

I. BACKGROUND

On September 10, 2004, Snohomish County (the **County**) adopted Ordinance No. 03-104 (the **Ordinance**). The Ordinance amended the County's Plan and development regulations to allow the extension of sewers beyond its urban area, to schools and churches located within the rural area. The State Department of Community, Trade and Economic Development (**CTED**) filed this timely petition for review (**PFR**) challenging Snohomish County's adoption of several Ordinances. The challenge was intertwined with several other matters then pending before the Board. Thus, portions of the original PFR were consolidated with another case and only the challenge to Ordinance Nos. 03-104 remained within the confines of this case. *See* Appendix A – Procedural History for a more detail on the filings in this matter.

During motions practice, Snohomish County School District No. 201 moved to intervene and supplement the record. Intervention was granted and the record was supplemented with the two exhibits offered. No dispositive motions were filed.

All prehearing briefing¹ was timely filed, with some motions for official notice contained in the briefing. The Board's ruling on these motions is discussed under Preliminary Matters, *infra*.

On April 8, 2004, the Board held a hearing on the merits in the training center adjacent to the Board's office at Suite 2470, 900 4th Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, and Joseph W. Tovar were present for the Board. Petitioner CTED was represented by Alan D. Copsey. Respondent Snohomish County was represented by Jason Cummings; and Liz Thomas and Denise M. Lietz appeared for intervenor Snohomish School District. Court reporting services were provided by Cheryl Wiese of Dean Moburo & Associates. The hearing convened at 10:00 a.m. and adjourned at approximately 11:00 a.m. No transcript was ordered.

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF REVIEW

Petitioner challenges Snohomish County's adoption of comprehensive plan and zoning amendments, as adopted by Ordinance No. 03-104. Pursuant to RCW 36.70A.320(1), Snohomish County's Ordinance No. 03-104 is presumed valid upon adoption.

The burden is 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).

Pursuant to RCW 36.70A.320(3), the Board "shall find compliance unless it determines that the action taken by Snohomish County is clearly erroneous in view of the entire

¹ Shortened citations to the briefs submitted to the parties and referenced in this FDO are contained in Appendix A.

record before the board and in light of the goals and requirements of [the GMA].” For the Board to find the County’s actions clearly erroneous, the Board must be “left with the firm and definite conviction that a mistake has been made.” *Dep’t of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

Pursuant to RCW 36.70A.3201 the Board will grant deference to the County in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. As the State Supreme Court has stated, “Local discretion is bounded . . . by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board (King County)*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). Division II of the Court of Appeals further clarified, “Consistent with *King County*, and notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not ‘consistent with the requirements and goals of the GMA.’” *Cooper Point Association v. Thurston County*, No. 26425-1-II, 108 Wn.App. 429, 31 P.3d 28 (Wn.App. Div. II, 2001).

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

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

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

III. BOARD JURISDICTION, PRELIMINARY MATTERS AND PREFATORY NOTE

A. BOARD JURISDICTION

The Board finds that: CTED’s PFR was timely filed, pursuant to RCW 36.70A.290(2); CTED has standing to appear before the Board, pursuant to RCW 36.70A.280(2); and, pursuant to RCW 36.70A.280(1)(a), the Board has subject matter jurisdiction over the challenged ordinance, which amends the County’s Comprehensive Plan and development regulations.

B. PRELIMINARY MATTERS

In their response briefs, both the County and Intervenor asked the Board to strike footnote 21 in CTED’s PHB. CTED’s Footnote 21 referenced *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 61 P.3d 332 (2002), and several recent studies pertaining to school construction outside UGAs. The studies noted are: 1) Land for Granted: The Effects of Acreage Policies on Rural Schools and Communities (2003),

by Barbara Kent Lawrence, *The Rural School Community Trust*; 2) Why Johnny Can't Walk to School (2nd Ed. 2002), by Constance E. Beaumont & Elizabeth G. Pianca, National Trust for Historic Preservation; and 3) Edge-ucation: What Compels Communities to Build Schools in the Middle of Nowhere? 17 *Governing* No. 6 at 22-26 (March 2004), by Rob Gurwitt.

