



RCW 36.70A.215, .130(3), .115, .070 and .110, and **is not guided** by GMA goals RCW 36.70A.020(1), (2), and (12).

3. Therefore the Board **remands** Ordinance No. 352-2005 to Kitsap County with direction to the County to take legislative action to comply with the requirements of the GMA as set forth in this Order.

*KCRP IV* FDO, at 31-32. The FDO acknowledged Kitsap County's efforts in undertaking its ten-year UGA review and established a compliance schedule concurrent with the schedule in *1000 Friends, et al v. Kitsap County (1000 Friends)*, CPSGMHB Case No. 04-3-0031c.<sup>1</sup>

On January 11, 2007, the Board received Kitsap County's Statement of Actions Taken to Comply [SATC] and Compliance Index. The County stated that it had completed the 10-year update of its comprehensive plan with the adoption of Ordinance 370-2006 on December 11, 2006. With its SATC, Kitsap County submitted copies of the 10-Year Comprehensive Plan Update, the Draft and Final Environmental Impact Statement (EIS), Land Use Maps, and revised development regulations (Kitsap County Code Title 17, 18, and 21) in Ordinances 367-2006, 368-2006 and 369-2006.

On January 22, 2007, the Board received Petitioners' Response to Statement of Actions Taken to Comply [**KCRP/Harless Response**]. On January 30, 2007, the Board received Kitsap's Reply re: Statement of Actions Taken to Comply [**Kitsap Reply**].

The Board coordinated the Compliance Hearings in *1000 Friends*, Case No. 04-3-0031c, and *KCRP VI*, Case No. 06-3-0007. On February 1, 2007, at approximately 11:45 a.m., the Board convened the Compliance Hearing. Present for the Board were Board members Margaret Pageler, Ed McGuire and Dave Earling, along with law clerk Julie Taylor. Kitsap County participated telephonically and was represented by Deputy Prosecutor Lisa Nickels. Petitioner Jerry Harless was present, and Petitioner Tom Donnelly, for KCRP, participated by telephone. Intervenor OPG Properties, represented by Charles Maduell, Davis Wright Tremaine LLP, and Kent Barryman, also participated by telephone.<sup>2</sup>

At the Compliance Hearing, the Presiding Officer informed the parties that the Board would need more specific briefing and in-person argument in order to decide the issues of compliance with respect to Case No. 06-3-0007. The parties orally stipulated to the County's compliance in completing its 10-year UGA review and update – thus resolving the first non-compliance issue in the Board's July 26, 2006, FDO. The briefing and hearing schedule for the remaining issues was discussed and agreed.<sup>3</sup>

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<sup>1</sup> The June 28, 2005, FDO in *1000 Friends* found Kitsap County's failure to complete its 10-year UGA review to be non-compliant with RCW 36.70A.130.

<sup>2</sup> *Amici* Home Builders Association of Kitsap County, *et al*, have not participated in the compliance proceedings.

<sup>3</sup> Petitioner Tom Donnelly, for KCRP, indicated he would be out of the country and would arrange for representation of KCRP at the rescheduled hearing.

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On February 2, 2007, the Board issued its Order Rescheduling Compliance Hearing.

On February 7, 2007, the Board received a Notice of Association of Counsel from Andrew Lane of Cairncross & Hempelmann, P.S. on behalf of the County.

On February 16, 2007, the Board received a Notice of Appearance from David A. Bricklin of Bricklin Newman Dold, LLP, on behalf of KCRP.

