

A. Index and Motions to Supplement

On April 7, 2006, Snohomish County filed “Snohomish County’s Index to the Administrative Record” (**Index**). The County’s Index consists of 291 pages listing hundreds of items related to the fifteen ordinances adopted by the County during its update process.

On April 14, 2006, Snohomish County filed “Snohomish County’s First Amended Index to the Administrative Record” (**Amended Index**). The Amended Index adds six items requested by Intervener Harvey Airfield and includes 16 Core Documents requested by the Board.

On April 14, 2006, the Board received “City of Marysville’s Motion to Supplement the Record” (Marysville Motion – Supp.) Marysville requests that the record be supplemented with five items: 1) Marysville’s draft Comprehensive Plan, development regulations and environmental impact statement (**EIS**); 2) Marysville’s final Plan, development regulations and EIS; 3) Marysville Ordinance No. 2569, adopting the final Plan, development regulations and EIS; 4) an Interlocal Agreement between Marysville and Snohomish County regarding mitigation of transportation impacts (**ILA – Trans**); and 5) an Interlocal Agreement between Marysville and Snohomish County concerning annexation and development within the City’s UGA (**ILA – UGA**).

On April 17, 2006, pursuant to the Board’s request, Pilchuck’s attorney provided maps of four UGA expansion areas adopted by the various challenged ordinances [UGAs for: Arlington, Snohomish, Lake Stevens and Marysville.]

On April 20, 2006, the Board received a “Motion to Correct the Record” from Petitioner Pilchuck. The Motion asks that the record be corrected to include 3 items inadvertently omitted by the County. The items were a declaration of Kristin Kelly and two letters submitted by Ms. Kelly to the County.

On April 20, 2006, the Board received “Snohomish County’s Response to City of Marysville’s Motion to Supplement the Record” (**SnoCo Response – Supp.**). The County did not object and proposed that it amend the index to include Marysville’s requested items.

On April 24, 2006, the Board received “Snohomish County’s Second Amended Index to the Administrative Record” (**2nd Amended Index**). The 2nd Amended Index includes items inadvertently omitted, including those requested by Pilchuck¹ and the items requested by the City of Arlington. There are nine separate listings of documents added

¹ The three items offered by Pilchuck related to testimony and correspondence offered by Kristin Kelly indicating she had testified at a public hearing at Mill Creek on June 2, 2005 and submitted two letters for the record. In its reply brief on dispositive motions, the County acknowledges that the three items “for correction” were inadvertently omitted from the Index and are now contained in the 2nd Amended Index. SnoCo Reply – Dismiss, at 2. If the County had not included them in the 2nd Amended Index, the Board would have admitted these items to the record.

submitted to the Planning Commission and County Council from County Departments, primarily documents submitted by the County's Public Works Department.

B. Dispositive Motions

On April 14, 2006, the Board received "Snohomish County's Dispositive Motions" (**SnoCo Motion – Dismiss**), with nine attached exhibits. The County moves to dismiss Pilchuck's Legal Issues 3, 5 and 11 for lack of standing. The County also moves to dismiss two components of the Strahm PFR: Buildable Lands Report (**BLR**) and Internal Consistency Issues.

On April 19, 2006, the Board received Pilchuck's "Motion Response" (**Pilchuck Response – Dismiss**), with no exhibits; and "Strahm's Response to County's Dispositive Motion (**Strahm Response – Dismiss**), with six exhibits.

On April 24, 2006, the Board received "Reply Brief of Snohomish County on Dispositive Motions" (**SnoCo Reply – Dismiss**), with no attached exhibits.

II. MOTIONS TO SUPPLEMENT AND CLARIFY

Given the County's 2nd Amended Index, there are no outstanding Motions to Supplement or Correct the Record. **The Record for this case is as contained in the 2nd Amended Index.**

The Board notes that several of the City Intervenors asked whether they would have to move to supplement the record with copies of their Plans and development regulations, etc. by the motions deadline or prior to briefing. The Board, through its Administrative Officer, informed the Cities that the Board can, and will, take **official notice** of such *matters of law* providing they have been officially enacted by the local government (signed copies). Such documents [those that can be officially noticed – *see* WAC 242-02-660] must be relevant and referenced in briefing on the various Legal Issues and the sections relied upon must be attached to the brief. In this matter, the presiding officer has determined that such matters of law need not be filed by the motions filing deadline, but may be attached to prehearing briefs.

III. MOTIONS TO DISMISS

The County's motion challenges aspects of the Pilchuck PFR and the Strahm PFR. The Board will address them accordingly.

A. Pilchuck PFR

First, the County asserts that Pilchuck Legal Issue 11 is a "failure to revise" issue that is untimely and should be dismissed. Second, the County contends that combined, none of the Petitioners have standing to raise Legal Issues 3 and 5. Third, the County asserts certain Petitioners do not have standing to raise some of the issues presented.