At the HOM, the parties agreed that they did not object to CTED's notation to the *Timberlake* case, but instead objected to the Board taking notice of the three referenced studies. The Board gave the County and School District until April 15, 2004 to file a brief explaining why the Board should not take notice of the referenced studies. CTED was given until April 19, 2004 to respond to the arguments of the County and School District.

On April 15, 2004, the Board received "Snohomish County's Memorandum in Opposition to CTED's Request to Supplement the Record" and "School District's Response to Request for Official Notice." Attached to the School District's Response was a "Declaration of Karen Blysmar-Riddle in Support of School District's Response to Request for Official Notice."

On April 19, 2004, the Board received "CTED's Reply Re: Its Request that the Board Take Official Notice." CTED contends it was not seeking to supplement the record.

The crux of the dispute regarding the three studies that CTED has asked the Board to take official notice of revolves around WAC 242-02-670(2).² The question is - Are these studies within the realm of material facts which the Board can officially notice? Notwithstanding CTED's contention that it did not seek to supplement the record, the Board will treat its offering as such a motion.

In prior cases the Board has viewed certain information, referenced by website, as material facts that it may officially notice. However, in this case the Board will **deny** CTED's motion for the following reasons: 1) the studies referenced by CTED have the tone of opinion or advocacy papers that are subject to reasonable dispute and are unlike technical or scientific facts³ that, being more objective, are appropriate for official notice; and 2) less significantly, CTED failed to file the motion as prescribed in the Board's rules and PHO. The Board has determined these studies will not be necessary or of substantial

² WAC 242-02-670 – Official notice – Material facts, (2) provides:

Notorious facts. Facts so generally and widely known to all well-informed persons as to not be subject to reasonable dispute or specific facts which are capable of immediate and accurate demonstration by resort to accessible sources of generally accepted authority, including, but not exclusively, facts stated in any publication authorized or permitted by law to be made by any federal or state officer, department or agency.

³ See WAC 242-02-670 – Official notice – Material facts, (3) provides:

Technical or scientific facts. Technical or scientific facts within a board's specialized knowledge.

assistance to the Board in reaching its decision. However, the Board will not strike this portion of footnote 21, although in rendering this Final Decision and Order, the Board will not consider the three studies referenced in footnote 21 of CTED's PHB.

C. PREFATORY NOTE

Although Legal Issue 1 involves amendments to the County's Plan and Legal Issue 2 involves amendments to the County's development regulations to implement the Plan; both challenges focus on compliance with the requirements of RCW 36.70A.110(4). Therefore, the Board will address Legal Issues 1 and 2 together.

IV. LEGAL ISSUES AND DISCUSSION

LEGAL ISSUE NOS. 1 and 2

The Board's PHO set forth Legal Issue Nos. 1 and 2, as follows:

1. *By amending Snohomish County's Comprehensive Plan (the **Plan**) to allow churches and schools located on rural lands to connect to public sewers located on or directly adjacent to their property, is Snohomish County Ordinance No. 03-104 in noncompliance with RCW 36.70A.110(4)?*
2. *By amending Snohomish County Code (the **Implementing Regulations**) to require churches and schools located on rural lands to connect to public sewers located on or directly adjacent to their property, is Snohomish County Ordinance No. 03-104 in noncompliance with RCW 36.70A.110(4)?*

Applicable Law

RCW 36.70A.110(4) provides:

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.

The Washington State Supreme Court recently interpreted this provision of the GMA [RCW 36.70A.110(4)] in *Thurston County v. The Cooper Point Association*, 148 Wn.2d 1, 57 P.3d 1156 (2002), (**Cooper Point**). As necessary, the Board will refer to this Court decision.