The following briefing was timely filed:

- County's Supplemental Statement of Actions Taken to Comply – **SSATC**
- Petitioners' Response to Second County Statement of Actions Taken to Comply (filed on behalf of both KCRP and Harless) – **KCRP Response**
- Kitsap County's Reply re: Supplemental Statement of Actions Taken to Comply - **County Reply**

The Rescheduled Compliance Hearing was convened on February 26, 2007, from 2:00 p.m. to approximately 4:00 p.m., in the Chief Sealth Room, Suite 2000, 800 Fifth Avenue, Seattle. Present for the Board were Board members Margaret Pageler, Ed McGuire and Dave Earling. Board law clerk Julie Taylor and Board extern Moani Russell also attended. Kitsap County was represented by Deputy Prosecutor Lisa Nickels and by Andrew Lane. Petitioner Jerry Harless was present, and David Bricklin represented Petitioner KCRP. Intervenor OPG Properties was represented by Charles Maduell.<sup>4</sup>

## **II. DISCUSSION**

### **A. Legal Issue Nos. 1 and 2**

The PHO stated Legal Issue Nos. 1 and 2 as follows:

*Legal Issue 1: Does adoption of Ordinance 352-2005, approving the “2005 Kingston Sub-Area Plan Update” and expanding the Kingston Urban Growth Area, fail to be guided by RCW 36.70A.020(1), RCW 36.70A.020(2) and fail to comply with RCW 36.70A.130(3) and this Board's Final Decision and Order in 1000 Friends v Kitsap County (04-3-0031c) by adjusting an isolated UGA without first completing the countywide ten year UGA update as required by the GMA and this Board's Order?*

*Legal Issue 2: Does adoption of Ordinance 352-2005, approving the “2005 Kingston Sub-Area Plan Update” and expanding the Kingston Urban Growth Area, fail to be guided by RCW 36.70A.020(1), RCW 36.70A.020(2) and RCW 36.70A.020(4) and fail to comply with RCW 36.70A.115 by amending the*

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<sup>4</sup> Mr. Maduell did not participate in the briefing or argument, but was available to answer questions from the Board.

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*Comprehensive Plan without accommodating all allocated growth as required by the GMA?*

In the FDO, the Board determined that Kitsap County should not have “expanded an individual urban growth area prior to the ten-year review of the County’s UGA, county-wide analysis and collective consideration to accommodate the full 2025 population target.” *KCRP VI* FDO, at 1-2.

By enacting Ordinance 370-2006, Kitsap County completed the required countywide ten-year UGA update accommodating the full 2025 target population, and incorporated the Kingston Urban Growth Area expansion in that updated plan. SSATC, at 4. Petitioners “stipulate that, with adoption of Ordinance 370-2006, the County has demonstrated procedural compliance with the FDO as it relates to Legal Issues 1 and 2.” *KCRP* Response, at 3.

### Conclusion

The Board concludes that Kitsap County has **complied** with the FDO and with RCW 36.70A.130(3) and .115 regarding Legal Issue Nos. 1 and 2.<sup>5</sup>

### **B. Legal Issue No. 3**

The PHO stated Legal Issue No. 3 as follows:

*Legal Issue 3: Does adoption of Ordinance 352-2005, approving the “2005 Kingston Sub-Area Plan Update” and expanding the Kingston Urban Growth Area, fail to be guided by RCW 36.70A.020(1) and RCW 36.70A.020(2) and fail to comply with RCW 36.70A.215 and this Board’s Final Decision and Order (as modified by the Thurston County Superior Court) in 1000 Friends v Kitsap County (04-3-0031c) by adjusting the UGA rather than implementing measures other than adjusting UGAs reasonably likely to increase consistency between actual and planned growth as required by the GMA?*

In the FDO, the Board held that the County should not have “expanded the UGA in the Kingston Sub-Area Plan prior to implementing measures likely to increase consistency with the County growth policies” and that the reasonable measures adopted in the Kingston Sub-Area Plan did not qualify as such. *KCRP VI* FDO, at 2. The Board ruled that “the County may not rely on the previously-adopted measures” and may not rely on measures “adopted as components of and contingent upon the expansion of the UGA.” *Id.* at 18-19.