Legal Issue No. 11:

The Pilchuck PFR and PHO state Legal Issue No. 11, as follows:

11. *Does the County's failure to revise Snohomish County Code (SCC) No. 30.28.010 (Accessory Apartments), SCC No. 30.41C.240 (Bonus Residential Density), SCC No. 30.23.030(1) (Bulk Matrix) and SCC No. 30.22.110 (Use Matrix) fail to comply with RCW 36.70A.130, RCW 36.70A.020(1), RCW 36.70A.020(2), RCW 36.70A.070(5), and RCW 36.70A.110 when these provisions each and together allow development in Rural areas at densities and development patterns that are urban in nature and fail to protect rural character?*

The County argues that Legal Issue 11 is untimely and a collateral attack on a prior issue addressed previously before the Board. The County relies on the fact that Futurewise brought the same issue to the Board in 2004 and the Board dismissed it as untimely. SnoCo Motion – Dismiss, at 3-7; *citing Futurewise III v. Snohomish County*, CPSGMHB Case No. 05-3-0020, Order on Motions, (May 23, 2005). In response, Petitioners acknowledge the validity of the County's arguments. Pilchuck Response – Dismiss, at 2. The Board also agrees with the County. Legal Issue No. 11 will be **dismissed** from this proceeding.

Legal Issue No. 3:

The Pilchuck PFR and PHO state Legal Issue No. 3, as follows:

3. *Does the adoption of Ordinance 05-069, adopting an updated and revised comprehensive plan, including policy LU 10.A.1, fail to comply with RCW 36.70A.130, RCW 36.70A.020(9), RCW 36.70A.020(10), RCW 36.70A.060 and RCW 36.70A.160 when it explicitly excludes consideration of critical areas for inclusion in open space corridors?*

The County asserts that no Petitioner has standing to bring the challenge as stated in Legal Issue 3. SnoCo Motion – Dismiss, at 8. Again, Petitioners concede the validity of the County's arguments. Pilchuck Response – Dismiss, at 2. Based upon the concession of Petitioners, the Board will **dismiss** Legal Issue 3 from this proceeding.

Legal Issue No. 5:

The Pilchuck PFR and PHO state Legal Issue No. 5, as follows:

5. *Does the adoption of Ordinance No. 05-071, adopting an updated and revised Capital Facilities Plan, fail to comply with RCW 36.70A.130, RCW 36.70A.020(12) and RCW 36.70A.070 when the adopted plan fails to meet the criteria required by RCW 36.70A.070(3)?*

RCW 36.70A.290(2) authorizes “GMA participation standing” and provides: “A petition may be filed only by: . . . (b) a person who has participated orally or in writing before the county or city regarding the matter on which review is being requested.” Subsection 4 of this same section of the GMA sets forth how to establish participation standing. It states:

(4) To establish participation standing under subsection (2)(b) of this section, a person must show that his or her participation before the county or city was reasonably related to the person’s issue as presented to the board.

The County again asserts that no Petitioner has standing to bring the challenge as stated in Legal Issue 5. SnoCo Motion – Dismiss, at 8. In response, Pilchuck quotes from two comment letters² submitted by Pilchuck/Futurewise to the chairs of the Planning Commission and County Council dated June 2, 2005. Pilchuck Response – Dismiss, at 2-4; attached Letters 1 and 2. In reply, the County concedes that Petitioners Pilchuck and Futurewise have standing to bring Legal Issue No. 5. SnoCo Reply – Dismiss, at 4. The Board agrees with Petitioners, the two letters express meaningful participation and provided the opportunity for the County to address the concerns raised in them. The County’s Motion to Dismiss Legal Issue 5 is **denied**.

Standing of Other Petitioners:

There were originally 14 Legal Issues set forth in the PHO for the Pilchuck PFR. Three Legal Issues were challenged and the Board has determined that two will be dismissed and one will remain. The County concedes that Legal Issues Nos. 1, 2, 4, 5, 6, 7, 8, 9, 10, 12, 13 and 14 are properly placed before the Board by at least Petitioners Pilchuck and Futurewise. SnoCo Motion – Dismiss, at 6-7; SnoCo Reply, at 2-4. However, the County contends that the participation of other Petitioners is nonexistent or limited to specific issues.³ Therefore, the County urges the Board to limit their participation to those issues where they have standing. SnoCo Motion – Dismiss, at 7-10. In response, Pilchuck indicates little objection to the approach suggested by the County, but contends that the County has not provided any evidence for the alleged lack of standing. Pilchuck Response – Dismiss, at 4. In reply, the County contends that once standing is challenged, Petitioners have an obligation to bring forth evidence of their participation, just as Pilchuck and Futurewise did in relation to Legal Issue No. 5. However, as no evidence was brought forth on behalf of any of the other Petitioners and the County urges the Board to dismiss those Petitioners who have not established standing and limit other Petitioners’ participation to specific issues.

