and fiscally responsible manner. However, no matter how well advised such an approach might be, this section of the Act does not compel the inclusion of a development phasing or timing mechanism in UGAs or comprehensive plans. Adoption of such a mechanism is certainly an option – an option that the County took.

It is undisputed that the County has, in fact, included a development phasing technique in the LSUGA Plan – the DPO. *See* FoF 5-14. However, the LSUGA Plan is not the subject of the challenge placed before the Board; it is amendments to the implementing development regulations that have been presented to the Board.

Consequently, the County is correct, the Board has previously determined, and continues to hold, that the provisions of RCW 36.70A.110(3) apply to UGA designations and comprehensive plans, not development regulations. Ordinance No. 03-019 amends the County’s development regulations that govern the DPO. Therefore, the Board **dismisses** Legal Issue 3, which alleges that RCW 36.70A.110(3) pertains to this Ordinance.

In essence, this case is about Snohomish County’s commitment to implement the LSUGA Plan as the County has adopted it. The Board understands the crux of Citizens’ argument, even as voiced in this Legal Issue, to be that the changes to the DPO are no longer consistent with, nor do they implement, the LSUGA Plan. The Board addresses this question in its discussion of the next Legal Issue.

### **Conclusion: Legal Issue 3**

RCW 36.70A.110(3) is not directly applicable to development regulations, which are the subject of the amendments contained in Ordinance No. 03-019. Legal Issue 3 does not apply to Ordinance No. 03-019, Legal Issue 3 is **dismissed**. Petitioners have **abandoned** Legal Issue 3 in regards to Ordinance Nos. 03-020 and 03-021.

### **B. Legal Issue No. 4 – Consistency/Implementation**

The Board’s PHO set forth Legal Issue No. 4 as follows:

*4. Has the County failed to comply with the requirements of RCW 36.70A.130(1), in adopting the Ordinances?*

### **Applicable Law**

RCW 36.70A.130(1) provides in relevant part:

(b) Any amendment of or revision to a comprehensive land use plan shall conform to

this chapter. *Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.*

(Emphasis supplied).

### **Discussion: Ordinance No. 03-019**

#### **1. Ordinance No. 03-019 – DPO Removal - Hearing Examiner Amendments**

##### **Ordinance No. 03-019 Amendments:**

It is important to note that although this Ordinance exempts proposals subject to the DPO and modifies the criteria used in lifting the DPO, it retains the requirement that the DPO can only be lifted if it is assured that all the public facilities necessary to support development in the area proposed for removal will be funded and constructed. *See* SCC 30.33C.050(3).

This Ordinance amended three sections of the Snohomish County Code dealing with the Development Phasing Overlay regulations – SCC 30.33C. Regarding Ordinance No. 03-019, Petitioners challenge amendments to two sections: 1) Amendments to SCC 30.33C.020 – Applicability; and 2) Amendments to SCC 30.33C.050 – Development phasing overlay – removal through quasi-judicial rezone.

In short, regarding this Ordinance, Petitioners contend that the DPO removal procedures are no longer consistent with, and do not implement, the LSUGA Plan because of the following changes: 1) the exemption from the DPO removal process for certain development generating 50 or fewer new peak hour trips (**<50 pht exemption**); 2) the deletion of two criteria for removal of the DPO by the hearing examiner: a) the 40 acre minimum rezone area requirement (if not adjacent to, or logically connected to, a “Green” area)(**40-acre minimum criterion**); and b) the requirement that the rezone area include abutting properties on both sides of the street (**Both sides of street criterion**); and 3) the extent of the hearing examiner’s authority to impose conditions on DPO removal (**HE conditions**).

##### **The <50 PHT exemption:**

Generally, the DPO applies to most land use permits and applications; however, SCC 30.33C.020 (3) exempts certain minor building permit and construction activities from the DPO provisions. Ordinance No. 03-019, amended the Applicability section of the DPO, SCC 30.33C.020(3) pertaining to exemptions, as follows [new language is underlined]:

(3) This chapter does not apply to the following permit and approval applications and

activities within the development phasing overlay:

...

[Items (a) through (g) are for various minor building permits on existing lots and various public construction and maintenance activities that do not involve land use changes.]

...

(h) Building permits on existing legal lots for new commercial development or multifamily development that generate 50 or fewer new peak hour trips, providing that the applicant submit a legally binding agreement with the county, in a form acceptable to the director and recorded with the property records of the county, in which the property owner and successors in interest agree to forbear protest of the formation of a Road Improvement District.

(i) Single family residential development generating 50 or fewer new peak hour trips, providing that the applicant submit a legally binding agreement with the county, in a form acceptable to the director and recorded with the property records of the county, in which the property owner and successors in interest agree to forbear protest of the formation of a Road Improvement District.

Ex. C-7, Ordinance No. 03-019, Section 3, at 4.

Position of the Parties - <50 PHT exemption:

To provide context, Citizens opens argument on this Legal Issue by quoting the LSUGA Plan regarding the purpose of the DPO.

The purpose of the DPO strategy is to

- Match urban-level development with necessary capital facilities, so that those facilities are available to serve new growth.
- Allow new urban development in areas with adequate capital facilities. Provide a basis for directing public funding for new capital facilities to areas that already have the most infrastructure.
- Avoid premature and uncoordinated development that would require the extension of services across undeveloped areas. This is accomplished by *precluding new urban development in areas without adequate capital facilities*. New growth may subsequently be approved once financing of needed facilities is assured.
- Establish a mechanism to require and encourage new growth to pay for, or contribute to, the cost of needed capital facilities. This may be done by forming special funding districts to finance the capital facilities needed to

support urban development.

Citizens PHB, at 14; *citing*, Ex. C-1, LSUGA Plan, at 8-24, (emphasis in PHB).

Petitioners then go on to cite numerous LSUGA Plan provisions that “outline clear principles and specifics about how phasing will be carried out.” Citizens PHB, at 15. The provisions noted by Petitioners state:

- New growth should not be permitted where the full range of facilities is lacking. Failure to provide necessary facilities is not an acceptable justification for new [\[7\]](#) development. Ex. C-1, LSUGA Plan, at 8-25.
- Within an adopted DPO, the County will not accept an application for urban development (*i.e.*, applications for residential development such as subdivisions and rezones or any commercial/industrial use; single family buildings on existing lots would still be allowed) until the County removes the DPO. *Id.*, at 8-26.
- Release of properties from any phasing requirements is contingent upon the applicant showing that adequate infrastructure is or can be available. In this way, implementing the plan is dependent through regulations on the extension of urban facilities. *Id.*, at 9-1.

Citizens then argues that exempting development that generates 50 or fewer peak hour trips from the DPO removal process “will allow 91% of developments to occur.” Citizens PHB, at 16. To support this contention, Petitioners cite to excerpts from 4/7/03 staff memo to a Councilmember,

Small and medium developments, those now being proposed for exemption, historically represented about 40% of the new vehicle trips and 91% of the development applications. . . .The amendments would result in continued piecemeal frontage improvements along county roads. It would cause some traffic and drainage impacts in the Lake Stevens subarea without the more comprehensive approach to infrastructure that was anticipated with the original DPO code. Only the very largest developments historically representing just 9% of the applications and 60% of the impacts on transportation would be contributing to transportation infrastructure and surface water infrastructure.

Citizens PHB, at 16, *citing*, Ex. 46, at 1-2. Citizens argue that the exemption would create an incentive to divide larger lots into smaller lots to fall within the exemption and undermine the DPO, yielding inconsistency with the Plan. *Id.*

Like Petitioners, the County provides context for its argument by noting that the only Policy from the County’s GMA General Policy Plan (**GPP**) that is relevant to the DPO is LU Policy 2.C.5,

which provides:

In those areas where a GPP amendment or UGA plan identifies that revenues from public and/or private sources to fund capital facilities are lacking, and consequently, a full range of public facilities necessary to support development is unavailable, the county may apply a development phasing overlay. The development phasing overlay will be applied as an overlay to a zoning classification within an UGA, pursuant to direction in an UGA plan, and will require that urban development of the overlay area be delayed until a commitment is in place to fund and construct public facilities necessary to support development.

Ex. C-2, LU Policy 2.C.5, GPP, at LU-12.

Additionally the County notes that Petitioners never cite the one policy in the LSUGA Plan that governs DPO implementing regulations – Policy 19. That Policy provides:

The phasing strategy used within the Lake Stevens UGA is tied to a capital facilities plan. Release of properties from any phasing requirements is contingent upon the applicant showing that adequate infrastructure is or can be available. In this way, implementing the plan is dependent, through regulations, on the extension of urban facilities. For that reason, the following policy is proposed. (Please see Chapter 8, Capital Facilities and Utilities, for a more detailed discussion of this regulation.)

**Policy 19:** The County shall adopt policies and regulations that phase development. Such regulations shall direct new development to areas that have access to a full range of urban services. The regulations shall provide opportunities for private sector financing of improvements in areas where existing levels of urban service are low and the need for public investment to improve LOS exceeds revenues. Clear and concise criteria shall be developed for the application and removal of any phasing boundaries and related regulations and policies. The phasing strategy used in the Lake Stevens UGA shall be tied to a capital facilities plan, and release of properties from any phasing requirements shall be supported by a demonstration that adequate infrastructure is available in Lake Stevens UGA.

County Response, at 12-13, *citing* Ex. C-7, LSUGA Plan, at 9-2.

The County suggests that these two policies are *the* yardstick for measuring consistency and determining whether the regulations implement the Plan. The County contends that Petitioners have failed to show how any of the challenged DPO amendments are inconsistent with, or do not implement, these policies [GPP Policy LU-2.C.5 and LSUGA Policy 19]. County Response, at

14-16.

Specifically related to the <50 PHT amendment, the County argues that Petitioners do not identify any Plan Policy that “prohibits the County’s elected policy makers from adjusting *thresholds* that trigger application of the DPO’s prohibition on urban development within the UGA, which is the clear effect of SCC 30.33C.040(1).” *Id.*, at 20, (emphasis supplied.) The County also argues that the LSUGA Plan provisions cited by Petitioners “simply describe features of the 2001 ordinance that was adopted concurrent with the plan,” and do not set forth minimum regulatory requirements. *Id.*, at 21.

The County also relies upon the staff memo cited by Petitioners. The County does not dispute the magnitude of the historical effect of the proposed exemption; however, the County points to the following excerpt:

It is the opinion of the Public Works Department that allowing small developments to be exempt from the DPO requirements would provide some relief to small parcel owners within the DPO area and therefore some economic stimulus. Extending the exemption to the medium sized developments would provide much greater relief and *economic stimulus*.

*Id.*, citing Ex. 46 at 1, (emphasis supplied).

The County also argues that “concurrency is a much more significant bar to development within the unincorporated UGA than the DPO.” *Id.*, at 22. And that to address the concerns raised about this exemption to discourage the formation of Road Improvement Districts, the County specifically required “no protest agreements” to be recorded. *Id.*, at 22-23.

MBA, likewise, argues that Petitioners have selected narrative from the LSUGA Plan and not demonstrated how any of the DPO amendments are not consistent with the policies noted by the County. MBA Response, at 10-11. MBA points out that the DPO is optional, and that if the Board turns to the narrative of the LSUGA it should also consider the text preceding the section describing the purpose of the DPO, which states, “**As one response to the shortfall**, the Lake Stevens UGA Plan includes development phasing policies and calls for the development of implementing regulations to ensure that urban-level development is approved only when adequate capital facilities and services are provided or financed.” *Id.*, at 12-13, (emphasis in PHB.) MBA suggests that this phrase demonstrates that the DPO is not mandatory under the [LSUGA Plan]. *Id.*

Intervenor also argues that “there is nothing explicit [in the LSUGA Plan] mandating a County duty to impose the DPO zoning regulations on projects with 50 or fewer new peak hour trips. To

the contrary, the applicable policies and text allow for adjustments. . . .” *Id.*, at 14. Also, “By allowing development within the DPO area that is below the 50-trip threshold, the County still subjects development to concurrency and other financing constraints.” *Id.* MBA concludes that the LSUGA “contemplates and authorizes” the DPO amendments adopted by the County. *Id.*, at 15.

In reply, Citizens argues,

[T]he language of the Lake Stevens UGA [Plan] and the direction which must be followed is not limited to the 22 policies in Appendix 9-A. . . .The plan must be viewed as an integrated whole. . . .The Plan itself speaks to this issue. . . .“A plan is realized through application of many tools at varying degrees of government. The key regulatory tools that will implement this UGA plan are the zoning and phasing regulations. . . .Those updates should confirm that both implementation is occurring *consistently with the plan’s intent*, as well as ensure that the plan continues to represent the community’s vision.” Plan at 9-6. Emphasis added.

[8]

Citizens Reply, at 6-7.