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<sup>5</sup> Other aspects of the ten-year countywide UGA and comprehensive plan update have been challenged in six subsequent petitions for review, consolidated as *CHECK v. Kitsap County*, CPSGMHB Case No. 07-3-0009, *Suquamish II v. Kitsap County*, CPSGMHB Case No 07-3-0019c, *Dyes Inlet Preservation Council v. Kitsap County*, CPSGMHB Case No. 07-3-0021c, and *Rohwein v. Kitsap County*, CPSGMHB Case No. 07-3-0022.

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Positions of the Parties

Both the Petitioners and the Respondent acknowledge that “the status of Legal Issue 3 is complicated by appeals pending in the Court of Appeals, including a stayed remand by the Thurston County Superior Court.” KCRP Response, at 3. However, the parties at the HOM agreed that the Board can and should address the question of whether Kitsap has taken actions to correct the error of expanding the Kingston Sub-Area UGA without first implementing reasonable measures in lieu of adjusting the UGA.

The County states that the UGA expansions in its ten-year update were necessary to accommodate “new, substantially increased” twenty-year population growth; whereas “reasonable measures” are directed at curing inconsistencies between development trends and comprehensive plans. SSATC, at 5. The County argues that there is “a clear distinction between the need for reasonable measures under RCW 36.70A.215 and the need to comprehensively review UGAs in light of the newest county-wide population forecast as required by the GMA’s ten-year update provisions of RCW 36.70A.130.” County Reply, at 5.

Nevertheless, the County points to the Reasonable Measures Review, attached as Appendix C to the Final EIS, as listing new county-wide measures “to increase urban growth, increase efficiency in the delivery of public services in urban areas, and to address the imbalance in urban and rural growth.” *Id.* The County cites examples of several new or revised measures to facilitate urban development, such as a requirement to plat to minimum urban densities, a TDR program, increased height limits, and expansion of the short-platting allowance. *Id.* at 8-9.

The thrust of Petitioners’ response is that the County’s failure to downsize the Kingston UGA demonstrates that its “measures” are not expected to make a measurable difference in promoting denser urban development and thus do not meet the RCW 36.70A.215 definition. KCRP Response, at 6-8. Petitioners point to the County’s own “quantitative analysis” in FEIS Appendix C which shows, according to Petitioners, that none of the reasonable measures is expected to have a significant effect. Petitioners argue: “If [measures] are reasonably likely to make a difference, then the UGA expansion should be proportionately impacted. If they are not, then they are not ‘reasonable measures’ at all.” *Id.* at 9. Petitioners note:

None of this [quantitative assessment] was included in the UGA land capacity analysis and so, not surprisingly, none of these reasonable measures led to any change in the size, geography or capacity of the UGA expansion. We cannot find in the voluminous record, and the County has not identified in its SSATC, anything to suggest a linkage between the reasonable measures

considered and/or adopted and the size of the UGA expansions, particularly in Kingston.

*Id.* at 7. Indeed, Petitioners point out that all the alternatives for the Kingston UGA considered in the Draft and Final EIS are identical to the UGA remanded by the Board as non-compliant. *Id.*

### Board Discussion

In the July 26, 2006 FDO, the Board, seeking to apply the standards for “reasonable measures” articulated by the Thurston County Superior Court,<sup>6</sup> found the County’s “reasonable measures” in the Kingston Sub-Area Plan non-compliant on two grounds: (1) many of them were not incentives for infill within the existing UGA but rather were conditions imposed on the new Arborwood subdivision, and (2) many were simply reiterations of pre-existing regulations. *KCRP VI* FDO, at 19-20. With Ordinance 370-2006, the County has now enacted a set of county-wide measures - including TDR’s, minimum-density platting requirements, and height incentives - designed to promote urban infill and increase densities.<sup>7</sup>

The Board notes that measures such as TDRs and minimum density platting requirements have previously been advocated by some of these Petitioners in this matter. In *1000 Friends*, Petitioner Harless, who was an intervenor in that case, argued in his Prehearing Brief:

As to the inconsistencies which must be corrected, the County is required to adopt and implement measures which are reasonably likely to increase the proportion of growth locating in UGAs, dramatically increase [from 2 du/acre] urban densities and decrease the proportion and density of growth locating in rural areas. ... At a minimum, these measures should include 1)

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<sup>6</sup> The Thurston County Superior Court ruling is attached as Appendix B to the July 2006 FDO. The ruling has been stayed, while review is pending at the Court of Appeals.