Additionally, this Board has recently interpreted this provision of the GMA [RCW 36.70A.110(4)] in *CTED v. Snohomish County*, CPSGMHB Case No. 03-3-0017, Final Decision and Order, (Mar. 8, 2004), (*CTED I*). As necessary, the Board will refer to this prior Board decision.

Discussion

The Action:

Sections 2 and 3 of Ordinance No. 03-104 amended two Policies in the County's Comprehensive Plan (*Plan amendments – Legal Issue 1*) to read as follows:

LU Policy 1.C.4, at page LU-6 is amended as follows [~~striketrough~~ indicates deleted language, underline indicates new language]:

Annexations and planned urban densities shall be prohibited outside of the UGA boundary, and the provision of sanitary sewers to development outside the UGA shall be allowed only for: (a) public health emergencies; (b) and for necessary public facilities that are required to be served by sanitary sewers and cannot be feasibly located within the UGA; and (c) for churches and schools located within rural lands with sewer lines located on or directly adjacent to the church or school property. Urban capital facilities, including sanitary sewer facilities, may be located outside a UGA only when there are compelling reasons for such locations related to engineering design requirements or significant limitations on site availability and when they are intended and designed solely to serve urban development within the UGA.

Ordinance No. 03-104, Section 2, Exhibit A, amending Plan Policy 1.C.4.

Utilities Policy 3.C.1, at page UT-7 is amended as follows [~~striketrough~~ indicates deleted language, underline indicates new language]:

The county shall prohibit new municipal sanitary sewer systems within the rural and resource lands unless sewers are necessitated by serious public health considerations or by necessary public facilities, or there are compelling reasons for such locations related to engineering design requirements or significant limitations on site availability, and when they are intended and designed solely to serve urban development within the UGA, with the exception that churches or schools located within the rural lands may hook up to sewer lines located on or directly adjacent to the church or school property.

Ordinance No. 03-104, Section 3, Exhibit B, amending Plan Policy 3.C.1.

Section 4, 5 and 6 of Ordinance No. 03-104 amended three separate sections of Snohomish County's implementing regulations (*Implementing regulation amendments – Legal Issue 2*), specifically Snohomish County Code Sections 7.44.030,⁴ 30.29.110⁵ and 30.29.120,⁶ respectively. Each amendment has the same effect: allowing or requiring the extension of sewers to schools and churches in the rural area.

Position of the Parties:

CTED argues that RCW 36.70A.110(4), on its face, and as interpreted by the Supreme Court in *Cooper Point*, is very clear that “extending a sewer line into a rural area to serve those that are not currently served” is prohibited, unless the extension or expansion is necessary to protect the public health, safety or environment. In short, there is only one

⁴ Section 4 of Ordinance No. 03-104 amends SCC 7.44.030 – General Regulations, as follows:

Every person, firm or corporation shall discharge all sewage in the following manner in Snohomish County:

- (1) When water is or becomes available under pressure, every dwelling unit, mobile home and every other establishment or premises required to provide toilet facilities are each required to construct a sanitary drainage system, and every plumbing fixture and every sanitary drainage system not connected to a public sewer or not required by law to be connected to a public sewer, shall be connected to a private sewage disposal system. When public sewer is at all accessible, connections must be made to the public sewage system, including churches or schools located within rural lands, when sewer lines are located on or directly adjacent to the church or school property.

⁵ Section 5 of Ordinance No. 03-104 amends SCC 30.29.110 – Public sewer connection prohibited outside UGA – exceptions, as follows:

Outside of a UGA, connection to a public sewer is prohibited except as follows:

- (1) When required by the Snohomish Health District or a state agency;
- (2) To provide public sewer to public facility, if the applicant demonstrates that it is not feasible to locate the public facility within a UGA; or
- (3) Where the county has contractually committed to permit public sewer connection; or
- (4) When a church or school is located within rural lands and existing sewer lines are located on or directly adjacent to the church or school property.

