

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

DIRECTOR OF THE STATE)	
DEPARTMENT OF COMMUNITY,)	Case No. 03-3-0017
TRADE AND ECONOMIC)	
DEVELOPMENT,)	<i>(CTED)</i>
)	
Petitioner,)	
)	
v.)	
)	
SNOHOMISH COUNTY,)	FINAL DECISION and ORDER
)	
Respondent.)	
)	

I. PROCEDURAL HISTORY

A. GENERAL

On September 8, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the Department of Community, Trade and Economic Development (**Petitioner** or **CTED**). The matter was assigned Case No. 03-3-0017, and is hereafter captioned *CTED v. Snohomish County*. Petitioner challenges Snohomish County’s (**Respondent** or the **County**) adoption of Ordinance Nos. 03-072 and 03-073 which both amend Snohomish County’s County-wide Planning Policies (**CPPs**). The basis for the challenge is noncompliance with the Growth Management Act (**GMA** or **Act**).

On September 8, 2003, the Board issued a “Notice of Hearing” in the above-captioned case. The Notice set a date for a prehearing conference (**PHC**) and established a tentative schedule for the case.

On October 17, 2003, the day after the PHC, the Board issued its “Prehearing Order” (**PHO**) establishing the final schedule and setting forth the Legal Issues in this case.

On October 21, 2003, the Board issued an “Order on Intervention” **granting** intervenor status to the Snohomish County-Camano Association of Realtors and Master Builders Association of King and Snohomish Counties (**Realtors**).

On November 10, 2003, the Board issued an “Order on Intervention” **granting** intervenor status to Sultan School District No. 311 and Snohomish County School District No. 201 (**School Districts**).

B. MOTIONS TO SUPPLEMENT AND AMEND INDEX

On October 8, 2003, the Board received “Snohomish County’s Index to the Record” (**Index**).

On October 29, 2003, the Board received “Joint Motion to Intervene by Sultan School District No. 311 and Snohomish School District No. 201 and Motion to Supplement the Record.” Attached to the motion were three proposed exhibits.

On October 31, 2003, via fax, the Board received “Snohomish County-Camano Association of Realtors and Master Builders Association of King and Snohomish Counties’ Motion to Supplement the Record.” Attached to the motion were four documents as proposed exhibits.

On November 3, 2003, the Board received CTED’s “Response to School Districts’ Motion to Intervene and Motion to Supplement the Record.” CTED did not oppose the School Districts motion to supplement the record.

On November 4, 2003, the Board received Snohomish County’s “Revised Index to the Record” (**Revised Index**). The Revised Index added eight items: an Ordinance adopted 7/9/03 and seven items pertaining to Snohomish County Tomorrow’s meetings. The Revised Index did not include any of the proposed exhibits offered by either the School Districts or MBA.

On November 10, 2003, the Board received “Snohomish County’s Response in Support of Intervenors’ Motions to Supplement the Record.”

The Board did not receive a reply brief from CTED on the MBA motion to supplement the record.

On November 13, 2003, the Board issued its “Order on Motions to Supplement the Record.” The Order summarized the items comprising the record in this case – the three exhibits proposed by the School Districts were **admitted**, and two of the four exhibits proposed by Realtors were **admitted**. These supplemental exhibits, in addition to the Revised Index, constitute the record in this matter.

C. DISPOSITIVE MOTIONS

There were no dispositive motions filed in this case.

D. BRIEFING AND HEARING ON THE MERITS

On December 9, 2003, the Board received “CTED’s Opening Brief” with three attached exhibits” (**CTED PHB**).

On January 9, 2004, the Board received: “Snohomish County’s Prehearing Brief” with nine attached exhibits (**County Response**); “Snohomish County-Camano Association of Realtors and Master Builders of King and Snohomish Counties’ Prehearing Brief” with three attached exhibits (**Realtor Response**); and “School Districts’ Prehearing Brief” with seven attached exhibits (**School District Response**).

On January 16, 2004, the Board received “CTED’s Reply Brief” with four attached exhibits (**CTED Reply**).

On January 26, 2004, the Board received “Washington State Association of Counties Motion to Appear as Amicus Curiae” and “Amicus Brief of Washington State Association of Counties” (**WSAC Amicus Brief**).

On January 29, 2004, the Board held a hearing on the merits (**HOM**) at the Board’s offices. Board members Edward G. McGuire, Presiding Officer, Bruce C. Laing and Joseph W. Tovar were present for the Board. Petitioner CTED was represented by Alan D. Copsy and Heather Ballash. Respondent Snohomish County was represented by Barbara Dykes and Brent D. Lloyd. Intervenor Realtors were represented by Tom Ehrlichman and Intervenor School Districts were represented by Elizabeth Thomas and Denise Lietz. Snohomish County Councilmembers John Kostner and Jeff Sax observed the proceedings, and Ed Moats, Snohomish County Council staff also attended. Also in attendance were: David Toyer, Mike Pattison and Russ Hokanson. Ketil Freeman and Lara Heisler, Board Externs were also present. 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 1:00 p.m. A transcript of the proceedings was ordered (**HOM Transcript**).

On February 4, 2004, the Board received, pursuant to Board Member Tovar’s request at the HOM, a copy of the relevant portions of chapter 30.29 Snohomish County Code (**SCC**), and SCC 7.44.030. The County noted that these code provisions, related to extending sewers to churches in the rural areas, are pending before the Board in *CTED II*, CPSGMHB Case No. 03-3-0020.

On February 9, 2004, the Board received the HOM Transcript.

II. BURDEN OF PROOF / STANDARD OF REVIEW / DEFERENCE

Petitioner challenges Snohomish County’s amendment of two County-wide Planning Policies (**CPPs**), as adopted by Ordinance Nos. 03-072 and 03-073. The Petitioner and Respondent acknowledge that the GMA, specifically RCW 36.70A.320(1), accords a

presumption of validity to the adoption of comprehensive plans and implementing development regulations, but does not accord a presumption of validity to the County in adopting CPPs. *See*: CTED PHB, at 6; County Response, at 11. The Board agrees.

CTED asserts that a “CPP is not presumptively valid until either the Board resolves a challenge to the policy by finding that it complies with the GMA, or the 60-day period for challenging the county-wide policy runs without a challenge having been filed. (Citation omitted).” CTED PHB, at 6-7. The County contends that “the law in Washington is that all ordinances are presumed valid.” (Citations omitted). County Response, at 11.

While both Petitioner and Respondent present interesting arguments, the Board is not compelled to resolve this issue. The question of the effect of the challenged Ordinance’s validity during the Board’s review is not one presented to the Board. In this case, the parties may be disputing a distinction without a difference, since notwithstanding the presumption of validity, RCW 36.70A.320(2) clearly places the burden of proof on Petitioner, CTED, to demonstrate that the actions taken by the County are not in compliance with the requirements of the GMA. RCW 36.70A.320(2).

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

Thus, notwithstanding presumptions, the Board will **determine** compliance or noncompliance of the challenged actions as part of the Board’s review. The Board’s determination is reflected in this Order.

As to the question of deference to local growth management decisions, pursuant to RCW 36.70A.3201 the Board will grant deference to Snohomish County in how it plans for growth, consistent with the goals and requirements of the GMA.

However, as our State Supreme Court has stated, “Local discretion is bounded, however, by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board*, 142 Wn.2d 543, 561 (2000) (**King County**).

Further, Division II of the Court of Appeals has stated, “Consistent with *King County*, and notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a county’s plan that is not ‘consistent with the requirements and goals of the GMA.’” *Cooper Point Association v. Thurston County*, 108 Wn. App. 429, 31 P. 3d 28 (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, 148 Wn.2d 1, 7, 57 P.3d 1156 (2002).

III. BOARD JURISDICTION, ABANDONED ISSUES, PRELIMINARY MATTERS AND PREFATORY NOTE

A. BOARD JURISDICTION

The Board finds that the CTED's PFR was timely filed, pursuant to RCW 36.70A.210(6); CTED has standing to appear before the Board, pursuant to RCW 36.70A.210(6);¹ and the Board has subject matter jurisdiction over the challenged ordinance, which amends Snohomish County's CPPs, pursuant to RCW 36.70A. 210(6) and .280(1)(a).

B. ABANDONED ISSUES

Issues not briefed are abandoned. WAC 242-02-570. In Legal Issue 5, Petitioner withdraws the allegation that Ordinance No. 03-073 does not comply with RCW 36.70A.215. *See* CTED PHB, footnote 59, at 32. Consequently, this portion of Legal Issue 5 is **abandoned**.

C. PRELIMINARY MATTERS

As the first matter of business at the HOM the Board heard argument and discussion regarding WSAC's motion for Amicus Curiae status. WAC 242-02-280 enables the Board to grant Amicus status. No party objected to WSAC's Amicus brief. The Board **granted** Amicus status to WSAC, and included its brief among those to be considered by the Board.

Attached to the briefing of CTED and the School Districts were motions to take official notice of various documents. The Board heard argument on each of the submittals and ruled on each. WAC 242-2-660(2) and (4) enables the Board to take official notice of matters of law, including enactments of counties and the state. The rulings are reflected in the following table.

¹ This section of the GMA specifically limits standing to appeal an adopted CPP to cities and the Governor. Attached to CTED's PFR was a September 3, 2003 letter from Governor Locke directing CTED to file an appeal challenging the County's adoption of Ordinance Nos. 03-072 and 03-073. *See* RCW 36.70A.310.

Proposed Exhibit: Documents	Ruling
CTED Items:	
1. Ordinance No. 03-063	Denied²
2. <i>Quadrant Corporation v. Growth Management Hearings Board</i> , __P.3d__, WL 23018887 (Wash. App Div. 1, Dec. 29, 2003)	Board takes notice – HOM Ex. 1.
3. <i>Low Income Housing Institute v. City of Lakewood</i> , __Wn. App. __, 77 P.3d 653, 655 (2003)	Board takes notice – HOM Ex. 2.
School District Items:	
1. Washington State Constitution ³	Board takes notice – HOM Ex. 3.
2. Ordinance No. 03-049	Board takes notice – HOM Ex. 4.
3. Ordinance No. 03-050	Board takes notice – HOM Ex. 5.
4. Snohomish County [GMA] Comprehensive General Policy Plan	Board takes notice – HOM Ex. 6.
5. Snohomish County Code 30.22.110	Board takes notice – HOM Ex. 7.

D. PREFATORY NOTE

This case involves review of the language of CPP amendments adopted by the County to determine whether they comply with the various provisions of the GMA. The bulk of the exhibits presented are the challenged Ordinances, Board and Court case law, and documents such as the County’s Buildable Lands Report or School District Capital Facility Plans. Consequently, the Board’s review and analysis focuses heavily on the actual language of, or the *words*, of the amended CPPs.

There are five Legal Issues presented in this case. In each issue CTED alleges noncompliance with the same provisions of the GMA, namely, RCW 36.70A.020, .110, .210 and .215. Therefore, the Board will set forth the relevant provisions of the GMA – the Applicable Law – prior to discussing each Legal Issue and not repeat it for all Legal Issues.

The applicability of RCW 36.70A.210 and .215 to CPPs are undisputed in this matter. However, there was argument offered, in briefing and orally, regarding the applicability of the GMA’s Goals [RCW 36.70A.020] and the GMA’s UGA requirements found in RCW 36.70A.110, to the County’s adoption of CPPs. The Board addresses these questions also under the “Applicable Law” section of this Order. The Board will then turn to the individual Legal Issues.

² The Board noted that Ordinance No. 03-063 is the subject of another pending case before the Board [CPSGMHB Case No. 03-3-0020] in which CTED is a party. Consequently, CTED will have the opportunity to explain its view of the Ordinance and argue on the merits in that proceeding.

³ Although the Board takes official notice of the Washington State Constitution, the Board has no jurisdiction to address constitutional questions.