<sup>7</sup> Appendix C to the FEIS lists the following new reasonable measures applicable to Kingston Sub-Area:

- Administrative short plat for plats up to nine lots
- Up-zones for increased densities in existing UGAs
- Alternative sewer technologies allowed in unincorporated UGAs
- Remove pre-planning allowances in UGAs
- Provide for regional stormwater facilities in unincorporated UGAs
- Promote low impact development
- Consolidated comprehensive plan land use designations
- Mandated minimum densities for new subdivisions
- Increased building heights and height incentives
- SEPA categorical exemption thresholds increased
- Transfer of Development Rights (TDR) policies and regulations
- Allowance for density bonuses

provide adequate urban services (e.g., streets, water, sanitary sewers) to support urban densities through out the existing UGAs; 2) prohibit continued development, both *platting* and construction permits, in urban areas at less than the *minimum density* allowed in the Plan [now 4 du/acre]; and 3) reduce rural densities either through aggregation of sub-sized lots, purchase or *transfer of development rights*, differential impact fees (higher in rural areas) and/or other regulatory or incentive measures.

*1000 Friends*, Case No 04-3-0031c, Intervenor Harless' PHB (Apr. 4, 2005), at 10-11 (emphasis added).

In *1000 Friends*, Harless referenced a County staff-recommended list that "contained a few measures which, if adopted and implemented, might be reasonably likely to increase the proportion and density of growth locating in UGAs."

Promising measures ... include multifamily tax credits, *transfer/purchase of development rights*, *increasing allowable densities*, maximum lot sizes in the UGA, master plan requirements for large parcel development in the UGA, programs to identify and redevelop vacant and abandoned buildings, and expedited permitting for dense development.

*Id.* at 26 (emphasis added).

While the County has not adopted all of the measures suggested by Petitioner Harless and has perhaps not adopted any in precisely the form that was advocated, the County appears to have made a fair start at measures to increase infill in urban areas at urban densities.<sup>8</sup> The County's analysis indicates the measures most likely to increase UGA capacity over time:

- rezoning for higher density and allowing density bonuses, especially in the urban residential zones;
- adopting minimum urban density/maximum lot sizes; and
- targeted capital facility investments to increase sewer feasibility.

FEIS, App. C, Mark Personius, at 8. The Kingston Sub-Area Plan specifically incorporates minimum density requirements, density incentives, and policies to identify and implement reasonable measures prior to further UGA amendments. Comprehensive Plan, at 12-9, 12-10, Policy King-35 to King-40.

The question of whether Kitsap County must adopt, implement, and monitor reasonable measures in lieu of overall expansion of UGAs in the County awaits resolution in the

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<sup>8</sup> In arguing that the County should have based its Land Capacity Analysis on its actual recently-achieved urban residential densities of 5.6 du/acre, Petitioners by implication acknowledge that the County's growth management efforts have begun to achieve better results.

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Courts. With respect to the narrow question of compliance in regard to the Kingston Sub-Area Plan, the Petitioners **have not carried their burden of proving** that Kitsap’s action is clearly erroneous. The Board finds and concludes that the reasonable measures adopted by Kitsap County appropriately address the deficiencies called out in the FDO concerning compliance with RCW 36.70A.215.

Conclusion

The Board finds and concludes that the County’s action, in adopting Ordinance No. 370-2006 – in particular the reasonable measures applicable to the Kingston Sub-Area Plan – is **not clearly erroneous** and **complies** with RCW 36.70A.215.