⁶ Section 6 of Ordinance No. 03-104 amends SCC 30.29.120 – Public sewer construction prohibited outside UGA – exceptions, as follows:

Construction of public sewers outside of a UGA is prohibited except as follows:

- (1) When required by the Snohomish Health District;
- (2) In accordance with an adopted ~~a~~-public sewer comprehensive plan which has been reviewed and approved by the county council; or
- (3) When system improvements designed solely to serve urban development within the UGA must be located outside of a UGA due to engineering design requirements or limitations on site availability; or
- (4) When a church or school located within rural lands is connecting to an existing sewer line located on or directly adjacent to the church or school property.

narrow exception to the prohibition in .110 and the County's action does not fit within it. CTED PHB, at 6-7.

CTED notes that the CPS Board acknowledged the statute's single narrow exception in *CTED v. Snohomish County*, CPSGMHB Case No. 03-3-0017, Final Decision and Order, (Mar. 8, 2004). Additionally, CTED notes that in recognition of this single exception, the County staff recommended against the County's adopting the Plan and implementing regulation amendments adopted in Ordinance No. 03-104. *See* PDS Staff Report; and Addendum No. 36 to the FEIS. *Id.*, at 10-11, *citing* Exs. 613a and 659.

CTED asserts that the only basis offered for the amendments' extension of sewer lines to schools and churches in the rural area is proximity to existing sewer, not necessity. Therefore, the County has attempted to create a new exception in contravention of RCW 36.70A.110(4). *Id.*, at 11-12.

In response, the County notes that a rationale for its adoption of the Ordinance is the County's concern with RLUIPA (Religious Land Use and Institutionalized Persons Act). The County also contends that the Board should look to legislative intent and consider the first two words of RCW 36.70A.110(4) – “In general” – as allowing local governments, at their discretion, to establish other exceptions to the general prohibition found in .110(4). County Response, at 4-6. The County goes on to discuss various GMA goals that are allegedly furthered by the County's action and distinguishes the facts in *Cooper Point* from the situations anticipated by the County's Ordinance. *Id.*, at 6-8. Next, the County argues that for a school or a church in the rural area to “hook-up” to a sewer line, the sewer line must be on, or adjacent to, the school or church property. Therefore, the County concludes, no expansion or extension of the sewer is necessary. *Id.*, at 9.

The School District articulates how the County and School District have worked together in the siting and location of schools for the growing school age population within the County and laments that there are limited new school sites within the UGA. School District Response, at 3-7. The School District also suggests *Cooper Point* is distinguishable on the facts and that the amendments do not allow sewer “trunk lines” to be extended or expanded into the rural area to serve schools or churches. *Id.*, at 8-9. Finally, the School District argues that proximity is an appropriate factor for allowing the schools and churches in the rural area to be hooked up to sewers. *Id.*, at 10.

In reply, CTED states,

The issue is not whether schools and churches may be located in the rural areas. They can be. (Footnote omitted.) The issue is whether [the] exception created by Ordinance No. 03-104 is contrary to RCW 36.70A.110(4). By allowing churches and schools located outside urban growth areas to connect to sewers, without satisfying the single exception to the general rule in RCW 36.70A.110(4), Ordinance No. 03-104 violates the explicit language of RCW 36.70A.110(4) as construed and applied by

the Supreme Court in *Thurston County v. Cooper Point Association*, 148 Wn.2d 1, 57 P.3d 1156 (2002).

CTED Reply, at 2. CTED asserts that the County's argument suggesting it is furthering various goals of the GMA is counter to the explicit language of .110 and is without merit. *Id.*, at 4-6. Finally, the state contends, for clarification, that neither the State Constitution nor RLUIPA create an inherent property right for churches or schools that mandates actions such as the adoption of Ordinance No. 03-104. *Id.*, at 7-10.