Legal Issues 1 through 4 challenge the County's amendment to CPP UG-14(d), as adopted in Ordinance No. 03-072. Legal Issue 5 challenges the County's amendment to CPP OD-4, as adopted in Ordinance No. 03-073. The Board first addresses the challenge to the amendments to CPP OD-4; then turns to the amendments to CPP UG-14(d). An additional prefatory note precedes the Board's discussion of CPP UG-14(d).

IV. APPLICABLE LAW DISCUSSION

Applicable Law – GMA Provisions

Petitioner asserts noncompliance with RCW 36.70A.110, .210(3), .215 and .020(1), (2), (8), (9) and (10). Relevant provisions of each challenged section of the GMA are set out *infra*.

RCW 36.70A.110 provides, in relevant part:

- (1) Each county that is required or chooses to plan under RCW 36.70A.040 shall designate an urban growth area or areas within which growth shall be encouraged and outside of which growth can only occur if it is not urban in nature. Each city that is located in such a county shall be included within an urban growth area. An urban growth area may include more than a single city. An urban growth area may include territory that is located outside of a city only if such territory is already characterized by urban growth whether or not the urban growth area includes a city, or is adjacent to territory already characterized by urban growth, or is a designated new fully contained community as defined by RCW 36.70A.350.
- (2) Based upon the growth management population projection made for the county by the office of financial management, the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period. Each urban growth area shall permit urban densities and shall include greenbelt and open space areas. An urban growth area determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses. In determining this market factor, cities and counties may consider local circumstances. Cities and counties have discretion in their comprehensive plans to make choices about accommodating growth. . . .
- (3) Urban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development, second in areas already characterized by urban growth that will be served adequately by a combination of both 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 area. Urban growth may also be located in designated new fully contained communities as defined by RCW 36.70A.350.

- (4) In general, cities are the units of local government most appropriate to provide urban governmental services. In general, it is not appropriate that urban governmental services be extended to or expanded in rural areas except in those limited circumstances shown to be necessary to protect basic public health and safety and the environment and when such services are financially supportable at rural densities and do not permit urban development.
- (5) . . .[Interim UGA provisions]. . .
- (6) Each county shall include designations of urban growth areas in its comprehensive plan.
- (7) An urban growth area designated in accordance with this section may include within its boundaries urban service areas or potential annexation areas designated for specific cities or towns within the county.

RCW 36.70A.210 provides, in relevant part:

- (1) The legislature recognizes that counties are regional governments within their boundaries, and cities are primarily providers of urban governmental services within urban growth areas. For purposes of this section a “county-wide planning policy” is a written policy statement or statements used solely for establishing a framework from which county and city comprehensive plans are developed and adopted pursuant to this chapter. This framework shall ensure that city and county comprehensive plans are consistent as required in RCW 36.70A.100. Nothing in this section shall be construed to alter the land-use powers of cities.
- (2) . . .[Procedures for development and adoption of CPPs]. . .
- (3) A county-wide planning policy shall at a minimum, address the following:
 - a. Policies to implement RCW 36.70A.110;
 - b. Policies for promotion of contiguous and orderly development and provision of urban services to such development;
 - c. Policies for siting public capital facilities of a county-wide or statewide nature, including transportation facilities of statewide significance as defined in RCW 47.06.140;
 - d. Policies for county-wide transportation facilities and strategies;
 - e. Policies that consider the need for affordable housing, such as housing for all economic segments of the population and parameters for its distribution;

- f. Policies for joint county and city planning within urban growth areas;
- g. Policies for county-wide economic development and employment; and
- h. An analysis of fiscal impact.

...

RCW 36.70A.215 provides in relevant part:

- (1) Subject to the limitations in subsection (7)⁴ of this section, a county shall adopt, in consultation with its cities, county-wide planning policies to establish a review and evaluation program. This program shall be in addition to the requirements of RCW 36.70A.110, 36.70A.130 and 36.70A.210. In developing and implementing the review and evaluation program required by this section, the county and its cities shall consider information from other appropriate jurisdictions and sources. The purpose of the review and evaluation program shall be to:
 - a. Determine whether a county and its cities are achieving urban densities within urban growth areas by comparing growth and development assumptions, targets, and objectives contained in the county-wide planning policies and the county and city comprehensive plans with actual growth and development that has occurred in the county and its cities; and
 - b. Identify reasonable measures, other than adjusting urban growth areas, that will be taken to comply with the requirements of this chapter.
- (2) The review and evaluation program shall:
 - a. Encompass land uses and activities both within and outside of urban growth areas and provide for annual collection of data on urban and rural land uses, development, critical areas, and capital facilities to the extent necessary to determine the quantity and type of land suitable for development, both for residential and employment-based activities;
 - b. Provide for the evaluation of the data collected under (a) of this subsection every five years as provided in subsection (3) of this section. The first evaluation shall be completed not later than September 1, 2002. The county and its cities may establish in the county-wide planning policies indicators, benchmarks, and other similar criteria to use in conducting the evaluation;
 - c. . . .[Develop methods to resolve data disputes]. . .
 - d. Provide for the amendment of the county-side planning policies and county and city comprehensive plans as needed to remedy

⁴ Snohomish County is not subject to the limitations noted in subsection (7).

an inconsistency identified through the evaluation required by this section, or to bring these policies into compliance with the requirements of this chapter.

- (3) At a minimum, the evaluation component of the program required by subsection (1) of this section shall:
 - a. Determine whether there is sufficient suitable land to accommodate the county-wide population projection established for the county pursuant to RCW 43.62.035 and the subsequent population allocations within the county and between the county and cities and the requirements of RCW 36.70A.110;
 - b. Determine the actual density of housing that has been constructed and the actual amount of land developed for commercial and industrial uses within the urban growth area since the adoption of a comprehensive plan under this chapter or since the last periodic evaluation as required by subsection (1) of this section; and
 - c. Based on the actual density of development as determined under subsection (b) of this subsection, review commercial, industrial and housing needs by type and density range to determine the amount of land needed for commercial, industrial, and housing for the remaining portion of the twenty-year planning period used in the most recently adopted comprehensive plan..
- (4) If the evaluation required by subsection (3) of this section demonstrates an inconsistency between what has occurred since the adoption of the county-wide policies and the county and city comprehensive plans and development regulations and what was envisioned in those policies and plans and the planning goals and requirements of this chapter, as the inconsistency relates to the evaluation factors specified in subsection (3) of this section, and the county and its cities shall adopt and implement measures that are reasonably likely to increase consistency during the subsequent five-year period. If necessary, a county, in consultation with its cities as required by RCW 36.70A.210, shall adopt amendments to county-side planning policies to increase consistency. The county and its cities shall annually monitor the measures adopted under this subsection to determine their effect and may revise or rescind them as appropriate.

...

RCW 36.70A.020 contains the GMA goals. The provisions of RCW 36.70A.020 and the relevant goals in this matter include:

The following goals are adopted to guide development and adoption of comprehensive plans and development regulations of those counties and

cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations:

- (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
- (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low density development.
- ...
- (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 uses.
- (9) Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities.
- (10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.
- ...

Discussion – Applicable Law

Position of the Parties re: Applicable Law:

It is undisputed that the provisions of RCW 36.70A.210 and .215 apply to the County's newly adopted CPPs. In its response brief the County argues that the CPPs amended by Ordinance Nos. 03-072 and 03-073 comply with the provisions of RCW 36.70A.210 and .215. However, the County takes issue with the notion that the UGA requirements of RCW 36.70A.110 and the goals of RCW 36.70A.020 even apply to CPPs.⁵ County Response, at 17-20.

The CPPs, the County contends, “[O]ccupy the highest and most general level of the GMA's ‘cascading hierarchy of substantive and directive policy’ and as such, they are the furthest removed from actual development on the ground. In fact, the GMA explicitly states that the CPPs are to be

⁵ The Realtors also seem to align with this position asserting that the CPPs need only be reviewed in the context of the GMA's CPP adoption provisions. Realtors Response, at 1.

[U]sed solely for establishing the county-wide framework from which county and city comprehensive plans are developed and adopted pursuant to this chapter. This framework shall ensure that city and county comprehensive plans are consistent as required by RCW 36.70A.100. RCW 36.70A.210(1) (framework)

Id., at 17, (emphasis in original).

The County also argues that RCW 36.70A.110 applies to UGA designations, which are done in comprehensive plans, not the CPPs. Therefore, the County concludes, .110 does not apply directly to CPPs. Challenges to actual UGA expansions in a plan, may be appropriate, but not challenges to framework CPPs. *Id.*, at 18.

Regarding the goals of the Act, the County asserts, “The GMA specifically states that the planning goals ‘shall be used *exclusively* for the purpose of guiding the development of comprehensive plans and development regulations.’ RCW 36.70A.020.” *Id.*, at 19, (emphasis in original). The County concludes that CPPs provide a framework for plans and development regulations which must directly be guided by and comply with the goals of the Act; however, CPPs are not directly governed by the goals. *Id.*, at 19-20.

In reply, CTED summarizes its arguments in its opening brief including the contention that CPPs must be consistent with the GMA’s requirements and goals regarding UGA expansions. CTED states,

This requirement [CPPs compliance with .110] is explicit in RCW 36.70A.210(3): a CPP “shall at a minimum, address the following: (a) ***Policies to implement RCW 36.70A.110.***” (emphasis added). In light of that clear directive, it is difficult to understand how the County can argue that the requirements of RCW 36.70A.110 and .020 do not apply directly to the CPPs. If the county-wide planning policies must establish a framework to guide development of comprehensive plans (and amendments to comprehensive plans), RCW 36.70A.210(1), that framework would not comply with the GMA if its directive effect resulted in noncompliant comprehensive plans or development regulations. Inescapably, the county-wide planning policies must be consistent with the same subjective provisions of GMA that apply directly to comprehensive plans and development regulations. Thus, if RCW 36.70A.110 requires that a UGA expansion be supported by a land capacity analysis, then a county-wide planning policy violates RCW 36.70A.110 – as well as RCW 36.70A.210(3) – if it permits a UGA expansion without a supporting land capacity analysis. While the County’s argument that a directive CPP may be challenged indirectly through a challenge to the implementing comprehensive plan provision applies to petitioners who are not authorized to challenge CPPs directly, there is no reason why the Governor or a city authorized under RCW 36.70A.210(6) is required to

wait until the CPP is implemented in the comprehensive plan. [CTED then references HOM Exs. 1 and 2 regarding the applicability of the goals of the Act.].

CTED Reply, at 8-9, (emphasis in original).

At the HOM, the County and CTED reiterated these arguments. Additionally, the Realtors asserted that the Act does not require a CPP for each goal of the Act; therefore, the goals of the Act to not apply to CPPs. *See* HOM Transcript, at 90.

Board Discussion:

Binding effect of CPPs:

In one of its earliest cases the Board stated:

The GMA requires ‘consistency’ between the plans of local governments, in or adjacent to a county, and between the plans and regulations of individual jurisdictions. The Board therefore holds that county-wide planning policies are not just procedural in their effect, but also substantive. CPPs have a substantive effect on the comprehensive plans of cities and the county adopting them if they meet a three prong test: (1) they must serve a legitimate regional purpose; (2) they must not alter the land use powers of cities; and (3) they must otherwise be consistent with the relevant provisions of the GMA.

City of Poulsbo, City of Port Orchard and City of Bremerton v. Kitsap County, CPSGPHB Case No. 92-3-0009c, Final Decision and Order, (Apr. 6, 1993), at 23.

In *King County v. Central Puget Sound Growth Management Hearings Board*, 138 Wn.2d 161, 175, 979 P.2d 374 (1999), the Supreme Court affirmed that CPPs have the binding effect described by the Board. (If the CPPs served merely as a nonbinding guide, municipalities would be at liberty to reject CPP provisions and the CPPs could not ensure consistency between local comprehensive plans. The Board was therefore correct to conclude that CPPs are binding on the County.)