**C. Legal Issue No. 4**

The PHO stated Legal Issue No. 4 as follows:

*Legal Issue 4: Does adoption of Ordinance 352-2005, approving the “2005 Kingston Sub-Area Plan Update” and expanding the Kingston Urban Growth Area, fail to be guided by RCW 36.70A.020(1), RCW 36.70A.020(2) and RCW 36.70A.020(12) and fail to comply with RCW 36.70A.070 and RCW 36.70A.110 by utilizing a non-compliant Urban Land Capacity Analysis as a basis for expanding the UGA resulting in an excessively oversized UGA and failure to provide urban services adequate to support planned growth as required by the GMA?*

In the FDO, the Board ruled that expansion of the Kingston UGA failed to comply with the goals and requirements of RCW 36.70A.110, .070(3), .020(1), (2) and (12) concerning provision of urban facilities and services, in that “the expansion was based on a Land Capacity Analysis that discounted un-serviced areas of the existing UGA and a Capital Facilities Element lacking plans to provide services to the existing UGA within the 20-year planning period.” *KCRP VI FDO*, at 2.

Part A – Sewer Reduction Factor

Positions of the Parties

The County states that, on remand, it removed the sewer reduction factor from the County methodology used to evaluate the potential capacity of the existing urban growth area. See FEIS, Appendix B, “Updated Land Capacity Analysis.” SSATC, at 10. The County states that the “net effect of this removal was minimal to the land capacity analysis,” and, therefore, no downward adjustment was made to the Kingston UGA. *Id.*

Petitioners acknowledge that the County has removed the ‘sewer-constrained lands’ deduction from the LCA, but they contend that the County has made another amendment that undermines any resulting benefit. *KCRP Response*, at 11. Petitioners state that the

County reduced the minimum allowable urban density from 5 du/acre to 4 du/acre and forecasted its land use requirements using 4 du/acre as the average anticipated density, in contrast to the County's current average achieved urban density of 5.6 du/acre. *Id.* at 12. In Petitioners' view, basing UGA expansion on predicted densities 29% lower than current observed average densities is clearly erroneous. *Id.* Therefore, Petitioners conclude that the County LCA is still flawed and noncompliant. *Id.*

The County, in reply, urges the Board to limit its ruling solely to the remand issue presented in the FDO – the sewer reduction factor – and to treat any newly-alleged flaw in the LCA – 4 du/acre anticipated density - as a “new issue,” to be decided in the context of the pending challenges to Ordinance 370-2006. County Reply, at 8. See, *Suquamish II v. Kitsap County*, CPSGMHB Case No. 07-3-0019c.

### Board Discussion

The July 2006 FDO identified the sewer-reduction factor as a flawed component of the County's LCA. *KCRP VI FDO*, at 25-26. The Kingston Sub-Area UGA [as enlarged] totals 1,650 acres, of which 39 acres were discounted for likely development because they were “sewer-constrained lands.” The Board finds that the County has now removed the deduction for sewer-constrained lands.

The Board rejects the County's suggestion that, in a compliance proceeding, the Board should close its eyes to *how* a jurisdiction has allegedly complied; rather, with respect to the issue before it, the Board must affirmatively determine whether the action taken in response to the Board's order is a compliant action. However, Petitioners contend that the LCA is still noncompliant<sup>9</sup> because the County substituted for the sewer-constrained-lands deduction an urban density calculation lower than its actual average achieved densities.<sup>10</sup> Petitioners' concern, however logical, does not appear to be grounded in any requirement of the GMA. Petitioners fail to cite to any statutory provision or case law for the proposition that UGA expansions to accommodate new population allocations must be measured against actual achieved densities. The parties here do not dispute that a density of 4 du/acre is urban.

### Conclusion

With respect to Kitsap's Land Capacity Analysis for the Kingston Sub-Area Plan, the Board finds and concludes: (1) Kitsap County **complied** with the Board's FDO by removing the sewer-reduction factor; (2) Petitioners **failed to carry their burden** of proving that the County's basing of its Land Capacity Analysis on a residential urban density of 4 du/acre violates the GMA or the FDO; and (3) the County's action is **not clearly erroneous**.