Board Discussion:

It is not within the Board's charge to interpret or apply the State Constitution or federal laws, such as RLUIPA; nor is it up to the Board to determine whether Ordinance No. 03-104 complies with various constitutional provisions or federal laws briefed in this case. However, the Board is empowered to answer the only question posed in this case: Does Ordinance No. 03-104 comply with the requirements of RCW 36.70A.110(4)? In brief, the Board's answer is **NO**.

RCW 36.70A.110(4), especially as construed and applied by the Supreme Court in *Cooper Point*, is very clear. The extension of urban governmental services into the rural area is **prohibited** except in those limited circumstances shown to be necessary to protect basic public health and safety and the environment. Unless there is a public health, safety or environmental problem to be addressed, the extension of sewers into the rural area is **not permitted**. There is one exception, and only one – necessary to protect the public health safety or environment - recognized in .110(4). The Board previously acknowledged and recognized this sole exception to .110(4) in its FDO in *CTED I*.

The Board notes that the County staff was also aware of the *Cooper Point* decision. In the PDS Staff Report and Recommendation that reviewed and evaluated this proposed Ordinance *Cooper Point* was discussed. Based upon the findings and conclusions in the PDS report, PDS recommended: "Based on the identified findings and conclusions, PDS recommends that the proposal by the Snohomish County Council to amend the GPP and the County code be **DENIED** to retain policy and code consistency with the GMA." Ex. 613a, at 6.

Additionally, the County's Addendum No. 36 to the FEIS states:

Finding: The county-initiated proposal [Ordinance No. 03-104] to amend GPPs LU 1.C.4 and UT 3.C.1 regarding sanitary sewers to allow sewer service outside UGAs for churches and schools, and the county code (Chapters 7.44 and 30.29 SCC) to allow churches and schools located in rural lands to connect to a public sewer system is not consistent with the county's comprehensive plan or development regulations. Revisions to the General Policy Plan and county codes would be necessary and may violate the GMA, which states that urban governmental services not be

extended to 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)).

Ex. 659, at 13-14. Notwithstanding the information disclosed in the Addendum, and the recommendation made in the PDS Staff Report, the County proceeded to adopt Ordinance No. 03-104.

As adopted, Ordinance No. 03-104 amends the County’s Plan and regulations to: 1) allow sewers “for churches and schools located within rural lands with sewer lines located on or directly adjacent to the church or school property” (Plan Land Use Policy 1.C.4); 2) prohibit sewers “with the exception that churches or schools located within the rural lands may hook up to sewer lines located on or directly adjacent to the church or school property” (Plan Utility Policy 3.C.1); 3) require sewer connections “including churches or schools located within rural lands, when sewer lines are located on or directly adjacent to the church or school property” (SCC 7.44.030); 4) allow sewers “when a church or school is located within rural lands and existing sewer lines are located on or directly adjacent to the church or school property” (SCC 30.29.110); and 5) allow sewers “when a church or school is located within rural lands and existing sewer lines are located on or directly adjacent to the church or school property” (SCC 30.29.120).

The amendatory language of the Ordinance is unambiguous; it either *allows*, or *requires*, schools or churches in the rural area to connect to sewers, based solely upon proximity to sewers. This action is contrary to the explicit provisions of .110(4) and its limited exception – necessary for protection of public health and safety and environment.

The Board finds:

1. Sewers are an urban governmental service (RCW 36.70A.020(19));
2. The churches and schools that would potentially be the beneficiary of Ordinance No 03-104’s provisions must be located in the rural area (Ordinance No. 03-104, Sections 2, 3, 4, 5 and 6);
3. The churches or schools in the rural area that would be subject to Ordinance No. 03-104’s provisions are not presently connected or hooked-up to sewers (*Id.*);
4. The Ordinance does not require schools or churches in the rural area to demonstrate a need for the sewer extensions for the purpose of protecting the basic health and safety and the environment. (Ordinance No. 03-104); and
5. Proximity to a sewer, not the protection of basic public health and safety and the environment is the County’s only stated basis for connecting schools or churches in the rural area to sewer service under the provisions of Ordinance No. 03-104, Sections 2, 3, 4, 5 and 6).