In this case, the Board’s review focuses on whether the challenged CPPs, which provide binding substantive direction for plans, are consistent with the relevant provisions of the GMA. In this discussion the Board determines the relevant provisions of the GMA that are applicable to the challenged CPPs.

Regarding RCW 36.70A.110:

First, the Board notes that the GMA resides at the top, or apex, of the “cascading hierarchy of substantive and directive policy.” The Board has explained this in several of

its prior cases.⁶ CPPs only exist by virtue of the GMA. Second, as noted by CTED, RCW 36.70A.210(3)(a) explicitly requires the CPPs to include “Policies to implement RCW 36.70A.110.” These CPPs provide a framework of substantive and directive policy for designating UGAs within comprehensive plans. The substantive and policy direction given by any such CPPs, such as UG-14 and OD-4, which are challenged here, must therefore, implement and comply with the requirements of RCW 36.70A.110. The Board concludes that the requirements of RCW 36.70A.110 apply to the CPPs at issue here – UG-14 and OD-4.

Regarding RCW 36.70A.020:

The County is correct in noting that the (14) Goals of the GMA “shall be used *exclusively* for the purpose of guiding the development of comprehensive plans and development regulations.” RCW 36.70A.020. Also the Act is clear that CPPs are to be “*used solely for establishing the county-wide framework* from which county and city comprehensive plans are developed and adopted pursuant to this chapter.” RCW 36.70A.210(1). Both provisions make the same point. Both the CPPs and goals must be used to guide the development of locally adopted plans. Those comprehensive plans must adhere to both the CPPs and the goals of the Act. The locally established CPPs cannot contradict the goals of the statute and still fulfill their statutory obligations.⁷

The Board agrees with CTED’s interpretation of these provisions: if CPPs are required to establish a framework for guiding the development and amendment of comprehensive plans so as to ensure GMA compliance and consistency among jurisdictions; then the CPP guiding framework must also adhere to the goals and requirements of the Act. CPPs cannot be blind to the goals of the Act – the GMA’s goals provide substantive context in the development and adoption of CPPs. This is in keeping with the interpretation of the Supreme Court which, in construing the Act, has consistently read the goals into substantive provisions.⁸

The Act requires local comprehensive plans and development regulations to be guided by, and consistent with, the state planning goals set forth in RCW 36.70A.020 and that local comprehensive plans be consistent with the county-wide planning policies developed through RCW 36.70A.210 and .215. To give effect to these GMA

⁶ See *City of Snoqualmie and City of Issaquah v. King County*, CPSGPHB Case No. 92-3-0004, Final Decision and Order, (Mar. 1, 1993); *Association of Rural Residents v. Kitsap County*, CPSGPHB Case No. 93-3-0010, Final Decision and Order, (Jun. 3, 1994); and *Ann Aagaard, et al., v. City of Bothell*, CPSGMHB Case No. 94-3-0011c, Final Decision and Order, (Feb. 21, 1995); and *Laurelhurst, et al., v. City of Seattle*, CPSGMHB Case No. 01-3-0008, Order on Motions, (Jun. 18, 2003).

⁷ However, this is not to say that *each* goal of the Act must have a corresponding and consistent CPP.

⁸ See *Thurston County v. The Cooper Point Association, et al.*, 148 Wn.2d 1 (2002) (Applying a narrow construction to the term “necessary” as being consistent with the legislatures intent to protect the rural character of an area in RCW 36.70A.070(5) based on a reading of the Act inclusive of the urban sprawl reduction goal, RCW 36.70A.020(2).) See also, generally, *King County v. Central Puget Sound Growth Management Hearings Board, et al.*, 142 Wn.2d 543 (2000).

requirements, **the Board holds that county-wide planning policies must be guided by, and be consistent with, the planning goals set forth in RCW 36.70A.020. Although the goals are not listed in order of priority for purposes of comprehensive plans, certain goals will have greater relevance than others at the county-wide scale.**⁹ Applying this holding to the present case, the Board concludes that the CPP amendments contained in Ordinance Nos. 03-072 and 03-072 must be guided by, and be consistent with, the goals of the Act – RCW 36.70A.020.

Conclusions – Applicable Law

CPPs provide binding substantive direction to local jurisdictions in developing and adopting their GMA plans.

It is undisputed that the County’s challenged CPP amendments contained in Ordinance Nos. 03-072 and 03-073 must comply with the requirements of RCW 36.70A.210 and RCW 36.70A.215. These provisions of the GMA apply to the challenged actions.

The Board concludes that the CPP amendments contained in Ordinance Nos. 03-072 and 03-073 must comply with the requirements of RCW 36.70A.110, since RCW 36.70A.210(3)(a) specifically requires CPPs “to implement RCW 36.70A.110.”

The Board concludes that the CPP amendments contained in Ordinance Nos. 03-072 and 03-072 must be guided by, and be consistent with, the goals of the Act – RCW 36.70A.020.

B. LEGAL ISSUE NO. 5

[CPP OD-4 – (Expansion of sewers into rural areas for churches)]

The Board’s PHO set forth Legal Issue No. 5

5. *In so far as it permits the extension of sewerage to a church located in a rural area adjacent to but outside the UGA, is section 2 or Snohomish County Amended Ordinance No. 03-073 in noncompliance with RCW 36.70A.110,*

⁹ The Board has previously held:

While the preamble to RCW 36.70A.020 clarifies that the goals are not listed in any order of priority, a close examination of the 13 goals reveals that there are some important distinctions that can be drawn among them. Unlike the other ten, three planning goals [(1) urban growth; (2) reduce sprawl; and (8) natural resource industries] operate as organizing principles at the county-wide level. Thus, they have not only a procedural dimension, but they also direct a tangible and measurable outcome.

Bremerton, et al., v. Kitsap County, CPSGMHB Case No. 95-3-0039c, Final Decision and Order, (Oct. 6, 1995), at 25.

RCW 36.70A.210(3) and RCW—36.70A.215,¹⁰ as guided by RCW 36.70A.020(1) and (2)?

Applicable Law

On this Legal Issue CTED asserts the County has not complied with RCW 36.70A.110 [specifically .110(4)], .210(3) and .020(1) and (2). *See supra* for the full text of each GMA provision.

Discussion

The Amendment to OD-4:

Section 2 of Ordinance No. 03-073 amends CPP OD¹¹- 4 as follows (new language is shown underlined; deleted language is shown in ~~strikeout~~):

In general, aAllow extension of urban infrastructure and urban levels of service only within UGAs, except as shown to be necessary to protect basic public health and safety and the environment, when such services are financially supportable at rural densities and do not permit urban development, to remedy public health emergencies. PROVIDED, a church located in a rural area directly adjacent to (abutting) an Urban Growth Area shall not be precluded from hooking up to an existing sewer main, so long as the size, scale and uses at the church are compatible with the surrounding area and preserve rural character, as evidenced by the issuance of a conditional use permit. Use of the stubouts or connecting lines serving the church by any residential, commercial, or industrial use in the rural area is prohibited.

Ordinance No. 03-073, Section 2, at 4.

Position of the Parties:

CTED notes that Section 1 of Ordinance No. 03-073 indicates the amendment to OD-4 was perhaps prompted by the Religious Land Use and Institutionalized Persons Act (**RLUIPA**), 42 USC 2000, and/or the First Amendment to the US Constitution. However, as CTED correctly observes, the Board has no jurisdiction to address these provisions of federal law. The Board's jurisdiction is limited to compliance with the GMA. CTED PHB, at 32.

¹⁰ Petitioner's challenge to compliance with this GMA provision was withdrawn and abandoned. *See* CTED PHB, at footnote 59, at 32.

¹¹ OD indicates an "Orderly Development" CPP.

CTED argues that the language of RCW 36.70A.110(4) is clear, especially in light of the Supreme Court's recent interpretation of this section of the Act in *Thurston County v. Cooper Point Association (Cooper Point)*, 148 Wn.2d 1, 57 P.3d 1156 (2002). Petitioner contends that the Court in *Cooper Point* “[U]pheld RCW 36.70A.110(4)’s general prohibition on extending urban governmental services, including sewers, into rural areas; and it refused to broaden the very narrow “necessity” exception to protect public health and safety and the environment.” *Id.*, at 33. CTED contends that the County “create[d] an exception that is not found in RCW 36.70A.110(4) . . . [and] contravene[s] the Court’s construction of that statute.” *Id.* CTED goes on to conclude that since the amendment does not comply with .110(4) it also fails to comply with .210(3) – it does not implement .110. *Id.* Finally, CTED asserts that CPP OD-4 “does not direct urban development to urban areas and does not reduce sprawl, thereby failing to fulfill a central purpose of CPPs and failing to comply with .020(1) and (2).” *Id.*

The County asserts that common sense supports the amendments to OD-4, especially in light of RLUIPA and the constitutional rights of religious groups. County Response, at 32-33. As to *Cooper Point*, the County asserts that is distinguishable, since *Cooper Point* involved extension of sewer to residential uses miles into the rural area, whereas OD-4 involves extension to a church use adjacent to the UGA. *Id.*, at 34. The County continues, “OD-4 does not violate RCW 36.70A.110(4) because it does not authorize the extension or expansion of urban governmental services beyond UGA boundaries. Where the sewer line is already in place on or adjacent to the churches property, CPP OD-4 merely authorizes the church to connect to that which is already there.” *Id.*

The County contends that OD-4 does not run afoul of the goals of the Act since churches are both urban and rural uses. “[T]he development of churches will continue in both rural and urban environments regardless of the disposition of this challenge.” *Id.*, at 35. The County explains that “by encouraging rural churches to locate on parcels adjacent to urban growth areas to take advantage of existing sewer lines, it is less likely that larger churches would locate further from population centers, thereby ensuring church development closer to services and decreasing potential sprawl. [Thereby, contending the action furthers goals 1 and 2 of the Act.]” *Id.*

The Realtors assert that the amendments to OD-4 pertaining to public health concerns merely reflects the language of RCW 36.70A.110(4), and is thereby consistent and compliant with the Act. Realtors Response, at 9. Further the Realtors contend that the “In general” language at the beginning of RCW 36.70A.110(4) “signifies that the legislature was not specifying an absolute prohibition, or a list of exclusive exceptions.” *Id.*

The School Districts did not brief this issue. School Districts PHB, at 1-17.

In reply, CTED argues that whether church uses are rural or urban is misleading since “RCW 36.70A.110(4)’s general prohibition on the extension of urban services applies beyond the boundaries of UGAs, regardless of the nature of the use that exists in the rural

area.” CTED Reply, at 15. Also, in response to the Realtors’ arguments, CTED notes that its concern is not based on the first clause of OD-4, but with the language following the proviso that “allows churches to connect to adjacent sewers even though they are outside the UGA.” *Id.*

Board Discussion:

It is well settled that the Board does not have jurisdiction to review, interpret or determine compliance with federal laws (*e.g.*, RLUIPA) or the state or federal constitutions. *See* RCW 36.70A.280, and relevant Board cases interpreting its jurisdiction (*See* CPSGMHB Digest – Subject Matter Jurisdiction). However, determining compliance with the GMA is the Board’s principle charge.

In this context, the focus of this issue is whether the extension or expansion of sanitary sewers (urban governmental services¹²) beyond the UGA boundary into the rural area complies with .110(4). The issue is not the uses that would ultimately be served, the distance of the extension, or the size of the pipe extended. To resolve this question, the Board need merely compare the provisions of RCW 36.70A.110(4) with the amendatory language of OD-4:

In general, cities are the units of local government most appropriate to provide urban governmental services. In general, it is not appropriate that urban governmental services be extended to or expanded in rural areas *except in those limited circumstances shown to be necessary to protect basic public health and safety and the environment and when such services are financially supportable at rural densities and do not permit urban development.*

RCW 36.70A.110(4), (emphasis supplied).