Petitioners further contend that “Petitioners are not asking the Board to take away the County’s right to change ‘thresholds’ as the County implies. The County sets its own thresholds in its plan. . . .If it wants to change thresholds, it must do so first in the plan (using the required public process) and then it can change the direction of implementing ordinances.” *Id.*, at 9. Petitioners’ note, “[T]he plan clearly states that ‘In the Red areas, urban development would be deferred until financing of the requisite capital facilities was assured.’ It does not say ‘some urban development’ or ‘large urban developments,’ it says ‘urban development. Plan at 8-26.” *Id.* Citizens continue to assert that, “In exempting large numbers of developments Ordinance No. 03-019 is inconsistent with the plan.” *Id.*

Citizens also refer to a partial transcript from the April 9, 2003 hearing on Ordinance No. 03-019 wherein a developer proponent of the <50 PHT exemption, a Mr. McCourt, states

The vast majority of the applications are for the development of under 50 peak hour trips. Thus the de-restriction of these developments would gut the DPO’s intended effectiveness. . . .[Apparently, prior to making this statement Mr. McCourt offered testimony and argument, pertaining to economic stimulus, in support of the exemption. He goes on to conclude.] So on the one hand I state my reasons why we should allow medium developments in the form of multi-family, commercial and plats and on the other hand I’m telling you why they shouldn’t be allowed because

they could, for all intents and purposes, gut the DPO.

*Id.*, at 10, *citing* Ex. 119.

At the HOM, Intervenor MBA stated, “There’s also been repeated reference to testimony by a Pat McCourt, who is a member of the Master Builders, but that’s [the testimony was] taken out of context. He was not there speaking on behalf of the Master Builders. Our brief speaks for itself, and we believe those comments were taken out of context anyway.” HOM Transcript, at 74.

#### Board Discussion - <50 PHT exemption:

The importance and relevance of the DPO in the LSUGA Plan is not limited to the 22 policies summarized in four pages of Appendix 9-A, nor more specifically to only Policy 19, as the County suggests. The LSUGA Plan discusses the DPO as a critical component for implementing the LSUGA Plan. It is referenced and discussed in Chapter 3 (Land Use, at Figure 3-2), Chapter 5 (Transportation Element, at 5-48 and 5-49), Chapter 6 (Surface Water Management, at 6-41 to 6-46), Chapter 8 (Capital Facilities and Utilities, at 8-24 to 8-28), Chapter 9 (Implementation, at 9-1 and 9-2), and Appendix 8-A (DPO Maps, at 8-A-1). As Petitioners recognize, the Board will look to the integrated whole of the Plan to determine whether the challenged ordinances are consistent with, and implement the LSUGA Plan.

Petitioners have clearly established, and the County does not dispute, that the LSUGA Plan articulates a fundamental purpose of the DPO is to preclude, defer or delay new development in areas without adequate capital facilities (the Red or DPO areas) until financing for the needed facilities to support the development is assured. *See* LSUGA Plan, at 8-24 through 8-26 and 9-1. The County also acknowledges this fundamental purpose. *See* GPP LU Policy 2.C.5 and LSUGA Plan Policy 19. The Board notes that this fundamental purpose permeates the Plan. *See also* LSUGA Plan at 5-48, 5-49, 6-46 and 8-28. Even Policy 19 states, “[R]elease of properties from any phasing requirements shall be supported by a demonstration that adequate infrastructure is available in Lake Stevens UGA.” Additionally, the Board notes that SCC 30.33C.040(1) provides:

The County shall not approve an application for a permit or approval as specified in SCC 30.33C.020(2) within a development phasing overlay until the development phasing overlay has been removed through the rezone process pursuant to SCC 30.33C.050 or 30.33C060, except as provided in SCC 30.33.040(2).

By its own enactments the County has attached significant importance to the DPO and the removal of the DPO through a deliberative rezoning process. This amendment simply excludes certain developments from consideration under the DPO processes. Therefore, the question for

the Board regarding this exemption is whether its inclusion is consistent with and implements this fundamental purpose of the DPO. The Board concludes that it is not consistent with and does not implement the DPO and therefore does not comply with the requirements of RCW 36.70A.130(1).

The County and Intervenor are correct in asserting that there is no specific policy or direction in the LSUGA Plan that either requires or prohibits the County from including this exemption. The Board agrees that the County does have discretion in designing how the DPO regulations work, so long as the DPO regulatory process is consistent with and implements the Plan. However, Petitioner has demonstrated, through evidence in the record presented to the Board, that supports the conclusion that the <50 PHT exemption undermines the purpose of the DPO; evidence that the County has not refuted.

Petitioners refer to Ex. 46 which indicates that small and medium developments, “those now being proposed for exemption” historically constitute 91% of development applications. And that “only the very largest developments historically representing just 9% of the applications and 60% of the impacts on transportation would be contributing to transportation infrastructure and surface water infrastructure.” The Board agrees with the comments of a proponent of the exemption that its inclusion would “gut the DPO.” *See* Ex. 119. Petitioners’ cited information shows that such an exemption would undermine, if not eviscerate, the County’s ability to defer or delay such new development in areas without adequate capital facilities (the DPO), until financing for the needed facilities to support the development is assured. While the exemption arguably would provide an economic stimulus to the County, it may not do so at the expense of thwarting the County’s adopted development phasing strategy – its phased ability to provide adequate capital facilities to support development.

The Board notes that Ex. 46 suggests that the original proposed amendment was to exempt residential and non-residential development generating <7 PHT from the DPO. Ex. 46 also indicates that this level of exemption would “[N]ot exceed the threshold for concurrency evaluation. This change would allow small development proposals within the DPO to proceed, exempt from the requirement to provide for the transportation and drainage improvements identified in the Lake Stevens Subarea Plan. The exempt developments would still need to satisfy the drainage regulations in place for the rest of the County as contained in SCC 30.63A as well as traffic impact mitigation according to SCC 30.66B.” *See* Ex. 46, at 1. This suggests that this lower level of exemption would not thwart the LSUGA Plan’s DPO provisions. Nonetheless, for reasons not presented to the Board or included in the record before the Board, the County chose to increase the exemption level to <50 PHT. This action leaves the Board with the firm and definite conviction that a mistake has been made by the County regarding this exemption. The <50 PHT exemption from the DPO process does not comply with RCW 36.70A.130(1).

Conclusion - <50 PHT exemption:

The Board concludes that the amendatory language in Section 3 of Ordinance No. 03-019 that amends SCC 30.33C.020(3) pertaining to the <50 PHT exemption from the DPO **fails to comply** with the consistency and implementation requirements of RCW 36.70A.130(1). The Board will remand this provision to the County with direction to take action to remove the inconsistency in a manner that implements the LSUGA Plan.

The 40-acre minimum criterion:

Ordinance No. 03-019, also amended the section of the DPO dealing with removal of the DPO through quasi-judicial rezones, SCC 30.33C.050(3)(a) pertaining to a 40-acre minimum criterion, was amended as follows [deleted language is indicated by ~~strikeout~~, new language is underlined]:

(3) The County shall approve removal of the development phasing overlay when the following conditions are met:

...

~~(a) The area proposed for removal contains at least 40 acres, unless the applicant can demonstrate that a smaller area:~~

~~——(i) is adjacent to an incorporated area or unincorporated area within the UGA that is not within the development phasing overlay; and~~

~~——(ii) has a logical connection to the adjacent area, as determined by the director;~~

~~(b) . .~~

~~(c) (a) All public facilities necessary to support development in the area proposed for removal from the development phasing overlay, as identified in the UGA plan and in~~

[\[9\]](#)

~~the list developed by the director pursuant to SCC 30.33C.050(2)(b) will be funded and constructed within three years of the effective date of the rezone except as provided in SCC 30.33C.100(2), as demonstrated by the adequacy recommendation of the director and a commitment to finance and construct such facilities as required by SCC 30.33C.080(1);~~

~~(d) (b) The application meets the requirements set forth in chapter 30.42A SCC and all other applicable requirements of county code;~~

~~(e) (c) The rezone implements the UGA plan; and~~

~~(f) (d) The rezone bears a substantial relation to the public health, safety and welfare~~

...

Ex. C-7, Ordinance No. 03-019, Section 4, at 5-6.

Position of the Parties – 40 acre minimum criterion:

Petitioners argue that the LSUGA Plan provided for an orderly progression and expansion of facilities and services, but allowed DPO removal for proposals involving larger areas.

All or portions of a DPO area may be removed through updates to a UGA plan, or through a standard rezone process proposed by an individual or group. The minimum acreage for a proposal is 40 acres, although smaller areas may be considered if the proposed boundary is logical, extension of facilities can occur in a logical way and is adjacent to an area that is not a DPO-suffix.

Citizens PHB, at 17, *citing* Ex. C-1, LSUGA Plan, at 8-26. Citizens also note that the LSUGA Plan provides, “The finding of adequacy [made by the Director of PDS, in consultation with

[\[10\]](#)

DPW and Parks] includes the following criteria: All proposals must be 40 acres in size. Smaller areas may be considered if they are a logical grouping and adjacent to a “green” area.” Citizens PHB, at 17, *citing* LSUGA Plan, at 8-27.

Within the context of this direction, and the deletion of the 40 acre minimum criterion in Ordinance No. 03-019, Petitioner concludes that the amendment is not consistent with, and no longer implements the LSUGA Plan. *Id.*

The County argues that neither GPP Policy LU 2.C.5 nor LSUGA Plan Policy 19 require the County to include the 40 acre minimum requirement in its regulations. County Response, at 16. The County asserts that the narrative portion of the LSUGA Plan cited by Petitioners “simply describes what was required to lift the DPO under the 2001 DPO ordinance [Ordinance No. 01-075, HOM Ex. 3, FoF 2.] that was adopted concurrently with the plan. Since the DPO ordinance included the 40 acre minimum, this section of the plan naturally described that requirement along with the other requirements of the 2001 ordinance. . . . [T]his section of the pan is simply describing the 2001 ordinance, rather than setting forth directive policy. . . . This is a far cry from imposing regulatory requirements.” *Id.*, at 17.

The County argues that deletion of the 40 acre minimum requirement would not change the requirement that “any development regardless of property size wishing to remove the DPO [is required to] fund and construct a given list of projects.” County Response, at 19, *citing* Ex. 60.

[\[11\]](#)

The County also refers to testimony provided that urges removal of the 40 acre minimum requirement. *Id.*, referencing Ex. 15, 30 and 40.

Intervenor asserts that removal of the 40 acre minimum requirement “avoid[s] the use of an arbitrary criterion that was disputed vigorously during the public process.” MBA Response, at 16.

MBA also quotes Ex. 60, which states,

[Question] Please explain how with the removal of 40 acres applicants would still have to finance and construct all necessary facilities?

[Answer] A premise of the DPO is to ensure that there are adequate facilities to support growth. Under the DPO any development regardless of property size wishing to remove the DPO is required to fund and construct a given list of projects. This requirement would not change should the 40-acre minimum be removed.

*Id.*, citing Ex. 60.

In reply, Citizens contend that “The intention of adopting the 40 acre minimum requirement where the rezone was not adjacent to the already green area (no minimum size required) was to encourage the development of adequate facilities in proximity to the existing facilities next to the city so that in the future annexation could be possible. The 40 acre requirement did not preclude development that was not adjacent to “green” areas, but did discourage leap frog development.” Citizens Reply, at 11, referencing HOM Ex. 2, Ordinance No. 01-077. [Note ordinance references avoiding leap frog development in GPP policy]

#### Board Discussion – 40 acre minimum criterion:

As done in discussing the <50 PHT exemption, the Board will look to the LSUGA Plan as an integrated whole. The Board notes that LSUGA Plan Policy 19 requires “Clear and concise criteria shall be developed for the application and removal of any phasing boundaries and related regulations and policies.” *See supra*. None of the parties dispute that a 40-acre minimum requirement is a clear and concise criterion for removal of the DPO. As Petitioners argue, the Plan itself discusses this criterion in several places. See Citizens PHB, at 17, *citing* the LSUGA Plan, at 8-26 and 8-27. The Plan clearly anticipates a 40-acre minimum criterion as part of the DPO regulations.

However, the County argues that the Plan language quoted by citizens is merely descriptive of the ordinance the County adopted to initially implement the DPO, and that that language does not impose a regulatory requirement. Further the County asserts, it is within the County’s discretion to decide upon criterion for the DPO, and it is free to delete the 40-acre minimum requirement.

The Board agrees with the County that it has discretion to determine what criteria it includes as part of the DPO process. However, notwithstanding the alleged controversy surrounding the 40-acre minimum criterion, when the County adopted the LSUGA Plan and the initial DPO regulations it chose to include and explain the 40-acre minimum requirement in both the DPO regulations and the Plan. Thus, the 40-acre minimum requirement was treated and addressed

consistently in both the Plan and regulations. The Plan explains in more detail how the entire DPO process is to work.

By amending SCC 30.33C.050(3)(a) to delete the 40-acre minimum requirement for removal of the DPO, the County has created an inconsistency with the LSUGA Plan, an inconsistency that no longer implements the DPO process as described in the Plan. The Plan itself was not altered. Consequently, the Board concludes that the 40-acre minimum amendment to the DPO regulations does **not comply** with the consistency and implementation requirements of RCW 36.70A.130(1).

Conclusion – 40 acre minimum criterion:

The Board concludes that the amendatory language in Section 4 of Ordinance No. 03-019, that amends SCC 30.33C.050(3)(a), pertaining to the 40-acre minimum criterion, **fails to comply** with the consistency and implementation requirements of RCW 36.70A.130(1). The Board will remand this provision to the County with direction to take the necessary legislative action to remove the inconsistency between the LSUGA Plan and the DPO regulations so that the regulations implement the Plan.