The Board agrees with the County. Once GMA participation standing is challenged by a jurisdiction after review of their record Index, Petitioners have the duty to come forward

² These two letters are now included in the 2nd Amended Index.

³ The County contends that the various Petitioners’ standing is limited to only certain Legal Issues as follows: Jody McVittie = 4, 12, 13 and 14; Cindy Howard = 12; Shelly Thomas = 7; Lisa Stettler = 8 and Barbara Bailey = 9. The County contends that the following named Petitioners have no standing on any Legal Issue: Darlene & Ken Salo and Tim Thomas.

with evidence to demonstrate their participation. In Pilchuck's response to the County motion, only evidence of Pilchuck's and Futurewise's participation was presented; nothing was offered to indicate the degree of participation by any of the other Petitioners. Therefore, the Board will accept the County's characterization of the participation of the various Petitioners. The County contends that its record shows that Petitioners Darlene & Ken Salo and Tim Thomas did not participate before the County on any of the Legal Issues presented for review. Petitioners did not rebut this contention. Therefore Darlene & Ken Salo and Tim Thomas are **dismissed** as Petitioners.

The County indicated that several other Petitioners did participate, but only on one or several issues; these assertions were not rebutted. While there is merit to the County's position that other Petitioners should be limited to certain issues where they have standing, the Board declines to do so in this matter for the following practical reasons. These Petitioners appear to have coordinated their appeal efforts. In lieu of receiving perhaps seven different PFRs from these Petitioners, the Board received one. At least two Petitioners have standing on all remaining Legal Issues in the Pilchuck matter. All Petitioners involved in the Pilchuck matter are represented by the same counsel. Counsel will be coordinating Petitioners' case and submitting briefing, exhibits and oral argument on behalf of all the Petitioners. The Board must trust Petitioners' counsel to keep in mind the degree of participation of the various Petitioners when preparing briefing and filing exhibits. Therefore, given a coordinated briefing effort, the Board will not attempt to orchestrate the participation by the remaining Petitioners with standing. However, in briefing, exhibits offered in argument should be limited to evidence from those Petitioners with standing on the Legal Issue being briefed [*see* footnote 3 *supra*].

B. Strahm PFR:

The County argues that Petitioner Strahm's challenge to the 2002 BLR should be dismissed for two reasons: 1) Petitioner Strahm did not establish standing; and 2) Strahm's challenge to the 2002 BLR is untimely. SnoCo Motion – Dismiss, at 11-16. Next, the County asserts that Petitioner Strahm's "consistency" challenges focus on external, rather than internal, consistency. Consequently, one issue dealing with external inconsistency, but framed as an internal inconsistency issue, should be dismissed. *Id.* at 16-17.

2002 BLR:

The County moves the Board to dismiss Petitioner Strahm's challenge to the County's 2002 BLR. SnoCo Motion – Dismiss, at 17; SnoCo Reply – Dismiss, at 13. The reference noted in both of the County's briefs cites to a sentence in Strahm's PFR, under Challenged Actions, which states, "Petitioner challenges the County's Buildable Lands Report Dated, January 2003." Strahm PFR, at 2. However, there is no reference in the PFR under Issues Presented for Resolution that directly challenges the County's BLR for compliance with the Act.

RCW 36.70A.215 governs the preparation of the review and evaluation program known as the BLR. This section of the Act *only* applies to the BLR and the locally adopted Countywide Planning Policies that govern countywide BLR programs, not Plans or development regulations, or related amendments. Petitioner does cite to .215 in Legal Issue H.⁴ However, the action being challenged in Legal Issue H is the County's Plan Update, and the various ordinances involved, not the BLR. Since .215 is not applicable to the Plan Update, the issue of whether the County's BLR complies with .215 is **not now, nor will it be, an issue** the Board will address.⁵

The parties are certainly free to *criticize* or *praise* the 2002 BLR, the County's 2005 land capacity analyses, or other land capacity analyses in the record that were considered by the County in enacting its Plan Update. But those technical documents are what they are – evidence that shows the work of the County in conducting the County's Plan Update, including the adjustments to the County's various UGAs.

The question of whether the County's 2002 BLR complies with RCW 36.70A.215 is not an issue before the Board. Therefore, the County's Motion to Dismiss is unnecessary since the question is not one the Board will address.