The Act is clear, extension of sewer into the rural area is inappropriate *except* when a sewer extension *is necessary to protect the public health, safety or environment* and the sewer extension is financially supportable at rural densities and will not permit urban growth. *See also Cooper Point*, 148 Wn.2d 1, 57 P.3d 1156 (2002).

In OD-4, quoted *supra*, the language preceding the proviso, clearly reflects the language and intent of RCW 36.70A.110(4). It captures the only statutorily recognized exception¹³

¹² It is undisputed that sewers are urban governmental services. *See* RCW 36.70A.030(19) and (16).

¹³ The Board concurs with the conclusion of the Court of Appeals,

The initial premise of RCW 36.70A.110(4) is that, generally, urban governmental services should not be extended or expanded into rural areas. But the Legislature has carved out an exception (1) where such extension or expansion is *necessary* to protect public health and safety and the environment, *and* (2) where such services “are financially supportable at rural densities and do not permit urban development.”

of extending sewers into the rural area - when they are necessary to protect the public health, safety and environment. It also recognizes that such extensions must be financially supportable and not allow urban development. This portion of OD-4 **complies** with the requirements of RCW 36.70A.110(4).

However, the remaining language of this CPP goes beyond the single statutory exception. It allows the extension of sewers to churches in a rural area that abut a UGA. Under this CPP, to extend a sewer line to a church outside the boundaries of the UGA, there need not be a showing that the extension is necessary to protect the public health, safety or environment, which is the only exception .110(4) recognizes.

The amendment to OD-4 creates an entirely new exception for churches that goes beyond the limited exception stated in RCW 36.70A.110(4) as interpreted in *Cooper Point* (i.e. extensions necessary to protect the public health, safety and environment). Snohomish County's enactment of Ordinance No. 03-073, amending CPP OD-4 was **clearly erroneous**. Therefore, the Board concludes that the amendments to CPP OD-4, specifically the exception created for extending sewer (an urban governmental service) to churches in the rural area abutting a UGA, does **not comply** with the requirements of RCW 36.70A.110(4).

RCW 36.70A.210(3) requires a CPP to "implement RCW 36.70A.110;" the language following the proviso in CPP OD-4 does not. Therefore, CPP OD-4 does **not comply** with RCW 36.70A.210(3).

Further, by permitting the extension of urban governmental services beyond the UGA, the language following the proviso in CPP OD-4 does not encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner; nor does this proviso reduce the inappropriate conversion of undeveloped land into sprawling, low density development. Therefore, the language following the proviso in CPP OD-4 was **not guided by**, and does **not comply** with, RCW 36.70A.020(1) and (2).

Conclusion – CPP OD-4

The Board concludes that Ordinance No. 03-073, amending CPP OD-4, specifically the exception created for providing sewer (an urban governmental service) to churches in the rural area abutting a UGA (language following the proviso), does **not comply** with the

Cooper Point, 108 Wn. App. 429, at 441 (2001), (emphasis in original). The Supreme Court did not disturb this conclusion and found, "[I]t is significant that the GMA seeks to reduce the 'inappropriate conversion of undeveloped land into sprawling, low-density development' RCW 36.70A.020(2). The provision at issue [RCW 36.70A.110(4)], which guards against the extension of services into designated rural areas, is certainly consistent with that purpose." *Thurston County v. Western Washington Growth Management Hearing Board*, 148 Wn.2d 1, 18, 57 P.3d 1156 (2002).

requirements of RCW 36.70A.110(4), .210(3); and was **not guided** by RCW 36.70A.020(1) and (2).

C. PREFATORY NOTE FOR CPP UG-14(d)

The following four Legal Issues all involve the question of whether a land capacity analysis is required prior to implementing any of the new Conditions added to UG-14(d) by Ordinance No. 03-072. To provide context for the discussion of the remaining Legal Issues in this case, the Board outlines the relationship of the land capacity analysis required by RCW 36.70A.110 [and .210(3)] and the review and evaluation program [Buildable Lands] required by RCW 36.70A.215.

The GMA requires cities and counties to accommodate the growth projected for them by the Office of Financial Management.¹⁴ The urban growth is to be accommodated within urban growth areas - the UGAs. The UGAs were sized and located by the counties in consultation and collaboration with their cities, but ultimately the UGA was, and is, designated and modified by the counties. A critical mechanism for *sizing* the UGAs is the *land capacity analysis* which determines *how much* urban land is needed. These land capacity analyses were used to calculate the needed urban land to accommodate the OFM population projections for the succeeding twenty-year period, *i.e.*, 2012. Snohomish County, like all other CPS counties, conducted this land capacity analysis in the early and mid-1990's, and designated their UGAs to accommodate the urban growth projected for 2012.

In 1997, the GMA was amended to add RCW 36.70A.215, which required an additional review and evaluation program¹⁵ for certain counties – including all CPS counties. This new section of the Act also required that counties “shall adopt, in consultation with its cities county-wide planning policies [CPP] to establish a review and evaluation program.” RCW 36.70A.215(1).

CPP UG-14 is the CPP that was adopted by Snohomish County to comply with .215. CPP UG-14 sets the parameters for the County's review and evaluation [Buildable Lands] program. *See* Appendix A for the full text of UG-14.

¹⁴ RCW 36.70A.110(2) provides in relevant part:

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

¹⁵ RCW 36.70A.215(1) provides, in relevant part:

This [buildable lands] program shall be in addition to the requirements of RCW 36.70A.110, 36.70A.130, and 36.70A.210.

UG-14(d) addresses the expansion of individual UGAs. UG-14(d) prohibits the expansion of the boundary of an individual UGA *unless* the expansion complies with the GMA [including, but not limited to, .110, .130 and .210] *and* complies with one of four conditions. These four conditions provided part of the basis for evaluating UGA capacity in the .215 review and evaluation program.¹⁶

The County's "Snohomish County Tomorrow 2002 Buildable Land Report – January 2003" (**BLR**) was developed to comply with .215 pursuant to this CPP.¹⁷ The BLR "characterizes the capacity of Snohomish County's UGAs, as of April 1, 2001, based on actual densities achieved between 1995 and 2000." Supp. Ex. 1; BLR, at 1. The report looks back, assessing that which has occurred. The BLR may be used "to review future land, housing and employment needs." *Id.* This review and evaluation report basically provides updated information and an evaluation of urban growth land utilization as of April 2001. *See Id.*, at 1-5 and 12-29; HOM Transcript, at 51-52.

In essence, the review and evaluation program (the Buildable Lands Program) is an assessment of the existing designated UGAs to determine whether they were appropriately sized and located to accommodate the urban growth projected for 2012. Since the first buildable lands review and evaluation was to be completed not later than September 1, 2002; it is a 10-year assessment, an early warning sign, which allows jurisdictions to consider reallocating population or take other actions to encourage urban development within the UGAs, thereby avoiding the need to expand them. The BLR may also provide information for mid-course corrections if adjustments to the UGA are documented in the BLR as necessary.

The information developed for the Buildable Lands review and evaluation program provides updated and important information for updating and perhaps revising the County's land capacity analysis. As noted in RCW 36.70A.215(1), it is not a substitute for the land capacity analysis required by .110. Thus, if all else fails, information obtained from the .215 review and analysis may be drawn upon in updating or revising the required .110 land capacity analyses used to size, locate and designate a county's UGA.

The challenged Ordinance adds new parameters for *subsequent buildable land reviews and evaluations*, especially as it relates to possible expansion of individual UGA boundaries. This new information may then be drawn upon to update and revise the required .110 land capacity analysis, if necessary.

¹⁶ For example: Condition 3 indicates that an expansion of an individual UGA for residential land would be possible if actual population growth within the UGA equals or exceeds fifty percent of the population capacity estimated at the beginning of the twenty-year planning period; and Condition 4 indicates that an expansion of an individual UGA would be possible if the commercial or industrial land consumption within the UGA equals or exceeds fifty percent of the developable commercial or industrial land supply at the beginning of the twenty-year period. *See* Appendix A, CPP UG-14(d)(3) and (4).

¹⁷ *See* BLR, at 1, 4, 5, 7, 8, 9 and 10.

Ordinance No. 03-072 adds six new conditions for potentially expanding individual UGA boundaries - four are challenged.

D. LEGAL ISSUE NO. 1
[CPP UG-14¹⁸ (Sec. 2.d.7 – UGA expansion for schools and churches)]

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

1. *In so far as it permits the expansion of a UGA to allow the development of a church or school in a rural area adjacent to but outside the UGA, is section 2.d.7 of Snohomish County Amended Ordinance No. 03-072 in noncompliance with RCW 36.70A.110, RCW 36.70A.210(3) and RCW 36.70A.215, as guided by RCW 36.70A.020(1) and (2)?*

Applicable Law

On this Legal Issue CTED asserts the County has not complied with RCW 36.70A.110, .210(3), .215 and .020(1) and (2). *See infra* for the full text of each GMA provision.

Discussion

The Amendment to UG-14(d)-adding Condition 7:

Section 2 of Ordinance No. 03-072 amends CPP UG – 14(d) as follow (new language is shown underlined; deleted language is shown in ~~strikeout~~):

- d. **Expansion of the Boundary of an Individual UGA:** Expansion of the boundary of an individual UGA to include additional residential, commercial and industrial land shall not be permitted unless it is supported by a land capacity analysis adopted by the County Council pursuant to RCW 36.70A.110 and otherwise complies with the Growth Management Act, includes consultation with appropriate jurisdictions in the UGA or MUGA, and one of the following ~~four~~ ten conditions are met; provided that conditions six through eight do not apply to the Southwest UGA:

...

7. The expansion will allow the development of 1) a church, or 2) a school, K-12, including public, private and parochial, provided that the expansion area is adjacent to an existing UGA and will be designated and zoned exclusively for that use and will not add any residential, commercial or industrial capacity to the affected UGA.

¹⁸ The entire text of CPP UG -14 is set forth in Appendix A.

Ordinance No. 03-072, Section 2, at 5.

Position of the Parties:

The foundation of CTED's argument is based upon an alleged lack of land capacity analysis to support UGA expansions. CTED states:

At first glance, it appears that section d of SCCPP UG-14, as amended, requires the expansion of any UGA to be supported by a land capacity analysis. The opening paragraph provides that no UGA may be expanded "unless it is supported by a land capacity analysis adopted by the County Council pursuant to RCW 36.70A.110 and otherwise complies with the Growth Management Act, . . . and one of the following ten conditions are met." When read more carefully, we submit that the structure of the subsequent conditions creates exceptions from the apparent requirement to support UGA expansions with a land capacity analysis.

The ten conditions are to be applied in the alternative: only one of the conditions needs to be met to allow UGA expansion. [CTED does not challenge conditions 1-6.] . . . Conditions 7 through 10 allow UGA expansions for reasons and to serve purposes that are independent of and unrelated to the fundamental purposes to be served by UGA designation and to the requirement that UGA designation be supported by land capacity analysis. . . . [Conditions 7-10 allow UGA expansions without a supporting land capacity analysis. These conditions] act as statutorily unauthorized exceptions to the requirements of RCW 36.70A.110.

CTED PHB, at 20-21.

CTED summarizes Condition 7 as allowing "an existing UGA to be expanded to allow the development of a church or a school outside but adjacent to the UGA, provided the expansion is designated and zoned only for that use and that the UGA expansion will not add any residential, commercial or industrial capacity to the UGA." *Id.*, at 21-22.

Petitioner does not contest Condition 7's adherence to the locational criteria of RCW 36.70A.110(1), since the proposed UGA expansion must be adjacent to an existing UGA; but, CTED's concern is with the sizing of the expansion – the land capacity analysis to support such expansion. "Application of Condition 7 does not depend on any analysis or determination that inadequate land exists within the UGA to accommodate a church or school or that projected population growth requires additional land." *Id.*, at 22.