The Both sides of street criterion:

Ordinance No. 03-019, also amended the section of the DPO dealing with removal of the DPO through quasi-judicial rezones, SCC 30.33C.050(3)(b) pertaining to a both sides of street criterion, was amended as follows [deleted language is indicated by ~~strikeout~~, new language is underlined]:

(3) The County shall approve removal of the development phasing overlay when the following conditions are met:

...

(a) ...

~~(b) The area proposed for removal from the development phasing overlay, shall, to the extent practicable, include all properties that abut on both sides of any street within the rezone area;~~

~~(c)~~ (a) All public facilities necessary to support development in the area proposed for removal from the development phasing overlay, as identified in the UGA plan and in [\[12\]](#)

the list developed by the director pursuant to SCC 30.33C.050(2)(b) will be funded and constructed within three years of the effective date of the rezone except as provided in SCC 30.33C.100(2), as demonstrated by the adequacy recommendation of the director and a commitment to finance and construct such facilities as required by SCC 30.33C.080(1);

- (d) (b) The application meets the requirements set forth in chapter 30.42A SCC and all other applicable requirements of county code;
  - (e) (c) The rezone implements the UGA plan; and
  - (f) (d) The rezone bears a substantial relation to the public health, safety and welfare
- ...

Ex. C-7, Ordinance No. 03-019, Section 4, at 5-6.

Position of the Parties – Both sides of street criterion:

With regard to this criterion, Citizens again, point to direction provided in the LSUGA Plan.

While County Engineering Design and Development Standards (EDDS) do require new development to provide an appropriate road standard, these requirements generally apply only to the frontage improvements on the property. Without phasing, such frontage improvements are usually made parcel-by-parcel and this case-by-case approach limits the effectiveness of these standards to achieve the level of adequate infrastructure envisioned. The plan provides better use of these required improvements by applying the Development Phasing Overlay (DPO) that restricts further development until adequate streets are provided. This requirement encourages adjacent developers to work together to find financing for the street, that includes the required frontage improvements. [Road improvement districts, latecomer programs and developer agreements are some of the ways this improved coordination and funding can be achieved. The relatively high densities that the plan allows (up to 8 and 9 units per acre with the PDR ordinance) in these areas should provide adequate financial capacity and incentive to provide these facilities.] Ultimately, the DPO should ensure that these developing areas would have a high level of street services to support a quality urban environment.

Citizens PHB, at 18, *citing* LSUGA Plan, at 5-48 and 49, (the [bracketed language is a complete quote of the paragraph] this language was not included in Petitioners citation).

Within the context of this Plan statement, and the deletion of the both sides of the street criterion in Ordinance No. 03-019, Petitioner concludes that the amendment is not consistent with, and no longer implements the LSUGA Plan. *Id.*

The County contends that, although Petitioners correctly describe the reasons underlying this provision, there is nothing in the LSUGA Plan that requires this criterion to be part of the DPO process. Further, the County notes the “fairness” concern included in the Planning Commission’s summary of the proposed amendment to support its deletion. “Eliminates requirement that

proposed removal area include both sides of the street (addresses constitutional fairness issue that applicant would have been required to mitigate impacts caused by a neighbor).” County Response, at 23-24, *See* Ex. 30.

Board Discussion – Both sides of street criterion:

Again the Board looks to the LSUGA Plan as an integrated whole. The Board finds that the discussion in the LSUGA Plan, quoted by Petitioners, is within a section of the Plan addressing the County’s “Financial Strategy Statement and Intent,” a generalized discussion of the strategy the County is pursuing, including concerns with coordination. The linkage between this quote and the original DPO regulatory language that included the “both side of the street criterion” is at best tenuous.

The Board notes that the *full* paragraph referenced by Petitioners notes measures to improve coordination and a non case-by-case approach by use of “road improvement districts, latecomer programs and developer agreements.” The Board also notes that Petitioners do not address the “fairness” issue noted by the Planning Commission in its summary provided to the County Council. Finally, the Board recognizes that that the deleted criterion included the phrase “to the extent practicable,” which suggests to the Board that the County anticipated some degree of difficulty in implementing this particular criterion. Deletion of this criterion is within the County’s discretion and does not create an inconsistency with the LSUGA Plan, nor does its deletion fail to implement the Plan.

The County has revisited this criterion, and determined it should be removed; this action is not clearly erroneous. Consequently, the Board concludes that Petitioners have **failed to carry the burden of proof** in demonstrating how the challenged amendatory language is inconsistent with, and does not implement, the LSUGA Plan.

Conclusion – Both sides of street criterion:

Petitioners have **failed to carry the burden of proof** in demonstrating how the amendatory language in Section 4 of Ordinance No. 03-019, that amends SCC 30.33C.050(3), pertaining to the both sides of the street criterion, fails to comply with the consistency and implementation requirements of RCW 36.70A.130(1).

The HE conditions:

Ordinance No. 03-019, also amended the section of the DPO dealing with removal of the DPO through quasi-judicial rezones, SCC 30.33C.050(5) pertaining to the authority of the hearing examiner to impose conditions, was amended as follows [deleted language is indicated by

~~strikeout~~, new language is underlined]:

(5) The hearing examiner may identify specific conditions pursuant to adopted plan policies and development regulations, to be imposed on any proposed development within the area in which the overlay is proposed for removal, if such conditions are necessary to assure compliance with SCC 30.33C.050(3) ~~including conditions not otherwise authorized by this chapter~~. Such conditions may include, but are not limited to, restrictions on the density and intensity of development and restrictions on timing of occupancy and development to assure that necessary capital facilities are operational.

Ex. C-7, Ordinance No. 03-019, Section 4, at 5-6.

Position of the Parties – HE conditions:

Petitioners argue that the LSUGA Plan is explicit about the role for the hearing examiner.

The Hearing Examiner shall base any action taken regarding the DPO on the Director’s finding of adequacy of capital facilities. The Hearing Examiner may impose conditions of approval on any development within the area proposed to be lifted, to ensure that necessary capital facilities are operational. These conditions may be include, but are not limited to the limitations on the density and intensity of development and restrictions on the timing of occupancy and development. The conditions imposed would be pursuant to adopted policies and regulations.

Citizens PHB, at 18, *citing* LSUGA Plan, at 8-27.

Within the context of this Plan provision, and the amendment to the basis for the HE conditioning authority in Ordinance No. 03-019, Petitioner concludes that the amendment is not consistent with, and no longer implements the LSUGA Plan. *Id.*, at 19.

The County responds that the removal of the phrase “not otherwise authorized by this chapter” essentially limits “unfettered discretion” that could be interpreted to reside within the hearing examiners authority. The County contends that the hearing examiner still maintains the authority to “impose any conditions necessary to assure compliance with the requirements of removing the DPO. . .including the paramount one of ensuring that ‘all necessary facilities’ will be funded and constructed within the requirement timeframe. County Response, at 25

Board Discussion – HE conditions:

The Board finds no inconsistency between the Plan language cited by Petitioner and the deletion of the phrase “not otherwise authorized by this chapter” and the addition of the phrase “if such conditions are necessary to assure compliance with SCC 30.33C.050(3)” in Ordinance No. 03-019.

The Board notes that the sentence following these amendments maintains the authority of the hearing examiner to condition development. That sentence states, “Such conditions may include, but are not limited to, restrictions on the density and intensity of development and restrictions on timing of occupancy and development to assure that necessary capital facilities are operational.” See Ordinance No. 03-019, Section 4 (amending SCC 30.33C.050(5), at 5. This amended regulatory language is consistent with and implements the LSUGA Plan; it therefore complies with the requirements of RCW 36.70A.130(1).

#### Conclusion – HE conditions:

The amendatory language in Section 4 of Ordinance No. 03-019 that amends SCC 30.33C.050(5) pertaining to the hearing examiner’s authority to condition development **complies** with the consistency and implementation requirements of RCW 36.70A.130(1).

#### Conclusions – Ordinance No. 03-019

The <50 PHT exemption: The amendatory language in Section 3 of Ordinance No. 03-019 that amends SCC 30.33C.020(3) pertaining to the <50 PHT exemption from the DPO **fails to comply** with the consistency and implementation requirements of RCW 36.70A.130(1). The Board will **remand** this provision to the County with direction to take action to remove the inconsistency in a manner that implements the LSUGA Plan.

The 40-acre minimum criterion: The amendatory language in Section 4 of Ordinance No. 03-019, that amends SCC 30.33C.050(3)(a), pertaining to the 40-acre minimum criterion, **fails to comply** with the consistency and implementation requirements of RCW 36.70A.130(1). The Board will **remand** this provision to the County with direction to take the necessary legislative action to remove the inconsistency between the LSUGA Plan and the DPO regulations so that the regulations implement the Plan.

The both sides of the street criterion: Petitioners have **failed to carry the burden of proof** in demonstrating how the amendatory language in Section 4 of Ordinance No. 03-019, that amends SCC 30.33C.050(3), pertaining to the both sides of the street criterion, fails to comply with the consistency and implementation requirements of RCW 36.70A.130(1). Therefore the amendment **complies** with this section of the Act.

The HE conditions: The amendatory language in Section 4 of Ordinance No. 03-019 that amends SCC 30.33C.050(5) pertaining to the hearing examiner’s authority to condition development **complies** with the consistency and implementation requirements of RCW 36.70A.130(1).

### **Discussion: Ordinance No. 03-021**

## **2. Ordinance No. 03-021 – DPO Removal - Council Area-wide Amendments**

### **03-021 Amendments:**

Although this Ordinance amends the County Council’s procedures for removal of the DPO through area-wide rezones, like the hearing examiner process, it also retains the requirement that for the DPO to be removed there be assurance that all public facilities necessary to support development will be funded and constructed. *See* SCC 30.33C.060(1)(a).

This Ordinance amended three sections of the Snohomish County Code dealing with the Development Phasing Overlay – SCC 30.33C. Petitioners challenge amendments to two of the three amendatory sections: 1) Amendments to SCC 30.33C.060 – Development Phasing Overlay – removal by areawide rezone; and 2) Amendments to SCC 30.33.100 –Construction of facilities – timing.

Ordinance No. 03-021, amended the section of the DPO dealing with removal of the DPO by areawide rezones, SCC 30.33C.060, as follows [deleted language is indicated by ~~strikeout~~, new language is underlined]:

(1) The county may remove the development phasing overlay, or a portion thereof, pursuant to an area-wide rezone process pursuant to chapter 30.73 SCC and this section. To approve the rezone, the county council must determine that:

(a) All public facilities necessary to support development, as identified ~~in the UGA plan and in the list developed by the director pursuant to SCC 30.33C.125(1)~~ pursuant to the procedures established in this chapter will be funded and constructed as required by this chapter ~~within three years of the effective date of the rezone;~~

(b) The rezone implements the UGA plan; and

(c) the rezone bears a substantial relation to the public health, safety and welfare.

...

Ex. C-6, Ordinance No. 03-021, Section 3, at 3. In the discussion *infra*, the Board will refer to this amendment as the “*Identified Project List Amendment*.”

Ordinance No. 03-021, amended the section of the DPO dealing with the timing of the construction of facilities, SCC 30.33C.100, as follows [deleted language is indicated by ~~strikeout~~, new language is underlined]:

(1) Public facilities necessary to support development shall be constructed no later than three years following the effective date of the rezone to remove the development phasing overlay pursuant to SCC 30.33C.050 and SCC 30.33C.060, except as provided in SCC 30.33C.100(2).

(2) ~~An applicant may~~ Upon request, that the director shall extend the time period for no more than three years, if ~~the applicant can demonstrate~~ it is demonstrated that construction of facilities cannot occur within three years but ~~. The extension shall be granted if the applicant provides evidence that construction~~ will occur within six years.

Ex. C-6, Ordinance No. 03-021, Section 4, at 3-4. In the discussion, *infra*, the Board will refer to this amendment as the “*Timing Amendment*.”

#### Position of the Parties:

Citizens offer two arguments in relation to the amendments challenged in Ordinance No. 03-021. First, Petitioners contend that the timing for removal of the DPO, the change from a three-year to a six-year period, conflicts with the LSUGA Plan. Citizens PHB, at 26-28. To illustrate this discrepancy, Petitioner cites to a statement contained in two different FEIS Addenda that says, “The DPO ordinance ensures that development will occur within the UGA only when adequate public facilities are in place.” *Id.*, citing Ex. 43A (Addendum 21), and Ex. 43B (Addendum 30). Second, Citizens assert that the amendments unlink the projects contained in the LSUGA Plan and the Directors list from the DPO. *Id.*, at 25.

As to the timing question, the County contends that the Plan does not mandate these, or the previous timeframes, within which construction of the needed facilities must occur. Further, the County argues that the amendment allowing an “automatic” three year extension “allows the County the same time as a private applicant to construct the facilities required by the DPO.” County Response, at 26.