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<sup>9</sup> The County argues that, in a compliance hearing, the Board may not assess whether the County's action taken in response to the FDO affirmatively complies with the GMA. SSATC, at 12. The Board disagrees.

<sup>10</sup> According to the FEIS, “preliminary growth monitoring indicates that between 2000 and 2005 Urban Low Residential plats in total achieved an average of 5.6 units/net acre.” FEIS, App. C, at 1.

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## Part B – Capital Facilities Element

In the July 2006 FDO, the Board ruled that the County erred in expanding the Kingston UGA based on a capital facilities element that lacked plans to provide urban services – specifically, wastewater collection - to the existing UGA within the twenty-year planning period.<sup>11</sup> *KCRP VI FDO*, at 27. The Board concluded that UGA expansion, in lieu of providing infrastructure within the existing UGA over a twenty-year time frame to accommodate projected population growth, did not meet the GMA requirements for the capital facilities element of the Kitsap County comprehensive plan. *Id.* The Board stated:

The GMA does require that the County’s twenty-year comprehensive plan ... indicate how adequate public facilities will be provided to serve allocated urban-area population. The County is required to demonstrate that public services, including sewer, will be available for the allocated population within the twenty-year planning period.

*KCRP VI FDO*, at 26. While recognizing the County’s plan to provide wastewater collection in the new Kingston UGA expansion area via the Arborwood development, the Board drew specific attention to the flaw of the “lack of a twenty-year plan for *extension of wastewater collection throughout the existing UGA.*” *Id.*

### Positions of the Parties

The County asserts that its twenty-year plan includes a Kingston wastewater treatment plant which has adequate capacity to serve the urban population at twenty-year build-out:

The overarching plan that Kitsap County has chosen is to ensure that sufficient capacity for wastewater [treatment] exists and then require that development provide the necessary pipes and connections when and where they are needed.

SSATC, at 15-16. According to the County’s new regulations, “Within Urban Growth Areas, all new residential subdivisions, single-family or multi-family developments are required to provide an urban level of sanitary sewer service for all proposed dwelling units.” KCC 17.381.050(A)(48). The County estimates that 50% of the currently unsewered residents within the existing Kingston UGA will connect to sewer within the twenty-year period. *Id.* at 13, fn. 31.

Petitioners counter that “those portions of the amended CFE and CFP which concern sanitary sewers in the Kingston UGA are unchanged from the subarea plan that was remanded by the Board.” *KCRP Response*, at 13. Petitioners point out that the County’s

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<sup>11</sup> The extent to which the existing UGA lacks sewer connections was depicted in Figure 7.1 of the Capital Facilities chapter. Kingston Sub-Area Plan, at Ch. 7-10.

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scheme of providing sewer treatment plants and leaving the planning and construction of the collection and transmission system to be determined at the project level has already been found non-compliant. *Id.* at 14. According to Petitioners, the County plan does “not even identify which areas or neighborhoods [currently] lack sewer collection/transmission systems or the source of funds to provide trunk lines to currently un-sewered areas of the expanded UGA.” *Id.* at 15. .

The County characterizes Petitioner’s argument as a demand that the County plan, pay for, and construct all necessary sewer collection and transmission lines, without relying on property developers for contribution to the cost. County Reply, at 9-11. According to the County, the GMA only requires that the provision of sewer services should accompany new development and does not dictate how it is paid for. *Id.*

### Board Discussion

The noncompliance identified in the Board’s FDO was the County’s failure to plan an urban level of sewer service for the *entire* Kingston Sub-Area UGA. Under the GMA, a county’s comprehensive plan must contain a capital facilities element that ensures that, over the twenty-year life of the plan, needed public facilities and services will be available and provided *throughout* the jurisdiction’s UGA. RCW 36.70A.070(3). “Urban governmental services” are defined in the GMA as “specifically including storm and sanitary sewer systems [and] domestic water systems ....” RCW 36.70A.030(19).