CTED asserts that Condition 7 is designed to allow churches and schools to purchase less expensive land just outside the UGA for development with the "promise that their development" will be brought inside the UGA thereby making urban governmental services available to the property. Allowing this expansion, CTED contends, encourages

churches and schools to locate outside the UGA and create development pressure for further UGA expansion. *Id.* Petitioner concludes that Condition 7 does not comply with RCW 36.70A.110(2), 215(4), .210(3)(a) and goals 1 and 2. *Id.*

The County responds by asserting that Condition 7 is unique from the other 10 Conditions noted in UG-14(d) because it addresses purely institutional UGA expansions. The County notes that the preamble to UG-14(d) requires a land capacity analysis only for residential, commercial and industrial UGA expansions; since Condition 7 is restricted to churches and schools, such an expansion need not be supported by a land capacity analysis. County Response, at 22.

Additionally, the County refers to this Board's decisions in *Hensley IV*¹⁹ (upholding a public/institutional use (P/IU) land use designation and implementing zones) and *Hensley VI*²⁰ (among other things, upholding an amendment to Plan Policy LU 1.A.9 that excepted churches and schools from four conditions in UG-14(d)(1 through 4) [regarding land capacity analysis]). *Id.*, 22-25. The County asserts that CTED has failed to demonstrate noncompliance with any provision of the GMA. *Id.*

Realtors did not brief this Legal Issue. Realtors PHB, at 1-10.

The School Districts assert that Condition 7 is part of the County's ongoing effort to accommodate public uses, such as schools, in its growth management planning and this condition allows the expansion of a UGA in order to accommodate a school only under the same limited circumstances as Plan Policy LU-1.A.9, which was approved in *Hensley VI*. School Districts PHB, at 2-7. Further, Intervenor contends that adoption of this limited policy is within the County's discretion and the Board should defer to its choice in this matter. *Id.*, at 9-10.

Intervenor School Districts assert that, "Nothing in the GMA prohibits the County from expanding a UGA for specific, limited public uses that do not increase the residential or employment-related capacity of the UGA. Therefore, Condition 7 does not violate the GMA." *Id.*, at 11. Intervenor continues:

Condition 7 simply clarifies the County Council's intent that the detailed calculations applicable to UGA expansions for residential, commercial, or industrial purposes (as set forth in CPP UG-14(d) Conditions 1 through 4, (citation omitted)) do not apply to expansions for specific limited public uses. All GMA provisions (for example, the territorial UGA limitations of RCW 36.70A.110, as well as the review and evaluation required by RCW 36.70A.215) and the County's own planning requirements still apply to all

¹⁹ *Hensley (IV) v. Snohomish County [Maltby UGA Remand]*, CPSGMHB Case No. 01-3-0004c, Order Rescinding Invalidity and Finding Compliance, (Jul. 24, 2003).

²⁰ *Hensley VI v. Snohomish County*, CPSGMHB Case No. 03-3-0009c, Final Decision and Order, (Se. 22, 2003).

UGA expansions. In order to expand a UGA for a public use, the County is still bounded by the GMA's planning goals, the provisions for public notice and participation, and the GMA's appeal process. *See e.g., Hensley VI*, FDO, at 17. Because any proposed UGA expansion under this policy would be subject to the goals and requirements of the GMA, especially when combined with the constraints implemented by the County's P/IU land use designation, the County has acted within its local planning discretion . . ."

Id., at 11-12.

Regarding compliance with .110(2) and .215, the School Districts reiterate: 1) the sizing and locational aspects of these GMA provisions, noting Board cases requiring "show your work" (including and using the land capacity analysis to support) in setting and expanding UGAs; 2) the range of density; and 3) reasonable measure requirements of the GMA's buildable lands review and evaluation provisions. *Id.*, at 12. The School Districts then argue that these provisions – "the buildable lands monitoring requirements, reasonable measures, and land capacity assessments all analyze only capacity-generating uses – those residential and industrial/commercial uses required to be measured under RCW 36.70A.215(2)(a)." *Id.*, at 13. Intervenor also asserts, "Like the buildable lands program, the land capacity analysis [required by .110] only looks at capacity-generating uses." *Id.* The School Districts also assert:

Moreover, the expansion of a UGA for a school use, this calculation would be meaningless: In the calculation of land capacity analysis, "publicly-owned land where development cannot occur" is deducted from parcels available for development or redevelopment. *See City of Gig Harbor*, at 42; see also Supp. Ex. 1 Snohomish County Tomorrow, 2002 Growth Monitoring Buildable Lands Report (Jan. 2003) at 21 (the County removed "parcels acquired or to be acquired for major public purposes from the buildable lands inventory [including] future school sites" prior to performing the capacity calculations). Under this methodology, unchallenged by CTED, the County's calculation of land capacity would be the same prior to and following the addition of lands to the UGA for a school.

Id., at 13-14. Intervenor contends that the UGA sizing requirements do not expressly address non-capacity uses such as schools. Therefore, Condition 7 complies with these provisions of the GMA. And since Condition 7 complies with .110 and .215, Intervenor concludes it also complies with .210(3). *Id.* Likewise, since the school or church would be included within the UGA, Goals 1 and 2 are not thwarted.

Intervenor also notes that under GMA schools are not growth, but rather are public facilities that serve development. Intervenor argues that schools are neither urban nor rural and under the GMA may be located in either area. *Id.*, at 15-16.

CTED replies that the County and School Districts, in essence, concur with CTED's position that Condition 7 creates an exception to the requirements of .110, since they argue expansion of a UGA for schools and churches does not require a land capacity analysis. CTED Reply, at 4. Petitioner asserts that the County and School Districts reliance upon *Hensley IV* and *VI* is misplaced, since CTED understands those decisions differently. Namely, CTED contends that neither of the cited *Hensley* decisions addressed compliance with the CPPs *as they are now amended and challenged* in this case. *Id.*, at 4-7 (emphasis added).

Petitioner argues that it is untrue that purely institutional UGA expansions result in no additional land capacity in the UGA; this is because the County already accounted for such uses in its buildable lands review and evaluation. CTED asserts that even though these lands were deducted from the inventory, all such uses were not accounted for. *Id.*, at 11-12. CTED continues:

If additional land is added to a UGA to allow new institutional development that otherwise would have been located within the UGA and that already has been accounted for through this reduction factor, some of the lands within the UGA that were designated or expected for public purposes and institutional development will be freed for other uses. The result: additional residential, commercial, and/or industrial land capacity is added to the UGA by expanding the UGA by expanding the UGA under [Condition 7] to accommodate "purely institutional UGA expansions."

Id. Consequently, CTED concludes Condition 7 produces a UGA that is larger than what is supported by the land capacity analysis and does not comply with the goals and requirements of the Act. *Id.*

Board Discussion:

As discussed briefly in the Prefatory Note for CPP UG-14(d), *supra*, a county-wide land capacity analysis is the critical component for sizing UGAs – deciding how much land is needed to accommodate the projected population growth. It is the County's duty and responsibility under the GMA to size and designate UGAs within its borders. The CPPs, developed in collaboration with the cities within a county, are to implement .110 and provide additional guidance for the County's UGA designation and revision process. There is a long line of Board cases establishing these principles. *See* CPSGMHB Digest.

The first question for the Board in reviewing CPP UG-14(d)(7) is, "Does Condition 7 create an exception, or exemption, from the county-wide land capacity analysis requirement of UG-14(d) preamble [per RCW 36.70A.215] or from the county-wide land capacity analysis requirements of RCW 36.70A.110?" There is no dispute among the parties, and the Board concurs, the answer to this question is yes.

CTED is correct in describing this condition as an exception to the land capacity analysis requirements; and the County and School Districts do not dispute that Condition 7 is an exception, but argue this Condition is designed to address unique and limited situations pertaining to churches and schools that do not necessitate a land capacity analysis. Therefore, the critical question before the Board is, “Whether Condition 7, which allows the expansion of a UGA for churches and schools *without* a land capacity analysis, is permissible pursuant to RCW 36.70A.215 and RCW 36.70A.110?”

RCW 36.70A.215 requires that the evaluation component of the Buildable Lands Program assess: 1) ability to accommodate projected population; 2) the amount of residential, commercial and industrial land used since the original plan was adopted; and 3) determine if there is a need for additional residential, commercial and industrial land during the remainder of the twenty-year planning period. *See* RCW 36.70A.215(3)(a), (b) and (c). These are the minimum requirements for this evaluation program. A jurisdiction may do more, but a county-wide assessment and evaluation of a jurisdiction’s residential, commercial and industrial land capacity is all that is required by RCW 36.70A.215. As the Board stated in its September 22, 2003 FDO in *Hensley VI*, at 16, “The [.215] review and evaluation program is designed to require the assessment of at least the three most significant consumers of urban land – residential, commercial and industrial uses. (Footnote omitted) These three use types provide the core of urban development and the basis for the possible expansion of UGAs.”

The language of UG-14(d)(preamble) addresses individual UGA expansions that “include additional *residential, commercial and industrial land.*” *See* UG-14(d). Needed UGA expansions that accommodate land for these capacity generating uses must be supported by a land capacity analysis as required by the review and evaluation program of .215. However, UGA expansions for public and institutional uses, specifically schools and churches as set forth in Condition 7, do not fall within the parameters of UG-14(d) or .215. Neither UG-14(d), nor .215, *requires* a county-wide land capacity analysis to support a limited UGA expansion to accommodate a church or a school. The language of UG-14(d) and Condition 7 is consistent with, and complies with, the GMA’s direction as provided in .215.

Although Condition 7 complies with the provisions of .215; does it comply with the county-wide land capacity analysis requirements for sizing UGAs as contained in RCW 36.70A.110? This overarching UGA sizing requirement is not limited to the initial sizing and designation of UGAs; it also applies to *any* UGA revision - expansion or contraction. But does .110 go beyond .215 and require that public institutional uses, such as churches and schools, be accounted for in the required county-wide land capacity analysis?

CTED points to nothing in the Act, Court or Board decisions that compels this result. In fact, CTED refers to at least one Board case that discusses the methodology for carrying out county-wide land capacity analyses that includes *deductions* from the land capacity calculations for “publicly-owned lands where development [residential, commercial or industrial] may not occur.” *See* CTED PHB, at 11, (*Citing: City of Gig Harbor v. Pierce*

County, CPSGMHB Case No. 95-3-0016c, Final Decision and Order, (Oct. 31, 1995). [Also cited in CTED's quoted portion of the *Gig Harbor* case is reference to the likely *deductions* from land capacity calculations discussed in WAC 365-195-335(3)(d) and (e) and the CTED publication Issues in Designating Urban Growth Areas – Part I: Providing Adequate Urban Area Land Supply].

As the School Districts argue, *supra*, inventorying and accounting for church and school sites that are ultimately *excluded* from capacity calculations to determine needed residential, commercial and industrial land would be meaningless in this UGA evaluation exercise. Land capacity analyses are intended to evaluate capacity-generating uses that consume most urban land - those uses that increase the residential or employment-related capacity of the UGA. CTED has not provided any support for its assertion that RCW 36.70A.110 requires the inclusion of public and institutional lands, such as church and school sites, in the county-wide land capacity calculations used to evaluate UGAs.

CTED's contention that allowing UGA expansions for churches and schools will free up previously identified school and church sites for use by other capacity generating uses, thereby over-sizing the UGA, is, in the Board's view, speculative.

Schools, as well as churches, are unique in that they are institutional facilities that *serve* the population. Although they do consume land, they are needed to support and serve existing and projected population and development. They are also unique in that both uses are needed to serve both the urban and rural population. Therefore these uses are allowed and may be located in many urban or rural areas.

The Board concludes that Condition 7 of CPP UG-14(d) is not contrary to the provisions of RCW 36.70A.110 or .215; also this condition encourages these schools and churches to locate within the urban areas – encouraging compact urban development. Therefore it is guided by Goals 1 and 2. Likewise, since CPP UG-14(d)(7) complies with the provisions of RCW 36.70A.215, and is not contrary to the provisions of .110, it complies with .210(3) – this CPP implements RCW the land capacity analysis and UGA sizing requirements of .110. Snohomish County's enactment of Ordinance No. 03-072, amending CPP UG-14(d) to add Condition 7, was **not clearly erroneous**.