The County contends that deleting the phrase “as identified in the UGA plan and in the list developed by the director pursuant to RCW 30.33C.125(1) will be funded and constructed within three years of the effective date of the rezone” and inserting “identified pursuant to this chapter be funded and constructed as required by this chapter” does not unlink the DPO removal process from the Plan. The County argues this is true since the directors list and the projects listed in the [LSUGA Plan] are “both requirements of this chapter.” However, the County does note that the

amendment “free[s] the Council to exercise greater independent judgment concerning facilities required to lift the DPO.” *Id.*, at 28.

MBA acknowledges that the phasing strategy of the LSUGA Plan is tied to the capital facilities plan. However, MBA notes that the capital facilities plan, or capital improvement plan, is reviewed annually and that the “permissible timeframe between planning and construction under the capital facilities plan [is] six years, not the three years cited repeatedly by Petitioners. MBA Response, at 13. Intervenor also note that the LSUGA Plan acknowledges that the narrative acknowledges that the DPO may be amended over time. *Id.*, at 13.

In reply, Citizens contends that “changing the timing requirements means that development may be permitted before necessary facilities are in place.” This, Petitioners assert, is contradictory to the DPO as contained in the LSUGA Plan.

### Board Discussion:

#### *The Timing Amendment:*

Notwithstanding the “development within the UGA will occur only when adequate public facilities are *in place*” statement from the two FEIS Addenda, the GMA and the LSUGA Plan provide otherwise. The GMA allows a six-year window to provide capital and transportation facilities. The GMA requires a six-year financing plan for capital facilities and a multi-year financing plan for transportation improvements. *See* RCW 36.70A.070(3)(d) and (6)(iv)(B).

Additionally, as the Board noted in its discussion of the <50 PHT exemption, *supra*, “the LSUGA Plan clearly articulates a fundamental purpose of the DPO is to preclude, defer or delay new development in areas without adequate capital facilities (the Red or DPO areas) until financing for the needed facilities to support the development is assured.” In short, securing financing and completing construction of needed capital facilities within the six-year GMA (CIP and TIP) timeframe sets the boundaries for timing of improvements. The County’s amendment allowing up to six-years to complete construction is consistent with, and implements, the LSUGA Plan and GMA. The timing amendment to SCC 30.33C.100, at Section 4 or Ordinance No. 03-021 is not inconsistent with the LSUGA Plan and **complies** with RCW 36.70A.130(1).

The Board concludes that amendatory language in Section 4 of Ordinance No. 03-020 that amends SCC 30.33C.100 pertaining to timing of construction **complies** with the consistency and implementation requirements of RCW 36.70A.130(1).

*The Identified Project List Amendment:*

However, the amendment to SCC 30.33C.060, regarding “identified project lists” is more problematic. The Board is not persuaded by the County’s contention that this change is inconsequential since the projects from the LSUGA Plan and the director’s list developed pursuant to SCC 30.33C.125 are “requirements of this chapter.”

It is undisputed that the DPO must be linked to the capital facilities plan or CIP for the LSUGA and that necessary capital projects may be reviewed and updated annually. It is also not disputed that the LSUGA Plan requires that a “director’s list” identifying the facilities required for removal of the DPO be prepared. *See* Ex. C-1, LSUGA Plan, at 8-26.

If annual review and updates indicate changes in the projects affecting the DPO in the LSUGA, such changes must be reflected in the LSUGA and its associated capital plan. Those newly needed or completed projects must be identified and included for the entire DPO to be kept it current. The GMA requires that plans be internally consistent. *See* RCW 36.70A.070 (preamble). Likewise, the director’s list that pinpoints needed projects within an identified area must be based upon the projects identified in the UGA plans, as may be updated. This assures that the amendments removing the DPO implement the updated and revised plans, pursuant to RCW 36.70A.130(1).

The existing language was clear and unambiguous. Prior to the amendments, for the County to engage in the lifting of a DPO through an area-wide rezone, it was required to look to the projects listed in the UGA Plan *and* a list created by the director based upon the UGA Plan. The director’s list would obviously be based upon the projects identified in the UGA Plan, but tailored to the reflect projects necessary to support development within the proposed area-wide rezone area – a more refined list. This process is clear.

However, deletion of these two reference points only obscures and confuses the basis for the Council’s area-wide DPO lifting process. For example, SCC 30.33C.125, on its face, does not appear to apply to the County, it provides “Upon request by an applicant,” and arguably is limited to applicants for a rezone before the hearing examiner. The deleted language in .060 clearly linked the director’s project list to area-wide rezones, it required a list developed pursuant to SCC 30.33C.125. Now this clear linkage is gone.

Likewise, reference to projects listed in a UGA Plan only appears in SCC 30.33C.050, the *hearing examiner process* for removing the DPO. Since it sets forth requirements for a separate removal process, it does not apply to an area-wide removal process. Now it is not clear that the director’s list or the UGA Plan list is a prerequisite to a lifting of the DPO through an area-wide rezone.

Just as this information [the LSUGA Plan list as refined by the Director's list] is critical to making a DPO removal decision in the hearing examiner context, it is critical to making a DPO removal decision through an area-wide rezone. In essence, this amendment confuses the process to be used for removal of a DPO as set forth and explained in the LSUGA Plan. Consequently, this amendment **does not comply** with the consistency and implementation requirements of RCW 36.70A.130(1).

The Board concludes that that amendatory language in Section 3 of Ordinance No. 03-020 that amends SCC 30.33C.060 pertaining to identified project lists **fails to comply** with the consistency and implementation requirements of RCW 36.70A.130(1). The Board will **remand** this provision with direction to the County to remove the inconsistency and clarify the project lists to be used for removal of the DPO by an area-side rezone.

### **Conclusions – Ordinance No. 03-021**

*The Timing Amendment:* The amendatory language in Section 4 of Ordinance No. 03-020 that amends SCC 30.33C.100 pertaining to timing of construction **complies** with the consistency and implementation requirements of RCW 36.70A.130(1).

*The Identified Project List Amendment:* The amendatory language in Section 3 of Ordinance No. 03-020 that amends SCC 30.33C.060 pertaining to identified project lists **fails to comply** with the consistency and implementation requirements of RCW 36.70A.130(1). The Board will **remand** this provision to the County with direction to take the necessary legislative action to remove the inconsistency between the LSUGA Plan and the DPO regulations so that the regulations implement the Plan

### **Discussion: Ordinance No. 03-020**

#### **3. Ordinance No. 03-020 – DPO Removal - Areawide Rezone**

##### **03-020 Areawide Rezone:**

The unincorporated land within the Lake Stevens UGA that is governed by the DPO regulations is approximately 4050 acres. County Response, at 37. Ordinance No. 03-020 adopted an area-wide rezone that lifted the DPO for 832 acres within the unincorporated area of the designated Lake Stevens UGA, thereby reducing the DPO area by approximately 20%. These 832 acres are located within the northwestern edge of the DPO area. HOM Ex.1 and Ex. C-4. Virtually all of the area was included in the DPO for deficiencies in surface water funding (Ex. C-1, LSUGA Plan, at Appendix Figure 8A-2, *see also* Figure 8-4); and 50 acres was also included for

deficiencies in transportation funding (Ex. C-1, LSUGA Plan, at Appendix Figure 8A-1, *see also* Figure 8-4). The effect of the lifting of the DPO overlay prefix is to allow the underlying zoning (ten different zones, mostly residential) to control the now permitted development of the area. *See* Ex. C-4, Ordinance No. 03-020 and attachments.

### Position of the Parties:

Citizens essentially offer three arguments challenging this area-wide rezone. The first two arguments relate to surface water and the third to transportation. First, Citizens argues there are eight required surface water projects listed in the LSUGA Plan necessary to lift the DPO, only one of those is funded in the Surface Water Management 6 year financing plan (2003-2008), and only six projects are listed in Ordinance No. 03-020. Therefore, the rezone is inconsistent with and does not implement the LSUGA. Second, Petitioners challenge whether the funding for the six listed necessary surface water projects, especially the Ebey Slough project, is assured. Next, Citizens contends that Ordinance No. 03-020 does not address the 50 acres that is within the DPO for transportation deficiencies. Citizens PHB, at 19-25.

The County counters that “Petitioners misstate the number of surface water projects required to lift the DPO for the 832-acre rezone area and insist on a level of certainty with respect to project construction that is neither possible nor required under the GMA, [LSUGA Plan] or the County’s DPO implementing regulations.” County Response, at 37. The County explains:

In order to lift any portion of the DPO, the GPP requires a “commitment [be] in place to fund and construct public facilities necessary to support development.” *See* GPP Policy LU 2.C.5. For the areawide rezone process, this plan requirement is implemented by SCC 30.33C.060(1), which conditions removal of the DPO upon the Council determining that:

All public facilities necessary to support development, as identified pursuant to the procedures of this chapter will be funded and constructed as required by this chapter[.]

*See* [Ex. HOM Ex. 5]. The “public facilities necessary to support development” referred to in SCC 30.33.060 are the recommended project list in the Lake Stevens UGA Plan. *See* [Ex. C-1, LSUGA Plan, at Table 6-2 (“Surface Water Projects Recommended for Construction Prior to Further Development.”)] Thus, the provision governing removal of the DPO through [an] areawide rezone is consistent with and implements the [GPP] plan policy requiring a link between decisions to remove the DPO and the Subarea capital facilities element. *See* GPP Policy LU 2.C.5.

The record demonstrates that the Council followed the process contemplated by the plan policies and code requirements in removing the DPO from the 832-acre rezone area. Based on the recommendations of the public works and planning departments, the Council “conclude[d] that the rezone meets the criteria set out in SCC 30.33C.060.” See Ordinance No. 03-020, at 4.

County Response, at 38-39. The County then continues to explain that the recommendations, contained in a memo from the public works department [Ex. 71] focused on six surface water projects with a cost of \$547,000. *Id.* “Each of these projects was incorporated in the legislative findings for Amended Ordinance 03-020, which concluded that the rezone met the requirements of SCC 30.33.060 and the [LSUGA Plan]. *Id.* The County also indicates that the planning department stated that this list met the code requirements.

For an areawide rezone, the list of projects necessary to remove the DPO was drawn from the Lake Stevens UGA plan. The director used the criteria in SCC 30.33C.125 to create the list of surface water facilities. Under the DPO only areas where projects are fully funded can the restrictions be removed. *Citing* Ex. 60, at 2.

County Response, at 40. Additionally, the County required the rezone area to adhere to LSUGA [\[13\]](#) [\[14\]](#) Plan Policies 13 and 16 “to help combat erosion that would otherwise occur in steep ravines as a result of future development.” *Id.* The essence of these policies were codified into SCC 30.63A.225 [Tightlines] and SCC 30.63A.226 [Detention facilities] by adoption of Ordinance No. 03-018. Ex. C-5. *Id.*

The County disputes whether the two additional surface water projects listed in the LSUGA Plan, and noted by Petitioner, “[A]re necessary to remove the DPO from the specific 832-acre area in question.” *Id.*, at 41. The County contends that “some judgment is necessary on the part of county staff and elected officials to determine which facilities listed in the plan are necessary to lift the DPO for a particular area. [The staff and Council exercised sound judgment in this case “concerning what commitments were necessary” in lifting the DPO].” *Id.*

The County then argues that its assurance or “commitments” to funding the necessary surface water projects provide an adequate degree of certainty that they will be constructed within the six year timeframe – including the Ebey Slough Floodplain project which is committed for completion by the end of 2006. Also, the County argues that feasibility studies and preliminary design studies are prerequisites to construction that need to be funded in order to assess proposed projects and alternatives. *Id.*, at 41-43. Also the County notes that some of the listed projects have been determined to be no longer necessary to lift the DPO. *Id.* The County also notes,

Between adoption of the UGA plan and the DPO some things have changed:

- Through reprioritization of revenues, surface water funds became available.
- These funds allow the county to expand the area not subject to the DPO and allow development to proceed.
- Through reprioritization of funds, the surface water shortfall can be satisfied.
- Fund sources include:
  - Drainage Needs Report (Bond Revenue)
  - SWM dollars programmed in the Lake Stevens UGA (REET)

*Citing* Ex. 61, at 3 and 6.

County Response, at 44-45.

Regarding the 50 acres that were “Red for Transportation,” the County argues that its action is presumed valid and that Petitioners have the burden of showing noncompliance. The county asserts that Citizens brief is conclusory and does not cite evidence to support their position. County Response, at 47-48.

Nonetheless, the County asserts that “no county funding was necessary to deal with any transportation issue that may arise from this parcel.” *Id.*, at 49. To support this conclusion the County notes that while in “Red areas” financing of the needed facilities must be assured, it can be achieved through the County’s capital facility process “or by private sources of funding such as the formation of road improvement districts or other mechanisms. *Citing* Ex. C-1, LSUGA Plan, at 8-26.” *Id.* For this 50-acre parcel, which is surrounded by “Green areas,” the County contends that, “sufficient funding sources for transportation are already in place through the concurrency provisions found in Subtitle 30.66B SCC.” *Id.*

Intervenor MBA incorporates by reference the County’s briefing on Ordinance No. 03-020 issues. MBA Response, at 17.