Given these facts, the Board also finds that it logically follows that where churches or schools in the rural area are not presently connected to a sewer system, the sewer system

would have to be extended, or expanded, to accomplish the connection or hook-up.⁷ Therefore, the Board concludes, that the provisions of Ordinance No. 03-104, on their face, permit the extension or expansion of sewers (urban governmental services) into the rural area without such extension being necessary to protect the basic health and safety or environment. The Ordinance creates a new exception (proximity to sewers) beyond the one limited exception in RCW 36.70A.110(4) identified by the Supreme Court in *Cooper Point*. Consequently, Ordinance No. 03-104 does not comply with, and in fact contradicts, the clear statutory direction of RCW 36.70A.110(4).

Conclusion

Ordinance No. 03-104 [amending the County's GMA Plan, specifically, Land Use Policy LU 1.C.4 and Utilities Policy UT 3.C.1, and amending SCC 7.44.03, SCC 30.29.110 and SCC 30.29.120] which authorizes churches or schools in the rural area to connect to urban governmental services (sewers) **does not comply** with the requirements of RCW 36.70A.110(4). The Ordinance will be **remanded** to the County with direction to take appropriate legislative action to achieve compliance with the GMA.

V. INVALIDITY

RCW 36.70A.302 provides in relevant part:

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

The Board has concluded, *supra*, that Snohomish County's adoption of Ordinance No. 03-104 **does not comply** with the requirements of RCW 36.70A.110(4). The Board's Order, *infra*, **remands** Ordinance No. 03-104 to the County with direction to take legislative action to bring it into compliance with the goals and requirements of the Act as interpreted and set forth in this Order.

⁷ In *CTED I*, at 18, the Board focused in on the specific requirements of RCW 36.70A.110(4) and stated, "[T]he focus of this issue is whether the extension or expansion of a sanitary sewer (urban governmental service) 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.*" (Emphasis supplied.) The same focus applies in the present case.

In addition, the Board finds and concludes that the continued validity of Ordinance No. 03-104 during the period of remand would substantially interfere with the fulfillment of RCW 36.70A.020(1), and (2), because it would allow, or require, sewers to be extended to churches and schools in the rural area. Therefore, the Ordinance does not encourage growth in the urban area (Goal 1) and does not reduce sprawl (Goal 2). Therefore, the Board enters a **determination of invalidity** for Ordinance No. 03-104.

VI. 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. 03-104, amending the County's Plan and implementing development regulations (*i.e.*, Land Use Policy LU 1.C.4 and Utilities Policy UT 3.C.1, and SCC 7.44.03, SCC 30.29.110 and SCC 30.29.120] was **clearly erroneous**. Ordinance No. 03-104 does **not comply** with the requirements of RCW 36.70A.110(4).

The Board **remands** Ordinance No. 03-104 to the County with the following directions:

1. By no later than **September 3, 2004**, the County shall take appropriate legislative action to bring its Plan and implementing development regulations into compliance with the goals and requirements of the GMA [RCW 36.70A.110(4)], 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 and Intervenor. By this same date, the County shall file a "**Remand Index**," listing the procedures and materials considered in taking the remand action.
3. By no later than **September 20, 2004**,⁸ the Petitioner or Intervenor may file with the Board an original and four copies of Comments on the County's SATC. Petitioner and Intervenor shall each

⁸ September 20, 2004 is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. See RCW 36.70A.330(2).

simultaneously serve a copy of its Comments on the County's SATC on the County and each other.

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 and Intervenor.

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 this Order, it may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 5th day of May 2004.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP⁹
Board Member

Edward G. McGuire, AICP
Board Member

Joseph W. Tovar, FAICP¹⁰
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.