However, the Board believes that any actual UGA extensions for these purposes should be **limited** and **rare**, for the following reasons. First, RCW 36.70A.150 requires cities and counties to identify lands useful for public purposes, specifically enumerating schools; so the need and location for potential school sites should come as no surprise to any jurisdiction. Secondly, and potentially complementing .150, the submittal of a school district capital facility plan is a condition precedent to the imposition and collection of school impact fees; therefore, ongoing coordination and communication between school districts and jurisdictions about the number and location of needed facilities should be known. Third, as both the Sultan and Snohomish School Districts Capital Facilities Plans indicate, typical school site requirements for schools ranging from elementary to high

schools require approximately 10 to 40 acres per school, respectively.²¹ Accommodating such limited site needs within existing UGAs should be a priority and a reasonable measure to take in lieu of expanding a UGA. Finally, notwithstanding the Board's decision in this case, any actual UGA expansion involving a church or a school must comply with the goals and requirements of the Act and could be the subject of challenge before the Board.²²

Conclusion – CPP UG-14(d) Condition 7

The Board concludes that Ordinance No. 03-072, amending CPP UG-14(d), by adding Condition 7 [allowing a UGA expansion to allow the development of a 1) church; or 2) school, K-12, including public, private and parochial, provided that the expansion area is adjacent to an existing UGA and will be designated and zoned exclusively for that use and will not add any residential, commercial or industrial capacity to the affected UGA] **complies** with the requirements of RCW 36.70A.215 and .210(3) and is **guided** by RCW 36.70A.020(1) and (2). Additionally, CTED **failed to meet its burden of proof** in demonstrating noncompliance with the UGA sizing requirements (land capacity analysis) of RCW 36.70A.110.

E. LEGAL ISSUE NO. 2

[CPP UG-14 (Sec. 2.d.8 – UGA expansion – open space and urban/rural separation)]

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

2. *In so far as it permits the expansion of a UGA to include open space within the UGA, purportedly to provide for separation of urban areas and rural areas, is section 2.d.8 of Snohomish County Amended Ordinance No. 03-072 in noncompliance with RCW 36.70A.110, RCW 36.70A.210(3) and RCW 36.70A.215, as guided by RCW 36.70A.020(1), (2), (9) and (10)?*

Applicable Law

On this Legal Issue CTED asserts the County has not complied with RCW 36.70A.110, .210(3), .215 and .020(1), (2), (9) and (10). *See infra* for the full text of each GMA provision.

²¹ See Supp. Ex. 2, Sultan School District No. 311 Capital Facilities Plan 2002-2008, at 6 and 21; and Supp. Ex. 3, Snohomish School District Capital Facilities Plan 2003-2008, at 12, 19 and 30.

²² In *King County v. Central Puget Sound Growth Management Hearings Board*, 138 Wn.2d 161, 175 (1999), the Supreme Court stated "Even though the CPPs required the County to adopt the Bear Creek UGA, a provision adopted from the CPPs may be reviewed for compliance with the GMA when the provision is incorporated into the comprehensive plan."

Discussion

The Amendment to UG-14(d)-adding Condition 8:

Section 2 of Ordinance No. 03-072 amends CPP UG – 14(d) as follow (new language is shown underlined; deleted language is shown in ~~strikeout~~):

- d. **Expansion of the Boundary of an Individual UGA:** Expansion of the boundary of an individual UGA to include additional residential, commercial and industrial land shall not be permitted unless it is supported by a land capacity analysis adopted by the County Council pursuant to RCW 36.70A.110 and otherwise complies with the Growth Management Act, includes consultation with appropriate jurisdictions in the UGA or MUGA, and one of the following ~~four~~ ten conditions are met; provided that conditions six through eight do not apply to the Southwest UGA:

...

8. The expansion will permanently preserve a substantial land area containing one or more significant natural or cultural feature(s) as open space adjacent to a revised UGA boundary and will provide separation between urban and rural areas. The presence of significant natural or cultural features shall be determined by the respective legislative bodies of the county and the city or cities immediately adjacent to the proposed expansion, and may include, but are not limited to, landforms, rivers, bodies of water, historic properties, archeological resources, unique wildlife habitats, and fish and wildlife conservation areas.

Ordinance No. 03-072, Section 2, at 5-6.

Position of the Parties:

Again, CTED’s argument is premised upon an alleged lack of land capacity analysis to support UGA expansions. Additionally, CTED contends that: 1) the identification of significant natural or cultural features is left to the discretion of local governments with no reference to the GMA; 2) this condition assumes that significant natural and cultural features outside the UGA are better protected by placing them within the UGA; 3) such an expansion would be based upon the exercise local legislative power or desire, not the need to bring such a feature into the UGA to protect it; and 4) such UGA expansions would include “substantial land areas” without demonstrating any need for additional land within the UGA. CTED PHB, at 23-25. Petitioner concludes that Condition 8 does not comply with RCW 36.70A.110(2), 215(4), .210(3)(a) and goals 1, 2, 9 and 10. *Id.*

The County contends that Condition 8 reflects one of the County’s core values – “the permanent preservation of areas containing significant natural or cultural features as open

space to serve as a buffer between the rural and urban environments.” County Response, at 25. The County explains that CTED’s reading of Condition 8 is inconsistent with its plain language – “Condition 8 does not authorize UGA expansions for the purpose of including open space *within* a UGA, but rather for ‘preserving open spaces *adjacent to the revised UGA boundary.*’” *Id.*, at 27. The County asserts that this Condition does not allow expansion of UGAs to include open space areas *within* a UGA to protect them. “Rather, it allows the County to expand a UGA for the purposes of preserving significant open space [adjacent to but outside the UGA] only in those situations where RCW 36.70A.110 and all other requirements of the GMA have also been satisfied. (*Citing* CPP UG-14(d) preamble).” *Id.*

The County suggests CTED’s concerns are speculative, but agrees that any actual UGA expansion adopted pursuant to this condition would be subject to challenge before the Board. *Id.*, at 28.

The Realtors contend that this condition “would allow, in limited circumstances, the expansion of a UGA (supported by a land capacity analysis)” Realtors PHB, at 5. The Realtors assert that had CTED participated fully in the County/City SCT process it would not have misunderstood that the preserved open space is adjacent to the UGA, not within it. *Id.*

The School Districts did not brief this issue. School Districts PHB, at 1-17.

In reply, CTED indicates that its concern would be lessened if the intent [to preserve lands *adjacent* to the UGA, not preserve them by bringing them *within* the UGA] were clear in the language of Condition 8. CTED Reply, at 13. However, CTED contends, that even if such clarity were provided, Condition 8 still allows expansion of the UGA without the required land capacity analysis. *Id.*

Board Discussion:

CTED admitted in briefing, and at the HOM, that it misunderstood Condition 8 as requiring lands to be preserved as being included *within* the UGA, not *adjacent* to and outside the expanded UGA. If this is the case, CTED indicates its concerns would be lessened. However, CTED still asserts the language of Condition 8 is not clear. *See*, CTED PHB, *supra*; and HOM Transcript, at 27-28.

The operative language of Condition 8 provides: “The expansion will permanently preserve a substantial land area containing one or more significant natural or cultural feature(s) as open space *adjacent to a revised UGA boundary* and will provide separation between urban and rural areas.” The Board agrees with CTED. Land “adjacent to the UGA boundary” could be on either the rural or urban side of the UGA boundary. Therefore, the Board will **remand** this condition to the County to clarify that such preserved land should be “adjacent to, but not within, a revised UGA boundary,” or other

clarifying language. Such a clarification will reflect the intent expressed by the County in its briefing and oral argument.

CTED also asserts that a Condition 8 UGA expansion could occur without the support of a land capacity analysis. However, both the County and Realtors indicated that a land capacity analysis, as stated in UG-14(d)(preamble), would be required to pursue a UGA expansion under this condition. *See supra*, and HOM Transcript, at 65 and 81. The Board agrees with the County and Realtors.

UG-14(d) requires a county-wide land capacity analysis to support any potential UGA expansion for residential, commercial or industrial land. If such a need is demonstrated and supported by a County's land capacity analysis, and if reasonable measures have been taken to avoid expansion of the UGA, then Condition 8 could be utilized.

Additionally, the Board notes that Condition 8 would seem to restrain the County's discretion by directing the County to pursue such a needed and documented UGA expansion in a location so as to maximize its ability to preserve the significant natural and cultural features as open space. This is more of a UGA *locational constraint*, rather than a UGA *sizing constraint*. Nonetheless, if the County chooses to constrain its discretion in this manner, it is free to do so.

Regarding CTED's concern that identification of significant natural and cultural features is not linked to the GMA, the Board is not persuaded by CTED's arguments. The GMA permeates land use planning in the CPS region; it cannot be ignored whether it is specifically referenced in a CPP or not. Further, as the County frequently acknowledged, an actual UGA expansion done by the County could be appealed to the Board, wherein the Board would determine whether the specific UGA expansion complied with any challenged goals and requirements of the Act.

Nonetheless, Snohomish County's enactment of Ordinance No. 03-072, amending CPP UG-14(d), to add Condition 8, was **clearly erroneous**. The Board concludes that given the lack of clarity in the wording of CPP UG-14(d), Condition 8, it must find that the County has not been guided by RCW 36.70A.020(1), (2), (9) and (10). However, once the County clarifies the wording in UG-14(d), Condition 8, to clearly indicate that this condition is intended to preserve significant natural or cultural features as open space *adjacent to and outside* the UGA boundary, the Board can easily find compliance with these provisions of the GMA.

Conclusion – CPP UG-14 Condition 8

The Board concludes that, given the lack of clarity in the wording of CPP UG-14(d), Condition 8, the County has **not been guided by** RCW 36.70A.020(1), (2), (9) and (10).

F. LEGAL ISSUE NO. 3
[CPP UG-14 (Sec. 2.d.9 – UGA expansion – shortage of affordable housing)]

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

3. *In so far as it permits the expansion of a UGA upon a determination by the County Executive or County Council that a critical shortage of affordable housing exists that is incurable in a timely manner by reasonably available measures that expansion of a UGA is reasonably calculated to provide affordable housing, is section 2.d.9 of Snohomish County Amended Ordinance No. 03-072 in noncompliance with RCW 36.70A.110, RCW 36.70A.210(3) and RCW 36.70A.215, as guided by RCW 36.70A.020(1) and (2)?*

Applicable Law

On this Legal Issue CTED asserts the County has not complied with RCW 36.70A.110, .210(3), .215 and .020(1) and (2). *See infra* for the full text of each GMA provision.

Discussion

The Amendment to UG-14(d)-adding Condition 9:

Section 2 of Ordinance No. 03-072 amends CPP UG – 14(d) as follow (new language is shown underlined; deleted language is shown in ~~strikeout~~):

- d. **Expansion of the Boundary of an Individual UGA:** Expansion of the boundary of an individual UGA to include additional residential, commercial and industrial land shall not be permitted unless it is supported by a land capacity analysis adopted by the County Council pursuant to RCW 36.70A.110 and otherwise complies with the Growth Management Act, includes consultation with appropriate jurisdictions in the UGA or MUGA, and one of the following four ten conditions are met; provided that conditions six through eight do not apply to the Southwest UGA:

...

9. The expansion is a response to a declaration by the County Executive, or the County Council, by resolution, of a critical shortage of affordable housing which is incurable in a timely manner by the implementation of reasonable measures or other instrumentality reasonably available to the jurisdiction, and the expansion is reasonably calculated to provide affordable housing.

Ordinance No. 03-072, Section 2, at 6.