Intervenor Capital Crescent X concurs with the County’s briefing as it relates to Ordinance No. 03-020, and indicates “as cited in the County’s brief, there is extensive evidence in the record that the infrastructure related to the DPO for this area is available and the facilities can be constructed in the appropriate time frame.” CCX Response, at 2. Additionally CCX contends that Citizens offer nothing to support their assertion that the “lifting of the DPO for the 50 acres previously encumbered by the DPO due to transportation was not appropriate.” *Id.* Intervenor CCX indicates that there is a statement in a staff memo to the Planning Commission, dated 7/12/02, stating “No shortfalls for transportation exist in this portion of the UGA. *Citing*, Ex. 7 and 6.” *Id.*

In reply, Citizens say that the County “misunderstands and misstates” Petitioners’ arguments regarding the 832-acre rezone. Petitioners state that they do not object to lifting the DPO “as long as the necessary capital facilities are *ensured*.” Ordinance No. 03-020 does not ensure that the necessary projects will be provided. Citizens Reply, at 11, (emphasis in original).

Petitioners assert that the issues are what projects are required to lift the DPO and what kind of commitment is required, both of which were addressed in the PHB. As to which projects would be necessary, Petitioners contend it is the list of projects in the LSUGA Plan. *Citing Ex. 73, Id.*, at 12.

As to the level of commitment question, Citizens turns to Policy 19, which states in relevant part, “The phasing strategy used in the Lake Stevens UGA shall be tied to a capital facilities plan, and release of properties from any phasing requirements shall be supported by a demonstration that adequate infrastructure *is available* in the Lake Stevens UGA.” *Id.*, (emphasis in original). Petitioners then reassert their position that, at least as related to the pump station for the Ebey Slough floodplain, that the solution to the flooding from the rezone is not “in any way ensured.” *Id.*, at 13. Citizens reiterate factors noted in their PHB to support this contention: 1) the \$215,000 funded for the pump station is for a feasibility study only [PHB, at 23]; 2) the actual cost of the pump station will likely be significantly higher [PHB, at 23]; 3) permitting constraints may make the pump station infeasible, especially federal and state permits [PHB, at 22]; 4) alternative technical solutions are not identified nor are costs for them included [PHB, at 23]; 5) to gain more time and gain more information, staff suggested reconsidering LOS [PHB, at 22]; and 6) the completion dates for the project are not identified [PHB, at 24]. *Id.*

As to the 50-acre “Red for Transportation” parcel, Citizens reasserts that the LSUGA Plan designates the area as within the DPO (Red), meaning it lacks funding for transportation. Additionally, Petitioners contend that the projects needed for the surrounding “Green” area have not been built and that perhaps the traffic modeling for the area was in error. *Id.*, at 14.

### Board Discussion:

This 832-acre area-wide rezone, or lifting of the DPO, was accomplished pursuant to the procedures of SCC 30.33C.060 as amended by Ordinance No. 03-021, which the Board concluded *supra*, did not comply with consistency and implementation requirements of RCW 36.70A.130(1). The reason for finding noncompliance in Ordinance No. 03-021 dealt with the vagueness of the project lists used to remove the DPO. Nonetheless, in this area-wide rezone the County contends it looked to the LSUGA Plan list and the Director’s list. HOM Transcript, at 59-60. As discussed *supra*, this is the proper procedure as set forth in the LSUGA Plan. The Board notes that the County indicates that it followed these procedures in undertaking its analysis of the

832-acre area-wide rezone and removal of the DPO in this Ordinance. County PHB, at 37-41, and HOM Transcript, at 45-46, 60 and 66.

The Board will first address the surface water issues then the transportation issue.

*Surface Water Issues:*

The context and linkages between the GPP Policies, LSUGA Plan Policies and provisions and the implementing regulations for removal of the DPO that guides the Board's review of this area-

[\[15\]](#)

wide rezone are as follows:

- The GPP, Policy LU 2.C.5, in relevant part: [The DPO] will require that urban development of the overlay area be delayed *until a commitment is in place to fund and construct public facilities necessary to support development.* (Emphasis supplied.)
- The LSUGA Plan, Policy 19, in relevant part: The phasing strategy used in the Lake Stevens UGA shall be tied to a capital facilities plan, and *release* of properties from any phasing requirement *shall be supported by a demonstration that adequate infrastructure is available* in the Lake Stevens UGA. (Emphasis supplied.)
- Certain LSUGA Plan provisions, in relevant part:
  - [Within a DPO preclude] new urban development in areas without adequate capital facilities. New growth may subsequently be approved *once financing of needed facilities is assured.* LSUGA Plan, at 8-24, (emphasis supplied.)
  - [In the DPO} urban development would be deferred *until financing of the requisite capital facilities is assured.*" *Id.*, at 8-26, (emphasis supplied).
  - *Release* of properties from any phasing requirements *is contingent upon the applicant showing that adequate infrastructure is or can be available.* *Id.*, at 9-1, (emphasis supplied.)
- The DPO implementing regulations for area-wide rezones, in relevant part:
  - *To approve the rezone, the county council must determine that: (a) All public facilities necessary to support development as identified pursuant to the procedures established in this chapter will be funded and constructed as required by this chapter.* SCC 30.33C.060, (emphasis supplied.)
  - Public facilities necessary to support development *shall be constructed* [within a maximum time of six years (initially a 3-year limit with an "automatic" 3-year extension). SCC 30.33C.100, (emphasis supplied).

Thus, to remain consistent with and implement the LSUGA Plan, per its DPO regulations (SCC 30.33C), to approve the 832-acre rezone and remove the DPO, the public facilities necessary to [\[16\]](#) support development need to be funded and constructed by May 25, 2009. The first question here is *what* surface water projects are necessary to support development? Next, is there a demonstrated commitment to *assure* they are funded? Finally, has it been demonstrated that are they to be *constructed* by 2009. To answer the first question, the Board must review and compare several project lists prepared by the County.

The LSUGA Plan includes a prioritized list of projects for the LSUGA that includes 19 different drainages and the Ebey Slough floodplain. Ex. C-1, LSUGA Plan, at 43-45. It is undisputed that the 832-acre DPO removal area involves three drainages: Hulbert Creek, Weiser Creek and Burri Creek, as well as the Ebey Slough floodplain. Citizens PHB, at 20-21 and County Response, at 39. The different surface water project lists and status reports as discussed in briefing include:

- 1) The LSUGA Plan list, (Surface Water Projects Recommended for Construction Prior to Further Development), **Table 6-2**, at 6-7 and 8;
- 2) The “Directors List,” contained in **Ex. 60**;
- 3) The list contained in Ordinance No. 03-020, Sec. 1. J, (**Table B**. Surface Water Projects Funded for Construction Within Areawide Rezone), at 3; and
- 4) The Project list for the Lake Stevens UGA status report, attached to the 2002-2007 CIP, **HOM Ex. 7**.

The following Comparative Table indicates the relevant information from each of these lists and status reports.

**Surface Water Project List - Comparison Table**

1. LSUGA Plan Table <a href="#">[17]</a> 6-2			2. Director’s List [Ex. 60]	3. Ordinance 03-021 Table B <a href="#">[18]</a>	4. Lake Stevens Project Status [HOM EX. 7] <a href="#">[19]</a>
Project ID	Project Type	Cost \$1,009 K	Status	Estimated Cost-\$ 547 K	Status

<b>Hulbert Creek</b>					
HUL 1	Install Drainage Pipes	\$ 153 K	Not included – not required, per LSUGA	Not included – not required, per LSUGA	Not included
HUL 2	Install Culvert	\$ 52 K	Project was sited on private property (utility) and an agreement could not be reached with them.	Included at \$ 52 K	Not Feasible
HUL 3	Install Stream Grade Controls	[20] \$ 212 K	Project designed in 2002 & funded in 2003.	Included at \$ 212 K	Design 2002 Construction 2003
HUL 4	Replace Culvert	\$ 23 K	Not included (?) Status not discussed.	Not included	Starts in 2007
<b>Weiser Creek</b>					
WEI 1	Replace Culvert	\$ 21 K	Updated, more detailed analysis indicated that the existing culvert has sufficient capacity, so project cancelled.	Included at \$ 21 K	Design in 2002 \$ 21 K
WEI 2	Replace & Extend Outflow Pipe	\$ 71 K	Not include (?) Status not discussed.	Not included	Starts in 2008
<b>Burri Creek</b>					
BUR 1	Replace Culvert	\$ 28 K	Updated, more detailed analysis indicated that the existing culvert has sufficient capacity, so project cancelled.	Included at \$ 28 K	Design in 2002 \$ 28 K
BUR 2	Replace Culvert	\$ 19 K	Because this project addressed only private property flooding, it was cancelled at the advice of DPA.	Included at \$ 19 K	Blacked out – status unknown (notes \$19K)
<b>Ebey Slough Flood-plain</b>					

EFL 1	Install two Pump Stations – locations not set.	\$ 430 K	A feasibility study and preliminary design is being conducted in 2003.	Included at \$ 215 K - Install one pump station or tightline or alternative technical solution to reduce flooding impacts caused by upstream development	Design 2003 \$ 215 K
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Within the effected three basins and floodplain, the LSUGA Plan identifies eight projects as “Recommended” for construction prior to further development (Hul 2, 3, 4; Wei 1, 2; Bur 1, 2 and Elf 1).

The Director’s List only includes six projects (Hul 2, 3; Wei 1, Bur 1, 2 and Elf 1); two projects are not mentioned at all (Hul 4 and Wei 2). However, even of the six projects included on the list, the director indicates that three of the projects have been cancelled as no longer being necessary (Wei 1 and Bur 1, 2); and one project has an access problem preventing it from going forward (Hul 2). This list seems to suggest that three of the eight projects are no longer necessary, the status of one is uncertain, and the status of two is unknown.

The Status Report for the Lake Stevens projects discusses seven of the eight projects identified in the LSUGA Plan. There is no status reported for one of the projects indicated as cancelled in the Director’s List (Bur 2). This report indicates that the two projects not discussed in the Director’s list are slated to start in 2007 and 2008 (Hul 4 and Wei 2). It also suggests that the project with the access problem is not feasible (Hul 2). Four projects are noted as being in design or construction during 2002 (Hul 3, Wei 1, Bur 1 and Elf 1). Two of these projects reported as being in design or construction in 2002 were indicated as cancelled in the Director’s List (Wei 1 and Bur 1). This list seems to suggest that of the eight LSUGA Plan projects: one project has been cancelled; one is infeasible; two are delayed; and four are funded and proceeding even though two were indicated as cancelled.

Apparently due to reprioritization of revenues (*See Ex. 61*), the Council was able to include six surface water projects to be addressed to lift the DPO from this area. The “infeasible” project (Hul 2) and three of the projects previously indicated as “cancelled” (Wei 1, Bur 1 and 2) are now deemed necessary and included. The two projects that have been deemed necessary in all lists (Hul 3 and Elf 1) are also included.

The two projects noted as starting in 2007 and 2008, and therefore apparently not necessary for lifting the DPO at this time, are not included in the Ordinance listing (Hul 4 and Wei 2).

Notwithstanding the contradictions and vagaries revealed by this Comparison Table, the Board

defers to the County's judgment in determining which surface water projects are necessary to consider in its process for lifting the DPO. The County has identified the necessary projects involved in the removal of the DPO. This means that funding and construction must be assured for the six surface water projects identified by the County and included in the Ordinance. The six needed projects are in three drainages: Hulbert Creek (Hul 2 and 3); Weiser Creek (Wei 1); and Burri Creek (Bur 1 and 2); and the Ebey Slough Floodplain (Elf 1).

The second question that needs to be answered is: Is there a demonstrated commitment to *assure* that these six surface water projects are funded? It is undisputed that one of the Hulbert Creek projects (Hul 3) is listed in the LSUGA Plan (Table 6-4) as being included in the CIP with its cost of \$212,000 funded. Likewise it is not disputed that there is an assured \$215,000 for one pump station or tightline or alternative technical solution committed to reduce flooding in the Ebey Slough Floodplain (Elf 1). Two projects (Wei 1 and Bur 2), are indicated as being designed in 2002 in the County's Status Report for the Lake Stevens Projects (HOM Ex. 7). Petitioner offers

[21]

no evidence, through citation to the CIP or elsewhere, to contradict the implication that these projects are funded. Likewise, for the remaining two projects (Hul 2 and Bur 1), Petitioners offer no citations or references to the record, or the CIP, to indicate that these projects are not assured funding. However, Petitioner does squarely challenge the commitment to, or assurance of, funding for the Ebey Slough Floodplain project (Elf 1).

[22]

On this question, Petitioners point to the following:

- Supp Ex. 5 and HOM Ex. 7, indicating that the \$215,000 funded for the pump station is for a feasibility study only.
- Ex. 71, indicating that the actual cost of the pump station will likely be significantly higher.
- Ex. 71, indicating that permitting constraints may make the pump station infeasible, especially federal and state permits.
- Ex. 71 and Ordinance No. 03-020, discuss one limited alternative technical solutions (tightlines), but others are not identified nor are any costs for any such alternative included.
- Ex. 72, indicating that to gain more time and gain more information, staff suggested reconsidering LOS standards for surface water projects.
- Ex. 73, indicating that a 2004 date is intended as a date to complete permitting not complete construction; no completion dates for the project are identified.