Sewer service in the Kingston area is owned and maintained by Kitsap County. The collection system consists of gravity sewer pipe, force mains, and six pump stations. Kitsap CFP 2007-2012, at 61. The wastewater treatment plant, completed in 2005, is designed to accommodate Kingston’s twenty-year growth targets. *Id.* at 62. The capacity of the sewage treatment plant is not at issue here; rather, Petitioners challenge (and the FDO specifically addressed) the County’s failure to plan for collection and transmission facilities.

Kitsap’s comprehensive plan requires developers to pay for the construction of local sewer connections as new projects are built. However, as Petitioners contend, this does not address the currently un-sewered residential areas within the Kingston UGA. Kitsap’s Capital Facilities Plan Population Allocation indicates that the Kingston Sewer Service Area in 2003 had 1,530 sewered and 1,105 un-sewered; by 2025, there will be 4,342 sewered and 622 un-sewered. Kitsap CFP 2007-2012, at 65. *In other words, over 40% of the population of the un-expanded Kingston UGA is not served.*

In reviewing the record, the Board finds that the County has no strategy to ensure that the population of the existing UGA is brought up to an urban level of sanitary service. Rather, the County’s plan states that “the population unserved by sewers will decrease over time ... as density increases and existing septic systems fail and the residents will hook up to sewer.” SSATC, at 13, fn. 41, citing Ordinance 367-2006, at 156. Twenty

years from now, the County projects, over half of these urban residents will still be on septic systems.

The Board notes that the County is open to alternative technologies: “New alternative technologies, such as ‘pocket plants’ or ‘membrane bioreactor treatment systems’ are an urban level of services that could be used in this situation, as are community drain fields that accommodate urban levels of development.” County Reply, at 10. However, these new technologies are proposed by the County as an option for *new* development, not as part of a plan to serve *existing* urban neighborhoods. *Id.* The County has not provided a strategy for accelerating the implementation of alternatives in the existing un-sewered Kingston UGA, such as through Utility Local-Improvement Districts (**LIDs**) or targeted capital facility investments. See, FEIS, App. C, Mark Petronius, at 8.

Goal 10 of the Kingston Sub-Area Plan provides:

Promote infill development in areas that have pre-existing services and adequate reserve capacity.

Comprehensive Plan, at 12-5. Goal 10 provides no comprehensive vision of sanitary services to the whole of the Kingston UGA.

In short, the County’s “plan” for 1,100 existing urban dwellers in the Kingston Sub-Area UGA is not an assurance of availability of urban sanitary systems but rather is the inevitability of septic system failure. Eventually septic systems will fail and then impacted residents will either hook up to sewer lines, if any are within range, or adopt alternative technologies. But waiting for failure is not a plan. And surely septic system failure is not an acceptable GMA plan for the required provision of urban sanitation. Planning involves anticipation of future events, developing strategies and taking action to address them.

In the July 2006 FDO, the Board made clear that “providing urban infrastructure to the UGA within the twenty-year planning horizon is a required component of comprehensive plans.” *KCRP IV FDO*, at 25, citing to RCW 36.70A.115 and .110 and a host of cases.<sup>12</sup> See, most recently, *Fallgatter V v. City of Sultan*, CPSGMHB Case No. 06-3-0003, Final Decision and Order (June 29, 2006) (ruling that water and sewer plans incorporated as elements of City Comprehensive Plan must address 20-year UGA population allocation); *Futurewise VII v. City of Issaquah*, CPSGMHB Case No. 05-3-0006, Final Decision and