Position of the Parties:

The alleged lack of land capacity analysis to support UGA expansions is, again, the basis for CTED's challenge to this condition. Further, CTED asserts that Condition 9: 1) allows the County Executive or Council to make a "critical shortage" determination for a city without consultation with the city; 2) provides no basis or criteria, qualitative or quantitative, for making a declaration; 3) is unclear whether what is meant by affordable housing is low-income housing; 4) allows UGA expansion by fiat without regard to any conclusions regarding housing supply reached in the land capacity analysis and buildable lands evaluation of housing needs. CTED PHB, at 25-26. Petitioner concludes that Condition 9 does not comply with RCW 36.70A.110(2), 215(4), .210(3)(a) and Goals 1 and 2. *Id.*

The County asserts that this condition does not create an exemption from .110 or any other provision of the GMA; it expresses the desire of county and city leaders to exercise discretion in that, decisions concerning UGA expansions should, in extreme cases, be guided by economic considerations that have real life ramifications for Snohomish County citizens. [The County goes on to note that it is local government, not the state, that is given the job of implementing the GMA.] County Response, at 28-29.

Realtors contend that this CPP Condition "would permit a UGA expansion to address a *verified housing crisis*, provided a Section .110 land capacity analysis were adopted in support." Realtors PHB, at 5 (emphasis supplied). Realtors continue,

[T]his [Condition 9] did not authorize unbridled expansions of UGAs upon the whim of elected officials. [CPP UG-14](d)(9) contains the following express limitations on any such expansions:

- Subject to a land capacity analysis that complies with Section .110 of the GMA;
- The County Executive or County Council have adopted a resolution declaring an affordable housing crisis;
- The shortage of affordable housing must be "critical;"
- The crisis must be one that is found to be "uncurable in a timely manner by the implementation of reasonable measures or other instrumentality reasonably available to the jurisdiction; and
- The expansion is "reasonably calculated to provide affordable housing."

Id., at 6. Based upon these limitations, the Realtors assert that this CPP is worthy of substantial deference. *Id.*

Realtors also contend that: 1) neither .110 nor .210 require the level of detail sought by CTED; 2) this is a self-imposed policy by the County; 3) this provision should not be challenged at the CPP level, but only if it were used as the basis of an actual UGA

expansion; 4) the preamble to UG-14(d) expressly requires a land capacity analysis per .110; 5) CTED's arguments rely upon GMA section that are not applicable to CPPs; and 6) affordable housing CPPs are required by .210(e). *Id.*, at 6-8.

The School Districts did not brief this issue. School Districts PHB, at 1-17.

CTED applauds and shares the County's concern for affordable housing; but continues to assert that Condition 9 does not require the required land capacity analysis, and contends that there needs to be some limit on the discretion that could be exercised. CTED Reply, at 13-14. Additionally, Petitioner reemphasizes the lack of coordination required with cities, especially in light of the fact that cities are the ones that will provide the required urban services to the areas included within a UGA under this provision. *Id.*, at 14.

Board Discussion:

In addition to the alleged lack of the required land capacity analysis, CTED's concerns regarding this Condition are directed at: the lack of coordination with Snohomish County cities; and the discretion that could be exercised by the County Executive or County Council in implementing this condition.

Review of the language of UG-14(d) and Condition 9 persuades the Board that CTED's assertion that no land capacity analysis is required for a UGA expansion under this condition is incorrect. Both the County and Realtors, in briefing and at the HOM cited the language of UG-14(d)(preamble) and emphasized that expansions pursuant to this condition must be "supported by a land capacity analysis adopted by the County Council pursuant to RCW 36.70A.110 and otherwise complies with the [GMA]." *Citing* UG-14(d) (preamble); *see also* County and Realtor PHB, *supra*; and HOM Transcript, at 69, 70 and 81.

Condition 9 deals directly with a UGA expansion necessitated by the need for additional *residential land*. Residential land is squarely within the provisions of UG-14(d) and a land capacity analysis is required. However, a land capacity analysis for residential *land* is somewhat off point in relation to this Condition. Condition 9 addresses "affordable housing." Whether the existing and projected housing stock is affordable falls within the parameters of RCW 36.70A.070(2) – the Housing Element.

A GMA Plan's Housing Element is required to *identify sufficient land for housing, including government-assisted housing, housing for low-income families, manufactured housing, multifamily housing, and group homes and foster care facilities*. RCW 36.70A.070(2)(c). Also the Housing Element requires jurisdictions have adequate provision for existing and projected housing needs for *all economic segments of the community*. RCW 36.70A.070(2)(d). Therefore, reliance upon just a land capacity analysis without supporting documentation in the County's Housing Element would be inadequate to implement Condition 9.

UG-14(d)(preamble) addresses both the land capacity analysis; and the Housing Element requirements, *i.e.*, “otherwise complies with the GMA.” Ironically, if the Housing Element documented an incurable shortage of affordable housing; the Housing Element would be noncompliant with .070(2) and Goal (4), thereby necessitating updates and revisions to that element to remove inconsistencies and attain compliance.

Also, under Condition 9, for the County Executive, or Council, to declare a critical shortage of affordable housing, they merely need to indicate that the crisis cannot be cured by reasonable measures in a timely manner. Contrary to the assertion of the Realtors, Condition 9 does not require any documentation or verification of *why* the reasonable measures that need to be taken, and are required by .215, cannot be implemented in time to stave off the crisis. This provision runs directly counter to the reasonable measures requirements of .215, and the clear legislative direction in .215 that UGA expansion is a last resort option *only* to be taken when all other avenues have been exhausted.

RCW 36.70A.215(4) requires the County *and its cities* to adopt and implement measures that are reasonably likely to increase consistency with the GMA of failing Plan or regulatory provisions. Condition 9 simply ignores the requirement that the County *and its cities* plan for existing and projected housing needs, anticipate affordable housing needs, and adopt and implement reasonable measures to avoid an affordable housing “crisis.” A UGA expansion may be part of this process, but it cannot be done in lieu of it. Consequently, CPP UG-14(d), Condition 9, must fail. Snohomish County’s enactment of Ordinance No. 03-072, amending CPP UG-14(d), to add Condition 9, was **clearly erroneous**. UG-14(d), Condition 9, does not comply with RCW 36.70A.215(4).

Additionally, the binding substantive direction of UG-14(d), Condition 9, leads to deficiencies in the County’s, and perhaps its cities, Housing Elements of subsequent noncompliance with GMA goals and requirements.

The Board concludes that UG-14(d), Condition 9, does **not comply** with the RCW 36.70A.215(4); and as a whole, provides binding substantive direction that leads to action that is noncompliant with the goals and requirements of the Act.

Conclusion – CPP UG-14 Condition 9

The Board concludes that UG-14(d), Condition 9, does **not comply** with the RCW 36.70A.215(4); and as a whole, provides binding substantive direction that leads to action that is noncompliant with the goals and requirements of the Act.

G. LEGAL ISSUE NO. 4

[CPP UG-14 (Sec. 2.d.10 – UGA expansion – economic development of previously designated resource lands)]

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

4. *In so far as it permits the expansion of a UGA to allow the development of lands that have been redesignated from natural resource to rural use, is section 2.d.10 of Snohomish County Amended Ordinance No. 03-072 in noncompliance with RCW 36.70A.110, RCW 36.70A.210(3) and RCW 36.70A.215, as guided by RCW 36.70A.020(1), (2) and (8)?*

Applicable Law

On this Legal Issue CTED asserts the County has not complied with RCW 36.70A.110, .210(3), .215 and .020(1), (2) and (8). *See infra* for the full text of each GMA provision.

Discussion

The Amendment to UG-14(d)-adding condition 10:

Section 2 of Ordinance No. 03-072 amends CPP UG – 14(d) as follow (new language is shown underlined; deleted language is shown in ~~strikeout~~):

- d. **Expansion of the Boundary of an Individual UGA:** Expansion of the boundary of an individual UGA to include additional residential, commercial and industrial land shall not be permitted unless it is supported by a land capacity analysis adopted by the County Council pursuant to RCW 36.70A.110 and otherwise complies with the Growth Management Act, includes consultation with appropriate jurisdictions in the UGA or MUGA, and one of the following ~~four~~ ten conditions are met; provided that conditions six through eight do not apply to the Southwest UGA:

...

10. The expansion will result in the economic development of lands that no longer satisfy the designation criteria for natural resource lands and the lands have been redesignated to an appropriate non-resource land use designation. Provided that expansions are supported by the majority of the affected cities and towns whose UGA or designated MUGA is being expanded and shall not create a significant increase in the total employment capacity (as represented by permanent jobs) of an individual UGA, as reported in the most recent Snohomish County Tomorrow Growth Monitory (*sic*) Report in the year of expansion.

Ordinance No. 03-072, Section 2, at 6.

Position of the Parties:

CTED's premise again, is that there is an alleged lack of land capacity analysis to support UGA expansions pursuant to this condition. CTED summarizes the case law that illustrates the state's priority and the importance of conserving and protecting agricultural land. CTED PHB, at 27-29. Petitioner notes that this Board has allowed "de-designation" of agricultural land although "[t]he GMA contains no provision specifically authorizing de-designation of agricultural lands that have been designated as of long-term commercial significance under RCW 36.70A.170." *Id.*, at 30. CTED also reminds the parties and the Board that the County may not rely upon landowner intent or current use to justify de-designation of agricultural land. *Id.* CTED concludes that Condition 10 does not comply with RCW 36.70A.110(1) or (2), .215(4), .210(3)(a) and Goals 1, 2 and 8.²³ *Id.*

The County asserts that Condition 10 "contemplates potential situations where the de-designation of natural resource lands may be appropriate under the requirements of the GMA." County Response, at 30. The County acknowledges that the Board has approved de-designations of agricultural land and noted that while landowner intent cannot control the designation or de-designation of natural resource lands, there is no prohibition against its consideration. *Id.* The County concedes that Condition 10 could *only* apply "where the UGA expansion is 'supported by a land capacity analysis. . . and otherwise complies with the GMA [also including .060 and .170]." *Id.* Again, the County asserts that CTED's challenge is based upon speculation of what might happen, and that this condition does not encourage the improper conversion of resource lands. *Id.*, at 31.

The Realtors discount CTED's arguments related to .060 and .170 as being beyond the scope of the Legal Issues set forth in the PHO; and further assert that, regarding the land capacity analysis, "the preamble amendment to UG-14 defeats that argument." Realtors PHB, at 8-9.

The School Districts did not brief this issue. School Districts PHB, at 1-17.

In reply CTED argues:

CPPs may not authorize what substantive provisions of the GMA prohibit. Where, as here, a county-wide planning policy that governs UGA expansion provides a special avenue for the commercial development of dedesignated or redesignated agricultural lands, the inevitable consequence is increased pressure for nonagricultural development of agricultural lands near UGAs. Indeed, [Condition 10] may have the perverse effect of making it easier to expand a UGA to include agricultural

²³ CTED also alleged noncompliance with RCW 36.70A.060 and .170 in its PHB; however, these references were not included in the PFR or PHO issue statements. Therefore, they are not before the Board.

lands than to include rural lands in general, which is directly contrary to one of the GMA's central purposes, as implemented through a series of statutory requirement: the conservation of agricultural lands and the agricultural industries that depend on those lands. (Citations omitted).

CTED Reply, at 14-15.

Board Discussion:

CPP UG-14(d), Condition 10, is premised on the notion that some type of designated resource land (agricultural, forest or mineral lands) no longer meets the criteria for designation as that resource land, and may be redesignated to a rural or urban designation. As the parties are well aware, any such reclassification of resource lands to either a rural or urban designation is an event that is appealable to the Board. Depending on the facts and circumstances surrounding the specific revised designation of natural resource lands, the Board may, or may not, find that the change complies with the goals and requirements of the Act. This CPP merely acknowledges the possibility of redesignation from resource land to a designation that would allow different economic development uses. Therefore, the Board need not consider this aspect of CPP UG-14(d), Condition 10.