The Board agrees with the County's contention that the Petitioners are seeking an unreasonable degree of certainty that is not required by the plan or regulations. Feasibility and design studies

precede construction. Further, Ordinance No. 03-020 addresses each of the points raised by Petitioner; it provides:

F. The Council finds that there are alternative feasible technical solutions to address the predicted increase to flooding in the floodplain area due to upstream development. These include, but are not limited to, a pump station or a tightline drainage system. The Council finds that the Director of Public Works has reviewed and approved these technical solutions, per Ordinance No. 03-021, Section 5, SCC 30.33C.110(1) and (2).

G. Table 6-4 of the Lake Stevens UGA Plan lists \$215,000 for the EFL 1 (pump station) as required for lifting the DPO in this area, which was the identified cost of construction of one pump station. The approved 2003 Surface Water Management budget (and the County CIP) commits these funds to the project. The Council supports this project and is committed to additional reasonable levels of funding which may be necessary to implement this project. The approved 2003 Surface Water Management budget commits these funds for this project. The county council supports this project and is committed to additional levels of funding which may be necessary to implement this project. Implementation of this project or technical equivalent solution by the end of 2006 (with permit applications to be made before end of 2004) will meet the public obligation/requirement related to ELF 1 for Table 6-4, as the additional pump station is shown as not required for the lifting of the DPO.

H. The Lake Stevens UGA Plan states that “[a]dditional study will be needed to determine the preferred location and operation of these pump stations and whether the installation of pump stations is even feasible given current regulatory and permit constraints.” Part of the initial study for this project will be a feasibility study. The director of public works and his professional staff have determined that it is reasonably likely that a pump station could be appropriately designed to allow for permitting by federal and state agencies, or that one of the approved technical solutions could be permitted. Although there is some degree of uncertainty, that is not unusual for any capital project. The Council finds that there is a reasonable degree of certainty that the project, or an alternative technical solution, will be implemented, so that lift of the DPO on this basis is an appropriate decision and consistent with the ordinance.

Ex. C-4, Ordinance No. 03-020, Section 1, at 2-3.

Based upon these Council findings, the Board is persuaded that the County is committed to the

implementation and completion of this project to avoid increased flooding that may occur due to upstream development. Two other facts also support the County's decision and this Board's conclusion regarding the area-wide rezone. First, Section 4 of the Ordinance adopts Policy 13 (tightlines) and Policy 16 (flow duration control standards for detention facilities) as conditions for the area-wide rezone. Second, Ordinance No. 03-018, Section 3 and 4 (Ex. C-5, at 2) adopts both these policies as requirements (SCC 30.63A.225 and 226) throughout the Lake Stevens UGA. These factors convince the Board that the County is committed to the financing and the construction the necessary projects to protect the Ebey Slough Floodplain from increased flooding due to upstream development within the required timeframe. (*i.e.*, within 3, or possibly 6, years of the effective date of the DPO removal Ordinance - May of 2009.) The answer to the second and third question posed *supra*, is yes. Therefore, the 832-acre area-wide rezone and removal of the DPO contained in Ordinance No. 03-020, as it relates to necessary surface water projects, **complies** with the consistency and implementation requirements of RCW 36.70A.130 (1).

*Transportation Issue:*

Regarding the 50-acre parcel that is indicated as "Red for Transportation," the Board acknowledges that Petitioner is correct, that Figure 8A-1 in the LSUGA Plan indicates the parcel is indicated as "Red." The Board also notes that the Ordinance itself is silent regarding this indicated transportation deficiency.

However, the County correctly points out that the LSUGA Plan allows and encourages such deficiencies to be alleviated "by private sources of funding such as the formation of road improvement districts or other mechanisms." *See* Ex. C-1, LSUGA Plan, at 8-26. Here, the County and MBA contend that the existing concurrency requirements will provide the necessary transportation funding for this 50-acre parcel. Finally, CCX notes the only record evidence offered on this issue; that evidence states that "No shortfalls for transportation exist in this portion of the UGA." Exs. 6 and 7. In light of the Plan provisions, the County's concurrency requirements and the evidence cited, the Board is not convinced that the County's action was clearly erroneous on this point.

Therefore, the 832-acre area-wide rezone and removal of the DPO contained in Ordinance No. 03-020, as it relates to the 50-acre transportation deficiency area, **complies** with the consistency and implementation requirements of RCW 36.70A.130(1).

Conclusion:

The Board concludes that Ordinance No. 03-020, which removes the DPO from 832-acres in the northwest portion of the Lakes Stevens UGA, **complies** with the consistency and implementation

requirements of RCW 36.70A.130(1), specifically as it applies to surface water projects and transportation projects.

### **Board Holding on Area-wide Rezone or DPO Removal Procedures**

It is evident from reviewing the LSUGA Plan that the County invested substantial time and effort obtaining public input, in designing the DPO process, designating the DPO, and identifying the projects needed to allow the DPO to be lifted. Here, the Board has concluded that the area-wide rezone and DPO removal achieved by Ordinance No. 03-020 complied with the consistency and implementation requirements of the GMA.

However, in conducting this review, the Board has discovered a flaw with, and perhaps an unforeseen consequence of, the County's DPO process that must be corrected if area-wide rezones of this nature are to occur in the future and comply with the GMA. To allow for the lifting of the DPO on an *area-wide* basis, especially one of significant size (this removal involved 20% of the DPO area), without *concurrently* amending the LSUGA Plan DPO map ("Red/Green

[23]

Areas" Figure 8-4) to indicate the area that will no longer be subject to the DPO; and without

[24]

amending the list of necessary projects *creates an immediate inconsistency with the LSUGA Plan. Consequently, the County will be directed, by no later than its next annual Plan review cycle, to amend the LSUGA Plan to maintain consistency, and upon adoption of the amending ordinance, notify the Board that the Plan has been amended accordingly.*

To avoid this from occurring in the future, the Board adopts the following holding: **The Board holds that for area-wide rezones that are intended to remove a development phasing overlay or other timing mechanism that will allow deferred development to proceed, the action removing the development phasing restriction or area-wide rezone and an action amending the governing Plan must occur *concurrently* to maintain consistency and ensure implementation of the Plan.** The Board notes that such a process should be part of the annual review process as set forth in RCW 36.70A.130. Likewise, to maintain consistency between the Plan and implementing regulations, at the same time, the County should include any smaller rezones approved by the hearing examiner as part of such an update.

### **Conclusions – Ordinance No. 03-020**

The Board concludes that Ordinance No. 03-020, which removes the DPO from 832-acres in the northwest portion of the Lakes Stevens UGA, **complies** with the consistency and implementation requirements of RCW 36.70A.130(1), specifically as it applies to surface water projects and transportation projects.

Although the Board has found that the County's removal of the DPO for this area complies with the challenged portions of the Act, the Board notes that several Tables and Maps in the LSUGA Plan were not amended *concurrently* with the adoption of this ordinance. Consequently, **the County is directed, during its next annual Plan review cycle, to amend the LSUGA Plan to make the necessary corrections and maintain consistency between the Plan and implementing regulations.** Upon adoption of the amending ordinance, the County shall notify the Board that the LSUGA Plan has been amended accordingly.

**Conclusions: Legal Issue 4 and Ordinance Nos. 03-019, 03-021 and 03-020**

**Ordinance No. 03-019:**

**The <50 PHT exemption:** The amendatory language in Section 3 of Ordinance No. 03-019 that amends SCC 30.33C.020(3) pertaining to the <50 PHT exemption from the DPO **fails to comply** with the consistency and implementation requirements of RCW 36.70A.130(1). The Board will **remand** this provision to the County with direction to take action to remove the inconsistency in a manner that implements the LSUGA Plan.

**The 40-acre minimum criterion:** The amendatory language in Section 4 of Ordinance No. 03-019, that amends SCC 30.33C.050(3)(a), pertaining to the 40-acre minimum criterion, **fails to comply** with the consistency and implementation requirements of RCW 36.70A.130(1). The Board will **remand** this provision to the County with direction to take the necessary legislative action to remove the inconsistency between the LSUGA Plan and the DPO regulations so that the regulations implement the Plan.

**The both sides of the street criterion:** Petitioners have **failed to carry the burden of proof** in demonstrating how the amendatory language in Section 4 of Ordinance No. 03-019, that amends SCC 30.33C.050(3), pertaining to the both sides of the street criterion, fails to comply with the consistency and implementation requirements of RCW 36.70A.130(1). Therefore the amendment **complies** with this section of the Act.

**The HE conditions:** The amendatory language in Section 4 of Ordinance No. 03-019 that amends SCC 30.33C.050(5) pertaining to the hearing examiner's authority to condition development **complies** with the consistency and implementation requirements of RCW 36.70A.130(1).

**Ordinance No. 03-021:**

**The Timing Amendment:** The amendatory language in Section 4 of Ordinance No. 03-020 that

amends SCC 30.33C.100 pertaining to timing of construction **complies** with the consistency and implementation requirements of RCW 36.70A.130(1).

The Identified Project List Amendment: The amendatory language in Section 3 of Ordinance No. 03-020 that amends SCC 30.33C.060 pertaining to identified project lists **fails to comply** with the consistency and implementation requirements of RCW 36.70A.130(1). The Board will **remand** this provision to the County with direction to take the necessary legislative action to remove the inconsistency between the LSUGA Plan and the DPO regulations so that the regulations implement the Plan

### **Ordinance No. 03-020:**

The 832-acre Area-wide Rezone and Removal of the DPO: Ordinance No. 03-020, which removes the DPO from 832-acres in the northwest portion of the Lakes Stevens UGA, **complies** with the consistency and implementation requirements of RCW 36.70A.130(1), specifically as it applies to surface water projects and transportation projects.

Necessary LSUGA Plan Amendments: Although the Board has found that the County's removal of the DPO for this area **complies** with the challenges portions of the Act, the Board notes that several Tables and Maps in the LSUGA Plan were not amended *concurrently* with the adoption of this ordinance. Consequently, **the County is directed, during its next annual Plan review cycle, to amend the LSUGA Plan to make the necessary corrections and maintain consistency between the Plan and implementing regulations.** Upon adoption of the amending ordinance, the County shall notify the Board that the LSUGA Plan has been amended accordingly.

## **C. LEGAL ISSUE 1 - GOALS**

The Board's PHO set forth Legal Issue No. 1 as follows:

1. *Did the County) fail to be guided by and/or fail to substantively comply with the goals [\[25\]](#) and requirements of RCW 36.70A.020(1), (6), (8) and (12), when it adopted the Ordinances?*

### **Applicable Law**

RCW 36.70A.020 provides in relevant part, "The following goals . . . shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations." The specific goals cited in this case are:

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

...

(8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands and discourage incompatible use.

...

(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.

## Discussion

### Goal 1:

Petitioner urges the Board to find noncompliance with Goal 1, arguing that the amendments in these ordinances and the rezone virtually remove development constraints from the area and expedite development to the detriment of farmland down in the floodplain. Citizens PHB, at 30-35; Citizens Reply, at 17-20. The County counters that the entire area is within the UGA and allowing development in this area thwarts pressures to develop in the rural areas. County Response, at 30.

Goal 1 seeks to direct development into urban areas where infrastructure exists or can be efficiently provided. Notwithstanding the inconsistencies and implementation deficiencies noted *supra* for Ordinance Nos. 03-019 and 03-021, each of the three challenged ordinances addresses the phasing of development *within the existing Lake Stevens urban growth area*. As a UGA, this area is designated to be urbanized and served with adequate facilities and services by 2012. The very nature of phasing, or timing, of development within this UGA to match the provision of the facilities and services needed to support it, demonstrates a fiscally responsible and efficient infrastructure development process. Each of the challenged ordinances, Ordinance Nos. 03-019, 03-020 and 03-021, are **guided by**, and **comply** with the direction set forth in Goal 1.

### Goal 8:

Citizens argues that the farmland between Sunnyside Boulevard and Ebey Slough will suffer increased flooding due to increased upstream development allowed by these ordinances and when these productive lands are flooded, they are not being conserved, nor is the agricultural industry

that works these lands being maintained and enhanced. Petitioners also assert that the pump station that is necessary to address the increased flooding cannot be delayed. Citizens PHB, at 36-39, Citizens Reply, at 20. In response, the County acknowledges that the farmlands in the floodplain are subject to flooding; but the County contends, the Ordinances do not exacerbate the existing problem and do include measures (pump station and tightlines) to address the farmland flooding. County Response, at 32-35.

Ordinance No. 03-020, involves the removal of 832-acres from the DPO. This 832-acre area is not within the floodplain nor is it designated as agricultural lands. This Ordinance does contain commitments to fund and construct surface water improvements to address the off-site farmland flooding, albeit, not as soon as Petitioners would like. Ordinance No. 03-018, adding requirements called for the LSUGA Plan (Policies 13 and 16), can also alleviate the flooding situation in the floodplain. Further, the County's Buildable Lands Report indicates that of the 832-acres removed from the DPO, only 75 acres is acceptable for residential development and only 110 acres is acceptable for construction of uses that will provide employment. County Response, at 37, *citing* Ex. 35. This Ordinance was **guided by**, and **complies** with Goal 8.