⁹ Although Board Member Laing was excused from the HOM, he did read and review the briefing, exhibits and material presented in this matter, and otherwise fully participated in the Board's discussion and deliberations in resolving this case.

¹⁰ Board Member Tovar also enters a concurring opinion which appears *infra*.

Board Member Tovar’s Concurring Opinion

I write separately here to offer an observation for the County’s consideration as it strives to meet its ongoing duty to comply with the goals and requirements of the Growth Management Act. I concur with my colleagues in all respects regarding the conclusions and outcome of the legal issues in this case. However, after considering the facts and arguments in this case in light of prior Snohomish County cases, I also concur with the aphorism that “This is like déjà vu all over again.”

The specific actions and statutory provisions at issue vary from case to case, and yet a clear and recurring theme appears in many Snohomish County cases – one in which the legislative body attempts to wield its policy-making discretion (a clear GMA prerogative) without sufficient evidentiary support in the record below (an equally clear GMA imperative) or in blatant disregard of case law precedent. In a number of cases,¹¹ the legislative action that the Board subsequently found noncompliant was taken despite contrary objective recommendations and technical information in the record (*e.g.*, the PDS staff report and SEPA documents). This is not to say that the elected officials must always agree with the conclusions or recommendations of their professional staff; however, when they do not, they must be able to point to other credible and objective evidence in the record to support the policy choice they wish to make. Absent such record support, when challenged, they run the risk of being found clearly erroneous.

¹¹For example, see *1000 Friends of Washington, et al., v. Snohomish County [Island Crossing]*, CPSGMHB Case No. 03-3-0019c, Final Decision and Order, (Mar. 22, 2004); *Hensley (VI), et al., v. Snohomish County [MacAngus Ranches]*, CPSGMHB Case No. 03-3-0009c, Final Decision and Order, (Sep. 22, 2003); *Hensley (IV), et al., v. Snohomish County [Clearview LAMIRD]*, CPSGMHB Case No. 01-3-0004c, Final Decision and Order, (Aug. 15, 2001).

APPENDIX A

PROCEDURAL HISTORY

GENERAL

On November 5, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from (**Petitioner** or **CTED**). The matter was assigned Case No. 03-3-0020, and is hereafter referred to as *CTED II v. Snohomish County*. Board Member McGuire is the Presiding Officer for this matter. Petitioner challenges Snohomish County's (the **County**) adoption of Ordinance Nos. 03-063 and 03-104 amending the County's GMA Comprehensive Plan, zoning map and regulations. The basis for the challenge is noncompliance with the Growth Management Act (**GMA** or **Act**).

CTED's November 5, 2003 filing included a "Motion to Consolidate." CTED requested that the Board consolidate this case (CPSGMHB Case No. 03-3-0020) with CPSGMHB Case Nos. 03-3-0019 and 03-3-0017.

This PFR set forth six Legal Issues; four of the issues go to Ordinance No. 03-063 and two of the issues go to Ordinance No. 03-104.

On November 6, 2003, the Board held a prehearing conference (**PHC**) in *1000 Friends v. Snohomish County*, CPSGMHB Case No. 03-3-0019. The *1000 Friends* case involves a challenge to Snohomish County's adoption of Ordinance No. 03-063. At the PHC, Presiding Officer Tovar, with the concurrence of the Board,¹² orally granted the motion to consolidate four issues challenging Ordinance No. 03-063 in this PFR (03-3-0020) with the *1000 Friends* case. The November 12, 2003 PHO, reflects this consolidation. *See infra*.

At the time of that PHC, the Board had not determined whether any other consolidation would be appropriate. Therefore, the parties were asked to respond and reply to CTED's consolidation motion. The question of further consolidation was to be discussed at the PHC in *CTED II*.