More important in consideration of Condition 10 is the question of whether a UGA may be expanded to include land needed for economic development – *i.e.* commercial and industrial land. Here again, the threshold question is whether such a UGA expansion requires a land capacity analysis.

The plain language of CPP UG-14(d)(preamble) indicates that a land capacity analysis is required. Both the County and Realtors maintain that the plain language of UG14(d) indicates a land capacity analysis is required for a Condition 10 expansion. *See* County Response, *supra*; Realtors Response, *supra*; and HOM Transcript, at 69-70 and 81. The Board agrees.

UG-14(d)(preamble) requires a land capacity analysis to support an individual UGA expansion involving commercial or industrial (economic development) lands. Snohomish County's enactment of Ordinance No. 03-072, amending CPP UG-14(d) to add Condition 10 was **not clearly erroneous**. Therefore, the Board concludes that CPP UG-14(d), Condition 10, **complies** with RCW 36.70A.110, .210(3), .215 and Goals 1, 2 and 8.

Conclusion – CPP UG-14 Condition 10

The Board concludes that CPP UG-14(d), Condition 10, **complies** with RCW 36.70A.110, .210(3), .215 and Goals 1, 2 and 8.

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, and having deliberated on the matter the Board ORDERS:

Snohomish County's enactment of *Ordinance No. 03-073*, amending *CPP OD-4* was **clearly erroneous**. CPP OD-4, specifically the exception created for providing sewer (an urban governmental service) to churches in the rural area abutting a UGA (language following the proviso), does **not comply** with the requirements of RCW 36.70A.110(4), .210(3); and was **not guided** by RCW 36.70A.020(1) and (2).

Snohomish County's enactment of *Ordinance No. 03-072*, amending *CPP UG-14(d)* was **clearly erroneous** with respect to the following provisions:

- Condition 8 - Due to the lack of clarity in the wording of CPP UG-14(d)(8) - Condition 8, (regarding UGA expansion for open space and urban/rural separation), this Condition was **not guided by** RCW 36.70A.020(1), (2), (9) and (10).
- Condition 9 - CPP UG-14(d)(9) - Condition 9, (regarding UGA expansion for a shortage of affordable housing), does **not comply** with the RCW 36.70A.215(4); and as a whole, provides binding substantive direction that leads to action that is noncompliant with the goals and requirements of the Act.

The Board **remands** Ordinance Nos. 03-073 (CPP OD-4) and 03-072 (CPP UG-14(d)(8) and (9)) to the County with the following directions:

1. By no later than **September 3, 2004**, the County, after consultation with its cities, shall take appropriate legislative action to repeal, clarify, revise or otherwise amend CPP OD-4 and CPP UG-14(8) and (9), to bring these noncompliant CPPs into compliance with the goals and requirements of the GMA, as interpreted and set forth in this Final Decision and Order (**FDO**).
2. By no later than **September 10, 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 FDO. The SATC shall attach copies of legislation enacted in order to comply. The County shall simultaneously serve a copy of the SATC, with attachments, on Petitioner.

3. By no later than **September 20, 2004**,²⁴ the Petitioner may file with the Board an original and four copies of Comments on the County's SATC. Petitioner shall simultaneously serve a copy of their Comments on the County's SATC on the County.
4. By no later than **September 27, 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 Petitioner.

Pursuant to RCW 36.70A.330(1), the Board hereby schedules the **Compliance Hearing** in this matter for **10:00 a.m. September 30, 2004** at the Board's offices. With the consent of the parties, the compliance hearing may be conducted telephonically.

If the County takes legislative compliance actions prior to the September 3, 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 8th day of March 2004.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

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.

²⁴ September 20, 2004 is also the deadline for a city to file a request to participate as a "participant" in the compliance proceeding. See RCW 36.70A.330(2).

APPENDIX A

The entire text of CPP UG-14, as amended in Section 2 of Ordinance No. 03-072, is as follows (new language is shown underlined; deleted language is shown in ~~strikeout~~):

UG -14 Establish a review and evaluation program, which includes an annual data collection component, pursuant to RCW 36.70A.215 (“Buildable Lands Program”). The evaluation component required by the Buildable Lands Program will be completed no later than September 1, 2002. Subsequent evaluations shall occur at least once every five years. This evaluation may be combined with the review and evaluation of county and city comprehensive land use plans and development regulations required by RCW 36.70A.130(3).

- a. **Procedures Report:** Using the Snohomish County Tomorrow process, develop a ~~buildable lands~~ an analysis procedures report for the evaluation required by the first Buildable Lands Program, that is has been accepted and recommended by the Snohomish County Tomorrow Steering Committee and adopted by the County Council, and is used by all Snohomish County jurisdictions when conducting their buildable lands review and evaluation; provided that in the event of subsequent disagreement among jurisdictions the SCT process will be used in an attempt to resolve the disagreement, and, if unresolvable, and individual jurisdiction may adopt its own procedures report. The procedures report used by local jurisdictions shall address the following issues:
 1. Multi-year work program and schedule;
 2. Jurisdictional responsibilities for data collection, analysis and reporting
 3. Five-year buildable lands review and evaluation methodology, including a methodology for establishing an accurate countywide baseline inventory of commercial and industrial lands;
 4. Annual data collection requirements;
 5. Coordinated interjurisdictional data collection strategy; and
 6. Content of the five-year buildable lands review and evaluation report.

- b. **Identification of Reasonable Measures:** A list of reasonable measures that may be used to increase residential, commercial and industrial capacity in UGAs, without adjusting UGA boundaries, is contained in Appendix C. ~~shall be developed using the Snohomish County Tomorrow process. The Snohomish County Tomorrow Steering Committee will recommend to the County Council a list of such reasonable measures. The County Council will consider the recommendation of the Steering Committee and will add a new Appendix to the countywide planning policies that contains a list of reasonable measures. The County Council will use the list of reasonable measures and guidelines for review contained in Appendix C to evaluate all UGA boundary expansions proposed pursuant to UG-14(d)1 through 4. proposals consistent with UG 14(d).~~

- c. **Procedures for Resolving Inconsistencies in Collection and Analysis of Data:** In the event of a dispute among jurisdictions relating to inconsistencies in collection and analysis of data, the affected jurisdictions shall meet and discuss methods of resolving the dispute. In the event a successful resolution cannot be achieved, the Snohomish County Tomorrow Steering Committee shall be asked to meet and discuss resolution of the matter. In such instances, the Steering Committee co-chairs will make every effort to ensure that all Steering Committee jurisdictions are provided with proper notice of such discussion. Nothing in this policy shall be construed to alter the land use power of any Snohomish County jurisdiction under established law.
- d. **Expansion of the Boundary of an Individual UGA:** Expansion of the boundary of an individual UGA to include additional residential, commercial and industrial land shall not be permitted unless it is supported by a land capacity analysis adopted by the County Council pursuant to RCW 36.70A.110 and otherwise complies with the Growth Management Act, includes consultation with appropriate jurisdictions in the UGA or MUGA, and one of the following ~~four~~ ten conditions are met; provided that conditions six through eight do not apply to the Southwest UGA:
1. The expansion is a result of the five-year most recent buildable lands review and evaluation required by RCW 36.70A.215.
 2. The expansion is a result of the review of UGAs at least every ten years to accommodate the succeeding twenty years of projected growth as required by RCW 36.70A.130(3).
 3. ~~All~~ Both of the following conditions are met for expansion of the boundary of an individual UGA to include additional residential land:
 - a. Population growth within the UGA (city plus unincorporated UGA combined) since the start of the twenty-year planning period, equals or exceeds fifty percent of the additional population capacity estimated for the UGA at the start of the planning period, as documented in the most recent annual Snohomish County Tomorrow Growth Monitoring Report or the buildable lands review and evaluation (Buildable Lands Report). ~~and~~
 - b. ~~An updated residential land capacity analysis conducted by city and county staff for the UGA confirms the accuracy of the above finding using more recent residential capacity estimates and assumptions; and~~ An updated residential land capacity analysis conducted by the city and county staff for the UGA confirms the accuracy of the above finding using more recent residential capacity estimates and assumptions, and any new information presented at public hearings by any jurisdiction that confirms or revises the conclusions is considered.
 - e. ~~The county and city or cities within the UGA consider reasonable measures adopted as an appendix to the Countywide Planning Policies~~

~~pursuant to UG 14(b) that could be taken to increase residential capacity inside the UGA without expanding the boundaries of the UGA.~~

4. ~~Both of the following conditions are met f~~For expansion of the boundary of an individual UGA to include additional commercial and industrial land:
 - ~~d. The county and city or cities within that UGA document that commercial or industrial land consumption within the UGA (city plus unincorporated UGA combined) since the start of the twenty-year planning period, equals or exceeds fifty percent of the developable commercial or industrial land supply within the UGA at the start of the planning period. In UGAs where this threshold has not yet been reached, the boundary of an individual UGA may be expanded to include additional commercial or industrial land if the expansion is based on an assessment that concludes there is a deficiency of larger parcels within that UGA to accommodate the remaining commercial or industrial growth projected for that UGA. Other parcel characteristics determined to be relevant to the assessment of the adequacy of the remaining commercial or industrial land base, as documented in the Procedures Report required by UG 14(a) most recent Snohomish County Tomorrow Growth Monitoring Report of the buildable lands review and evaluation (Buildable Lands Report), as they may be confirmed or revised based upon any new information presented at public hearings, may also be considered as a basis for expansion of the boundary of an individual UGA to include additional commercial or industrial land;~~
~~and~~
 - ~~e. The county and the city or cities within the UGA consider reasonable measures adopted as an appendix to the Countywide Planning Policies pursuant to UG 14(b) that could be taken to increase commercial or industrial land capacity inside the UGA without expanding the boundaries of the UGA.~~
5. The expansion will result in the realization of a significant public benefit as evidenced by Transfer of Development Rights (TD) to the expansion area from Agriculture or Forest lands designated as TDR sending areas. The expansion area shall not be designated forest or agricultural land of long-term significance.
6. The expansion is necessary to make technical corrections to a UGA boundary to be more consistent with UG-1, which requires a UGA to have identifiable physical boundaries such as natural features, roads, or special purpose districts, where feasible. Provided that expansions shall not increase total residential or employment capacity of and individual UGA, as reported in the most recent Snohomish County Tomorrow Growth Monitoring Report, by more than ~~0.25%~~ 0.5% in any given year.

7. The expansion will allow the development of 1) a church, or 2) a school, K-12, including public, private and parochial, provided that the expansion area is adjacent to an existing UGA and will be designated and zoned exclusively for that use and will not add any residential, commercial or industrial capacity to the affected UGA.
8. The expansion will permanently preserve a substantial land area containing one or more significant natural or cultural feature(s) as open space adjacent to a revised UGA boundary and will provide separation between urban and rural areas. The presence of significant natural or cultural features shall be determined by the respective legislative bodies of the county and the city or cities immediately adjacent to the proposed expansion, and may include, but are not limited to, landforms, rivers, bodies of water, historic properties, archeological resources, unique wildlife habitats, and fish and wildlife conservation areas.
9. The expansion is a response to a declaration by the County Executive, or the County Council, by resolution, of a critical shortage of affordable housing which is uncurable in a timely manner by the implementation of reasonable measures or other instrumentality reasonably available to the jurisdiction, and the expansion is reasonably calculated to provide affordable housing.
10. The expansion will result in the economic development of lands that no longer satisfy the designation criteria for natural resource lands and the lands have been redesignated to an appropriate non-resource land use designation. Provided that expansions are supported by the majority of the affected cities and towns whose UGA or designated MUGA is being expanded and shall not create a significant increase in the total employment capacity (as represented by permanent jobs) of an individual UGA, as reported in the most recent Snohomish County Tomorrow Growth Monitory (*sic*) Report in the year of expansion.