As to Ordinance Nos. 03-021, the Petitioners primary concern here in relation to Goal 8 was the extension of time allowed. As discussed *supra*, this provision falls within the timing parameters established by the GMA. Consequently, the Board finds that this Ordinance was **guided by**, and **complies** with Goal 8.

The Board has found several provisions (<50 PHT and 40-acre minimum criteria) of Ordinance No. 03-019 noncompliant with RCW 36.70A.130(1). These provisions would have applied throughout the entire DPO area, and would have enabled uncoordinated piecemeal development that could contribute significantly to an increase in flooding.

However, the Board notes that the area upstream and adjacent to the Ebey Slough floodplain is now no longer in the DPO due to Ordinance No. 03-020. This means that the necessary capital facilities to support development in this upland area (and protect the floodplain) are being funded and will be constructed so that development in the upland area can proceed. In short, since the area has been removed from the DPO, Ordinance No. 03-019 does not apply to the 832-acre upland area. Therefore, the Board concludes that Ordinance No. 03-019 also was **guided by**, and **complies** with Goal 8.

#### Goal 12:

Citizens note that the LSUGA Plan concedes, and documents, that there are inadequate public facilities within the DPO area, and that the DPO regulations defer development until adequate infrastructure is provided. Petitioners also contend that by allowing exemptions, eliminating

criteria, extending timetables and eliminating a huge area of the DPO where adequate facilities are not available flies in the face of Goal 12. Citizens PHB, at 39-42, Citizens Reply, at 22-25. The County counters that these Ordinances do not require the lowering of LOS and they do provide adequate facilities to serve development. County Response, at 35-37.

Ordinance No. 03-020, removing 832-acres from the DPO, as discussed extensively *supra*, clearly was **guided by**, and **complies** with, Goal 12. Likewise for Ordinance No. 03-021, which allowed an extension of time within the 6-year funding and construction timing requirements of the Act, also was **guided by**, and **complies** with Goal 12.

Regarding Ordinance No. 03-019, Petitioners have carried their burden in demonstrating that the <50 PHT exemption and 40-acre minimum criterion did not comply with the consistency and implementation requirements of the Act. The presence or absence of the 40-acre minimum criterion would not alter the requirement that proponents of developments would have to demonstrate that all public facilities necessary to support the development are available and adequate. So this provision of the Ordinance does not run afoul of Goal 12. However, the <50 PHT exemption from the DPO procedures would allow development to occur throughout the entire DPO area (where the infrastructure needed is not funded and inadequate) without any demonstration by the applicant, or the County, that infrastructure deficiencies would be eliminated. Consequently, this provision of Ordinance No. 03-019 was **not guided by** and does **not comply** with Goal 12.

### **Conclusion: Legal Issue 1**

Ordinance Nos. 03-019, 03-020 and 03-021, are **guided by**, and **comply** with the direction set forth in Goal 1 – RCW 36.70A.020(1).

Ordinance Nos. 03-019, 03-020 and 03-021, are **guided by** and **comply** with the direction set forth in Goal 8 – RCW 36.70A.020(8).

Ordinance Nos. 03-020 and 03-021, are **guided by** and **comply** with the direction set for the in Goal 12 – RCW 36.70A.020(12).

Ordinance No. 03-019, as related to the <50 PHT exemption, is **not guided by**, and **does not comply** with the direction set forth in Goal 12 – RCW 36.70A.020(12).

### **D. Legal Issue No. 2 – CTED REVIEW and submittal**

The Board's PHO set forth Legal Issue No. 2

2. *Has the County failed to comply with the requirements of RCW 35.70A.106 in adopting Ordinance No. 03-019?*

### **Applicable Law**

RCW 36.70A.106 provides, in relevant part:

(1) Each county and city proposing adoption of a comprehensive plan or development regulation under this chapter *shall notify the department* of its intent to adopt such plan or regulation *at least sixty days prior to final adoption. . . .*

. . .

(3) *Any amendments* for permanent changes to a comprehensive plan or development regulation that are proposed by a county or city to its adopted comprehensive plan or regulations *shall be submitted to the department in the same manner as initial plans and development regulations under this section. . . .*

(Emphasis supplied.) This section is unambiguous; it requires the County to submit its proposed amendments to the DPO implementing regulations to CTED at least sixty days prior to their adoption.

### **Discussion**

#### **Position of the parties:**

Citizens correctly note that Ordinance No. 03-019 was adopted by the County on April 30, 2003. *See* Ex. C-7, Ordinance No. 03-019, at 7. Petitioners then contend that this Ordinance was *never* transmitted to CTED *prior* to adoption, thereby violating the submittal requirements of RCW 36.70A.106. Citizens PHB, at 12.

In response, the County does not dispute that it neglected to notify CTED of the proposed amendments contained in Ordinance 03-019 at least sixty days prior to its adoption. The County states, “county staff may have neglected to provide notice to CTED immediately prior to adoption of Ordinance No. 03-019, as required by RCW 36.70A.106.” County Response, at 7. The County continues, “The County recognizes the significance of this requirement, but due to heavy workloads, staffing changes, and an unusually high level of activity, this step has sometimes been overlooked, as it was for a separate set of ordinances adopted during the same period.” *Id.*, at 7-8. However, the County contends that Petitioners do not have standing to raise this issue since they never raised it prior to the County’s adoption of the Ordinance. The County

notes that all of the participation by Petitioners dealt with substantive issues, not this procedural requirement. The County therefore requests that this issue be dismissed. *Id.*, at 8-10.

In reply, Citizens asserts that the County was not “blindsided” by Petitioners since the submittal requirement is a duty under the Act that the County must fulfill. Additionally, Petitioners note that they objected to significant amendments to the ordinance being introduced only 28 days prior to its proposed adoption date leaving inadequate time for review. Citizens Reply, at 3-4.

#### Board discussion:

The County acknowledges the significance and importance of this submittal requirement and admits that it was derelict in discharging this GMA duty. **The County concedes that it did not comply with this important requirement of the Act.** County Response, at 7-8. Nonetheless, the County seeks to have its admitted noncompliance ignored by challenging Petitioners standing to even raise the issue.

The CTED submittal is an important and straightforward procedural requirement of the Act that is easy to document and comply with. The County has the duty and obligation to comply with the GMA; here, Petitioners have clearly shown that the County has breached this duty, and the County cannot deny it – it failed to act. Given this admission of noncompliance the Board will not and need not address the standing question. However, the Board notes that it is the jurisdiction that controls the schedule for drafting, review, processing and adopting amendments, if any. Given the inherent duty upon a jurisdiction to adhere to this notice and submittal mandate, the Board finds it hard to conceive of a situation where it could entertain argument challenging participation standing on this particular GMA requirement.

The County’s adoption of Ordinance No. 03-019, was clearly erroneous and did **not comply** with the requirements of RCW 36.70A.106. The Board is also remanding this Ordinance to the County with direction to bring it into compliance on other issues and will require the County to comply with the CTED submittal requirements as part of the compliance phase of this case.

#### **Conclusion: Legal Issue 2**

The County’s adoption of Ordinance No. 03-019, was clearly erroneous and did **not comply** with the requirements of RCW 36.70A.106.

#### **IV. REQUEST FOR INVALIDITY**

At the HOM, the Board granted Petitioners’ request to amend the PFR to request that the Board enter a determination of invalidity if it finds the County noncompliant and remands for

compliance with the GMA. HOM Transcript, at 5-6, *cited supra*.

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.

The Board has found that Ordinance No. 03-019 was **not guided by**, and **does not comply** with the requirements of RCW 36.70A.020(12), .106 and .130. The Board has also found that Ordinance No. 03-021 **does not comply** with the requirements of RCW 36.70A.130(1). The question now for the Board is whether the continuing validity of any of these noncompliant provisions would substantially interfere with the fulfillment of the goals of the Act.

As discussed *supra*, the Board finds that Ordinance No. 03-019's amendment to SCC 30.33C.020 (3) [the <50 PHT exemption from the DPO regulations] is inconsistent with, and fails to implement, the LSUGA Plan. Additionally the Board finds this provision is noncompliant with, and not guided by Goal 12 – RCW 36.70A.020(12). Goal 12 provides:

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

This exemption would allow development to occur throughout the entire DPO area, an area where the public facilities and services necessary to support development are inadequate. The exemption would allow development to occur without any demonstration by the applicant, or the County, that infrastructure deficiencies would be eliminated. Such development would cause the services to fall below the locally adopted levels of service. Permitting this noncompliant provision to remain in effect during the compliance period would substantially interfere with the fulfillment of RCW 36.70A.020(12) – Goal 12. Therefore, Based upon FoF 1-14, 19-22, the Board's discussion and conclusions noted *supra*, the Board enters a **determination of invalidity**

for Ordinance No. 03-019, Section 3, amending SCC 30.33C.020 [the <50 PHT exemption].

The Board **declines to enter a determination of invalidity** on the remaining noncompliant provisions of Ordinance No. 03-019; nor will the Board enter a determination of invalidity for the noncompliant provisions of Ordinance No. 03-021; as neither of these noncompliant provisions yield substantial interference with the fulfillment of the goals of the Act.

## V. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, having considered the arguments of the parties, the GMA, the procedural criteria, prior decisions of the Boards and the Courts, and having deliberated on the matter the Board ORDERS:

Snohomish County's adoption of Ordinance No. 03-019 does **not comply** with the requirement of RCW 36.70A.106. The County's adoption of Ordinance No. 03-019, specifically amendments to SCC 30.33C.020(3) [<50 PHT exemption] and SCC 30.33C.050(3) [40-acre minimum criterion] as they relate to the removal of the development phasing overlay, does **not comply** with the consistency and implementation requirements of RCW 36.70A.130(1). Further the amendments to SCC 30.33C.020(3) [<50 PHT exemption] was **not guided by** and does **not comply** with, RCW 36.70A.020(12).

Snohomish County's adoption of Ordinance Nos. 03-021, specifically amendments to SCC 30.33C.060 [Identified project lists] as it relates to the removal of the development phasing overlay, does **not comply** with the consistency and implementation requirements of RCW 36.70A.130(1).

Additionally, the Board has entered a **Declaration of Invalidity** for Ordinance Nos. 03-019, Section 3, amending SCC 30.33C.020 [the <50 PHT exemption].

The Board **remands** Ordinance Nos. 03-019 and 03-021 to the County with the following directions:

1. By no later than **May 18, 2004**, the County shall take appropriate legislative action to achieve compliance with the goals and requirements of the GMA, as interpreted and set forth in this Order, regarding its regulations governing the removal of areas from the development phasing overlay.
2. By no later than **May 25, 2004**, 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 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 **June 1, 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 **June 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.

5. Although the Board has found that Snohomish County's adoption of Ordinance No. 03-020, which removes of 832-acres from the DPO, **complies** with the challenged portions of the Act, the Board notes that several Tables and Maps in the LSUGA Plan were not amended concurrently with the adoption of Ordinance No. 03-020. Consequently, **the County is directed, by no later than its next annual Plan review cycle, to amend the LSUGA Plan to make the necessary corrections and maintain consistency between the Plan and implementing regulations.** The County shall report on the status of this corrective action at the compliance hearing.

Pursuant to RCW 36.70A.330(1), the Board hereby schedules a **Compliance Hearing** in this matter for **10:00 a.m. June 14, 2004**, at the Board's offices. The compliance hearing may be conducted telephonically, if the parties so stipulate.

If the County takes legislative compliance actions prior to the **May 18, 2004** 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 8<sup>th</sup> day of December 2003.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Bruce C. Laing, FAICP

Board Member

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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.

**appendix a**

**Findings of Fact**

1. The Lake Stevens UGA Plan (**LSUGA Plan**) was adopted November 7, 2001, by Ordinance No. 01-073 and 01-074; it was subsequently amended on January 13, 2003, by Ordinance No. 02-092. The LSUGA Plan, as amended, is not before the Board in the present proceeding. HOM Ex. 2 and Ex. C 1, LSUGA Plan.
2. The Development Phasing regulations that implemented the DPO provisions of the LSUGA Plan were also adopted November 7, 2001, by Ordinance No. 01-077. HOM Ex. 3.
3. The zoning map to implement the LSUGA Plan DPO designations was also adopted November 7, 2001, by Ordinance No. 01-075. HOM Ex. 4

4. The Snohomish County GMA Comprehensive Plan – General Policy Plan (**GPP**), was originally adopted June 28, 1995; it has been amended numerous times during the ensuing years. The GPP was amended to incorporate the map and text amendments to the LSUGA Plan by Ordinance No. 02-092 in January 2003. The GPP is not before the Board in the present proceeding. Ex. C-2, GPP.
5. The LSUGA Plan’s capital facility element includes the following key finding, “[F]or the Lake Stevens UGA: There is a gap between the capital facilities needs and the public funding available for surface water and transportation.” Ex. C-1, LSUGA Plan, at 8-3.
6. The GMA requires a “reassessment of the land use element” if a gap or revenue shortfall occurs. *See* RCW 36.70A.070(3)(e).
7. The LSUGA Plan describes a number of options for the County to consider as a “response to the revenue shortfall.” The options include, “reducing demand by timing development.” Ex. C-1, LSUGA Plan at 8-3 and 5-47.
8. When Snohomish County adopted the LSUGA Plan, it included provisions for a Development Phasing Overlay (**DPO**) – a method of reducing demand by timing development. Ex. C-1, LSUGA Plan, at 8-23 through 8-28.
9. If the County did not include the optional DPO procedure in the LSUGA Plan, it would have had to pursue other available options in reassessing its land use element due to the revenue shortfall.
10. A DPO map appears in the LSUGA Plan, and the LSUGA Plan also includes a zoning map denoting the DPO overlay area. *Id.*, at Figures 8-4 and 3-2, respectively.
11. The DPO applies within the unincorporated area of the Lake Stevens UGA. The Plan’s DPO map indicates “Green” and “Red” areas. *Id.*, at Figure 8-4 and Appendix 8-A.
12. The “Green” area is that “portion of the Lake Stevens UGA where capital project costs match the available financial capacity of the UGA. In other words, it is the area where the total expected revenues from the UGA over the lifetime of the Plan are equal to the capital needs identified within that area.” *Id.*, at 8-25.
13. The “Red” area is that portion of the Lake Stevens UGA area where “there are insufficient funds available to pay for necessary capital facilities. . . .In the Red areas, urban development would be deferred until financing of the requisite capital facilities is assured.”