⁴ Strahm's PFR, and the PHO, state Legal Issue H as:

- H. Does the Plan Update fail to comply with RCW 36.70A.110, RCW 36.70A.130 and RCW 36.70A.215 because it incorporates an incomplete and erroneous land capacity review and evaluation?*
- i. Does the Plan Update omit sufficient facts or analysis to demonstrate how the minimal UGA expansions, increased densities and projected rates of re-development provide sufficient capacity to fulfill the County's allocation of population, housing and employment growth?*
 - ii. Does the Plan Update employ an erroneous buildable lands analysis that is inconsistent with CPP UG-13 and UG-14 and the methodology recommended by the Washington State Department of Community, Trade and Economic Development?*
 - iii. Does the Plan Update employ erroneous buildable lands analysis, because the Plan Update does not take into account the effect of proposed Best Available Science critical areas regulations that are more restrictive and would potentially reduce available buildable land, when the County is required by RCW 36.70A.172(1) to include Best Available Science in designating and protecting critical areas?*
 - iv. Does the Plan Update employ erroneous buildable lands analysis, because it lacks any valid statistical, scientific or factual analysis to support the 5% upward adjustment of unmapped critical areas?*

Strahm PFR, at 5-6; and 4/10/06 PHO, at 19, (emphasis supplied).

⁵ Review of the briefing provided by the parties on the BLR suggests to the Board that since the County did not publish notice of its action on Motion 03-080, adopting the BLR, an appeal is **not time barred**. See *S/K Realtors v. King County*, CPSGMHB Case No. 04-3-0028, Final Decision and Order, (May 31, 2005). However, Petitioner's participation in the County's 2005 Plan Update process **does not establish standing** to challenge the County's 2002 action on the BLR.

Internal Consistency:

The County moves to dismiss Petitioner Strahm's Issues B i, ii, and iii,⁶ asserting that this Legal Issue alleges external inconsistencies, not internal inconsistencies. SnoCo Motion – Dismiss, at 16-17; and SnoCo Reply, at 12-13. Petitioner asserts that these issues are internal consistency issues. Strahm Response, at 7-10. The arguments presented go to the merits. The Board will not, on this limited record, decide this matter on motions. Strahm's Legal Issue B will be addressed in the Board's Final Decision and Order. The parties should reargue, and supplement, their briefing in their prehearing briefs. The County's Motion to Dismiss Strahm's Legal Issue B, is **denied**, at this time.

III. ORDER

Based upon review of the Petition for Review, the motions, responses and materials submitted by the parties, the Act, Board Rules of Practice and Procedure, and prior decisions of this Board, the Board enters the following ORDER:

- Snohomish County's Motion to Dismiss Legal Issue No. 11 from the Pilchuck PFR is **granted**. Legal Issue No. 11, as stated in the PHO, at 17, is **dismissed with prejudice**.
- Snohomish County's Motion to Dismiss Legal Issue No. 3 from the Pilchuck PFR is **granted**. Legal Issue No. 3, as stated in the PHO, at 15, is **dismissed with prejudice**.
- Snohomish County's Motion to Dismiss Legal Issue 5 from the Pilchuck PFR is **denied**.

⁶ Strahm's PFR, and the PHO, state Legal Issue B as:

- B. Does the Plan Update fail to comply with RCW 36.70A.070, which requires comprehensive plans to be internally consistent?*
- i. Is the Plan Update internally consistent when it includes a public park (McCollum Park) as available buildable land?*
 - ii. Is the Plan Update internally consistent when the January 2003 Buildable Lands Report concludes that the City of Everett had an additional population capacity of 15,833 (scenario A) and 13, 236 (scenario B) in 2001, and the Land Capacity Analysis concludes that the City of Everett had an additional population capacity of 27,070 for 2001-2025, when the City of Everett made no capacity increases in the City's updated comprehensive plan?*
 - iii. Is the Plan Update internally consistent when the January 2003 Buildable Lands Report concludes that the City of Everett had an additional employment capacity of 39,582 (scenario A) and 31,466 (scenario B) in 2001, and the April 2005 UGA Land Capacity Technical Report (updated December 21, 2005) concludes that the City of Everett had an additional population capacity of 48,354 for 2000-2025, when the City of Everett made no capacity increases I the City's updated comprehensive plan"*

Strahm PFR, at 2-3; and 4/10/06 PHO, at 18.

- Snohomish County's Motion to Dismiss Petitioners Darlene & Ken Salo and Tim Thomas as Petitioners from this matter is **granted**.
- The following Legal Issues from the Pilchuck PFR and PHO remain for the Board to decide: Legal Issue Nos. 1, 2, 4, 5, 6, 7, 8, 9, 10, 12, 13 and 14.
- Neither Strahm's PFR, nor the Board's PHO frame an issue where the County's 2002 BLR is challenged for compliance with RCW 36.70A.215. The County's Motion to Dismiss such issue is unnecessary since the question is not presented to the Board, nor is it one the Board will address.
- The County's Motion to Dismiss Strahm's Legal Issue B, is **denied**, at this time.

So ORDERED this 4th day of May, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
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.