On November 7, 2003, the Board received "Snohomish County-Camano Association of Realtors and Master Builders Association of King and Snohomish Counties Joint Opposition to CTED's Motion to Consolidate."

On November 10, 2003, the Board received "Snohomish County's Opposition to Petitioner CTED's Motion to Consolidate"

¹² Board Members Laing and McGuire also attended the PHC.

On November 12, 2003, the Board entered its “Prehearing Order, Order Granting Partial Consolidation and Granting Motion to Intervene” (**PHO**) in the *1000 Friends* case. The four Legal Issues challenging the County’s adoption of Ordinance No. 03-063, presented in this PFR (CPSGMHB Case No. 03-3-0020) were consolidated into the proceeding for the *1000 Friends* case. Therefore, two Legal Issues challenging the County’s adoption of Ordinance No. 03-104 remain a part of the present proceeding.

On November 21, 2003, the Board received a letter from CTED indicating it had withdrawn the remainder of its motion to consolidate. CTED stated, “CTED is satisfied to have the remaining issues in Case No. 03-3-0020 heard separately from those in the other two cases. Consequently, two Legal Issues remain in the *CTED II* (CPSGMHB Case No. 03-3-0020) proceeding.

On November 24, 2003, the Board conducted the PHC at the Board’s Offices in Seattle. Board member Edward G. McGuire, Presiding Officer in this matter, convened the conference. Alan D. Copsey represented Petitioner CTED and Jason Cummings represented Respondent Snohomish County. Also attending the PHC were Brent Lloyd (Snohomish County), Denise Lietz (Intervenor School Districts in *CTED I*) and Tom Ehrlichman (Intervenor MBA/Realtors in *CTED I*).

Pursuant to CTED’s withdrawal of its Motion to Consolidate, the Board ruled that the *CTED II* case would proceed as separate matter.

MOTIONS TO SUPPLEMENT AND AMEND INDEX

On December 5, 2003, the Board received “Snohomish County’s Index to the Record.”

On December 23, 2003,¹³ the Board received: “Motion to Intervene and to Supplement the Record by Snohomish County School District No. 201.” The Motion to Supplement asked to include 2 attached exhibits¹⁴ in the record in this matter.

The Board did not receive a response from CTED regarding the School District’s Motion to Intervene or Supplement the Record.

On January 22, 2004, the Board issued its “Order on Intervention and Motion to Supplement the Record.” The Order **granted** intervenor status to Snohomish County School District No. 201 and **admitted** two items into the record as supplemental exhibits.

DISPOSITIVE MOTIONS

There were no dispositive motions filed in this matter.

¹³ WAC 242-02-270(1) allows any person to move for intervenor status at any time.

¹⁴ The first attachment is the “Snohomish School District Capital Facilities Plan 2003-2008;” the second attachment is the “Declaration of Karen Bylsma-Riddle in Support of the District’s Motion to Intervene.”

BRIEFING AND HEARING ON THE MERITS

On March 19, 2004, the Board received “CTED’s Opening Brief,” with four attached exhibits. (**CTED PHB**).

On April 2, 2004, the Board received “Snohomish County’s Response Brief” (**County Response**), with one attached exhibit. The Board also received Intervenor’s “Snohomish School District’s Prehearing Brief” (**School District Response**), with two exhibits attached.

On April 5, 2004, the Board received “CTED’s Reply Brief” (**CTED Reply**).

On April 8, 2004, the Board held a hearing on the merits in the training center adjacent to the Board’s office at Suite 2470, 900 4th Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, and Joseph W. Tovar were present for the Board. Petitioner CTED was represented by Alan D. Copsey. Respondent Snohomish County was represented by Jason Cummings; and Liz Thomas and Denise M. Lietz appeared for intervenor Snohomish School District. Court reporting services were provided by Cheryl Wiese of Dean Moburg & Associates. The hearing convened at 10:00 a.m. and adjourned at approximately 11:00 a.m. No transcript was ordered.