*Id.*, at 8-26.

14. The implementing zoning map for the LSUGA, indicates the Red area as crosshatched and includes the DPO suffix. *Id.*, at Figure 3-2.
15. Ordinance No. 03-021 was adopted by the County on April 9, 2003. The effective date of Ordinance No. 03-021 was April 21, 2003. Ex. C-6.
16. Ordinance No. 03-019 was adopted by the County on April 30, 2003. The effective date of Ordinance No. 03-019 was May 25, 2003. Ex. C-7.
17. Ordinance No. 03-020 was adopted by the County on April 30, 2003. The effective date of Ordinance No. 03-020 was May 25, 2003. Ex. C-4.
18. Ordinance Nos. 03-019, 03-020 and 03-021 amended the County's development phasing overlay implementing regulations – Chapter 30.33C SCC and the zoning map, not the LSUGA Plan. Ex. C-4, C-6 and C-7.
19. The LSUGA Plan discusses the DPO as a critical component for implementing the LSUGA Plan. The DPO is referenced and discussed in Chapter 3 (Land Use, at Figure 3-2), Chapter 5 (Transportation Element, at 5-48 and 5-49), Chapter 6 (Surface Water Management, at 6-41 to 6-46), Chapter 8 (Capital Facilities and Utilities, at 8-24 to 8-28), Chapter 9 (Implementation, at 9-1 and 9-2) and Appendix 8-A (DPO Maps, at 8-A-1).
20. The LSUGA Plan articulates a fundamental purpose of the DPO is to preclude, defer or delay new development in areas without adequate capital facilities (the DPO or Red areas) until financing for the needed facilities to support development is assured. Ex. C-1, LSUGA Plan, at 8-24 to 8-26 and 9-1. *See also*, Ex. C-2, GPP LU Policy 2.C.5 and Ex. C-1, LSUGA Plan Policy 19, at 9-2, and 5-48 to 49, 6-46 and 8-23.
21. By exempting new development proposals that generated fewer than 50 peak hour trips from the provisions of the DPO regulations; such proposals would not be delayed or deferred and could proceed even though adequate capital facilities were not available, nor was financing and construction assured. Ex. C-7.
22. Exempting new development proposals with fewer than 50 peak hour trips would allow substantial development to occur throughout the DPO without adequate capital facilities being available and undermine the fundamental purpose of the DPO. *See* Ex. 46 and 119.
23. The LSUGA Plan provides that “Clear and concise criteria shall be developed for the

application and removal of any phasing boundaries and related regulations and policies.”  
Ex. C-1, LSUGA Plan, Policy 19, at 9-2.

24. The LSUGA Plan discusses the 40-acre minimum acreage requirement as a clear and concise criterion for removal of the DPO. Ex. C-1, LSUGA Plan, at 8-26 and 8-27.
25. The DPO is linked to the capital facilities plan or CIP for the LSUGA Plan and the LSUGA Plan requires a “director’s list” to be prepared that identifies the facilities required to be funded and constructed for removal of the DPO. Ex. C-1, LSUGA Plan, at 8-26.
26. In acting upon Ordinance No. 03-020, the County considered the surface water projects listed in the LSUGA Plan and the “director’s list.” HOM Transcript 59-60.
27. The unincorporated land area within the Lake Stevens UGA that is governed by the DPO is approximately 4050 acres. County Response, at 37.
28. Ordinance No. 03-020 adopted an area-wide rezone that lifted the DPO for 832 acres within the unincorporated area of the designated Lake Stevens UGA, thereby reducing the DPO area by approximately 20%. Ex. C-4.
29. The 832 acres removed from the DPO are located within the northwestern edge of the DPO area. HOM Ex. 1 and Ex. C-4.
30. Virtually all of the 832-acres in the DPO removal area were included in the DPO area for deficiencies in surface water project funding and construction. Ex. C-1, LSUGA Plan, at Appendix Figure 8A-2 and 8-4.
31. 50 acres of the 832-acres in the DPO removal area were included in the DPO area for deficiencies in transportation funding. Ex. C-1, LSUGA Plan, at Appendix Figure 8A-1 and 8-4.
32. Removal of an area from the DPO requires: a commitment in place to fund and construct public facilities necessary to support development (Ex. C-2, GPP Policy LU 2.C.5); a demonstration that adequate infrastructure is available (C-1, LSUGA Plan Policy 19, at 9-2); financing of needed facilities is assured (*Id.*, at 8-24); financing of requisite capital facilities is assured (*Id.*, at 8-26); a showing that adequate infrastructure is or can be available (*Id.*, at 9-1); all public facilities necessary to support development will be funded and constructed (SCC 30.33C.060); and public facilities necessary to support development shall be constructed within the maximum timeframe allowed – six years (SCC 30.33C.100).

33. The LSUGA Plan includes a prioritized list of projects for the LSUGA DPO that includes 19 different drainages and the Ebey Slough floodplain Ex. C-1, LSUGA Plan, at 43-45.
34. The 832-acre DPO removal area involves three drainages: Hulbert Creek, Weiser Creek and Burri Creek as well as the Ebey Slough floodplain. Citizens PHB, at 20-21 and County Response, at 39.
35. The LSUGA Plan lists includes 8 recommended surface water projects in the 832-acre DPO removal area. C-1, LSUGA Plan, Table 6-2, at 6-7 and 6-8.
36. The “Director’s List” includes discussion of 6 of the recommended surface water projects from the LSUGA Plan. Ex. 60.
37. Ordinance No. 03-020 includes 6 surface water projects with commitments to assure for financing and construction. Ex. C-4, Ordinance findings F, G and H, Section 4 and Ordinance No. 03-018.
38. The two additional projects included in the LSUGA Plan project list, but not in the Ordinance are slated for funding in 2007 and 2008. HOM Ex. 7.
39. Each of the three challenged ordinances addresses the phasing of development within the existing Lake Stevens Urban Growth Area. Ex. C-4, C-6 and C-7.
40. Of the 832-acres removed from the DPO, 75 acres is acceptable for residential development and 110 acres is acceptable for construction of uses that will provide employment. Ex. 35. Snohomish County Buildable Lands Report.
41. Snohomish County neglected to notify the Washington State Department of Community, Trade and Economic Development at least sixty days prior to enacting Ordinance No. 03-019. Citizens PHB, at 12 and County Response, at 7-8.

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[1]

On November 1, 2003, Board Member Laing's term officially began.

[2]

*See also* the Board’s August 15, 2003 Order on Motions.

[3]

The Board notes that there are two other key findings listed that are not relevant to the present case.

[4]

The Board notes that although the DPO technique is optional, if it were repealed, the County would be required to

pursue other “options” to address the “revenue shortfall” that triggers the RCW 36.70A.070(3)(e) “reassessment of the land use element.”

[5]

The time horizon noted in the LSUGA Plan extends to 2012. Ex. C-1, LSUGA Plan, at i-1.

[6]

The DPO as depicted on the Plan and Implementing zoning map is implemented by SCC 30.33C. It is a regulatory implementing technique that the County has adopted to direct and phase development over time, within a designated UGA.

[7]

This is one of the five “Key Principles” for capital facilities planning noted in the Plan. The other principles are:

- Costs of financing public facilities should be fairly shared among public and private interests.
- Public investments should be made first where the fullest range of urban infrastructure already exists.
- [This key principle is quoted *supra*.]
- For areas without adequate public facilities or adequate financing for such facilities, regulatory mechanisms should be developed to postpone growth.
- Property owners or developers can provide the necessary capital facilities so that development consistent with land use can proceed.

Ex. C-1, LSUGA Plan, at 8-25.

[8]

The Board notes that Citizens refer to LSUGA Plan Policy 19, at 9-2 in their PHB, at 20.

[9]

SCC 30.33C.050(2)(b) was amended by Ordinance No. 03-019 as follows:

(2) The process for removing the development phasing overlay through a quasi-judicial rezone shall be as follows:

...

(b) At the pre-application conference, the department shall provide the applicant with a list of required facilities necessary to remove the development phasing overlay from the area requested pursuant to SCC 30.33C.125(1) and the department of public works shall provide a transportation concurrency evaluation pursuant to SCC 30.33C.090. The department ~~(s will not schedule the pre-hearing application conference until)~~ shall produce the list of facilities (and concurrency evaluation is complete) and schedule a pre-application conference within thirty (30) days after being requested to do so.

...

Ex. C-7, Ordinance No. 03-019, Section 4, at 5.

[10]

Petitioners noted one of five criteria to be used by the Director of PDS in making a finding of adequacy. The other four criteria noted in the plan are: 1) The applicant has provided evidence that the necessary facilities will be provided or financed, or are shown in the county capital improvement program; 2) Facilities must be committed for construction within three years for all developments. The Director of PDS may grant an additional three years for all developments; 3) [The 40 acre minimum noted *supra*]; 4) The project must be deemed concurrent; and 5) Alternative technical solutions may be considered. See Ex. C-1, LSUGA Plan, at 8-27.

[11]

Memo from PDS to Councilmember Gossett, dated 4/9/03, answering questions posed by Mr. Gossett.

[12]

SCC 30.33C.050(2)(b) was amended by Ordinance No. 03-019 as follows:

(2) The process for removing the development phasing overlay through a quasi-judicial rezone shall be as follows:

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...

Ex. C-7, Ordinance No. 03-019, Section 4, at 5.

[13]

LSUGA Plan Policy 13 provides: All new drainage systems that discharge into stream channels with steep ravine walls shall install tightlines to convey the stormwater from the top of the ravine wall to the stream channel to prevent erosion. SCC 30.63.225 defines steep ravine walls as those greater than 33%, and defines tightlines as totally enclosed drainage systems.

[14]

LSUGA Plan Policy 16 provides: All new development within the Weiser Creek, Burri Creek and Fox Creek basins must base the design of their detention facilities on the use of a flow duration control standard. This means that duration of stormwater flows being released from the site for a flow between 50% of the existing 2-year peak flow rate and existing 50-year flow rate. SCC 30.33C.226 essentially reflects this language.

[15]

The provisions of the GMA, particularly RCW 36.70A.110 and 070(3)(c), (d) and (e) provide the statutory context for the County's establishment of the DPO process.

[16]

Assuming six years after the May 25, 2003 effective date of Ordinance No. 03-020.

[17]

This Table is entitled: Surface Water Projects Surface Water Projects Recommended for Construction Prior to Further Development Recommended for Construction Prior to Further Development

[18]

This Table is entitled: Surface Water Projects Funded for Construction within Areawide Rezone

[19]

This Table is entitled Project List for Lake Stevens UGA – Status Report, attached to 2002-2007 Surface Water CIP.

[20]

Table 6-4 in the LSUGA Plan indicates that this project is in the CIP. The Board notes that the 2003 – 2008 Surface Water Management Six Year Detailed Improvement Plan, as adopted by Motion No. 02-435 (Supp. Ex. 5) on 11/20/02, does not use the same Project IDs as the LSUGA Plan projects, Director's List Projects or Ordinance List projects. Therefore the projects cannot be directly correlated. However, none of the parties disputes that funding for Hul 3 or ELF 1 is in the 6 year plan. The Board also acknowledges that the County's 2003-2008 CIP identifies approximately \$26 million in Countywide projects, by surface water program type, and a like amount of

revenue to fund them. *See* Ex. C-2b, 2003-2008 Capital Improvement Plan, at 39-44 and 10.

[\[21\]](#)

*See* Footnote 21.

[\[22\]](#)

*See* Citizens PHB, at 22-24; and Citizens Reply, at 13.

[\[23\]](#)

The Board acknowledges that in this instance, Ordinance No. 03-020 amended the zoning map which is found at Figure 3-2 in the LSUGA Plan.

[\[24\]](#)

In this case the following Tables should have been amended: “Surface Water Projects Recommended for Construction Prior to Further Development” (Table 6-2) and “Priority Projects” (Table 6-4).

[\[25\]](#)

As noted *supra*, Petitioners have **abandoned** the challenge to the Ordinances’ compliance with Goal 6.