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<sup>12</sup> See e.g., *Association of Rural Residents v. Kitsap County*, CPSGPHB Case No. 93-3-0010, Final Decision and Order, (June 3, 1994); *Bremerton, et al., v. Kitsap County / Alpine Evergreen, et al., v. Kitsap County*, CPSGMHB Case No. 95-3-0039c Coordinated with Case No. 98-3-0032c, Order Rescinding Invalidity in *Bremerton* and Final Decision and Order in *Alpine*, (Feb. 8, 1999); *Corrine R. Hensley v. City of Woodinville*, CPSGMHB Case No. 96-3-0031, Final Decision and Order, (Feb. 25, 1997); *Citizens for Responsible Growth of Greater Lake Stevens, Ruth Brandal and Jody McVittie v. Snohomish County [Crescent Capital X and Master Builders Association of King and Snohomish County-Camano Association of Realtors – Intervenors]*, CPSGMHB Case No. 03-3-0013, Final Decision and Order, (Dec. 8, 2003). *06307 KCRP VI v. Kitsap County (March 16, 2007)*

Order (July 20, 2005), at 28-29 (finding non-compliance with respect to un-sewered 150-unit subdivision).

The FDO stated, with emphasis: “Urban growth requires urban services, including sanitary sewer systems. RCW 36.70A.030(18), .030(19).” The GMA mandate includes not just extending service to new developments but also bringing already-developed areas within the UGA up to an urban level of service within the planning period.

Land within an UGA [including subarea planning areas] reflects the jurisdiction’s commitment and assurance that it will develop with urban uses, at urban densities and intensities, and it will ultimately be provided with urban facilities and services.

*MBA/Brink v Pierce County*, CPSGMHB Case No. 02-3-0010, Final Decision and Order (Feb. 4, 2003), at 11-12.

In *Fallgatter V*, the Board found the City of Sultan’s water and sewer plans non-compliant with the GMA mandate for urban service provision. The Comprehensive Plan set a twenty-year population of 11,000 for the Sultan urban area, while the Water Plan adopted a 20-year target of 6,750 and the Sewer Plan projected a 20-year service population of 7,200.<sup>13</sup> It was not clear whether the twenty-year water and sewer service projections contemplated service to the whole of the assigned twenty-year UGA. The Board stated:

Under the GMA, the City must match land use planning and infrastructure development by means of “comprehensive” planning that provides capacity to serve the total assigned area and allocated population within the 20-year planning horizon....

[O]ver the [20-year] time horizon of its Plan, the City of Sultan has a duty to ultimately provide urban services, including water and sewer services, for those urban areas within the “existing UGA.”

*Fallgatter V*, FDO, at 14-16. The Board explained: “The Growth Management Act, from its inception, was built around the concept of coordinating urban growth with availability of urban infrastructure. ... [Thus] the “urban growth” and “public facilities” goals used to guide local comprehensive plans are cross-referenced.” *Id.* at 11, *citing* RCW 36.70A.020(1) and (12).

Here, in its Comprehensive Plan, Kitsap County must demonstrate that urban sanitary services, whether sewer or alternative technologies, will be available for the allocated Kingston Sub-Area urban population within the twenty-year planning period. Ordinance

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<sup>13</sup> Sewer connection for Sultan’s in-city residents currently served by septic systems was also an issue in the target numbers (*see*, *Fallgatter PHB*, Ex. 44).

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370-2006 fails to meet that requirement, and therefore the Board finds continuing noncompliance with RCW 36.70A.070(3) and .110.<sup>14</sup>

Petitioners further contend that the County's re-adoption of the Kingston Sub-Area Plan was not guided by GMA Planning Goals 1, 2, and 12. The Board concurs. GMA Goal 1 calls for urban development to be encouraged where adequate public facilities and services exist or can be provided in an efficient manner. GMA Goal 2 calls for reducing low-density sprawl.<sup>15</sup> GMA Goal 12 calls for ensuring urban public facilities and services necessary to support urban development. The Board finds and concludes that Kitsap County's adoption of Ordinance No. 352-2005 was not guided by and is inconsistent with these goals.

The Petitioners have met their burden of proof in regard to Legal Issue 4B. The Board finds and concludes that the County's re-adoption of the Kingston Sub-Area Plan was **clearly erroneous**, because it relied on a Capital Facilities Element that does not comply with RCW 36.70A.070(3) or meet the requirements of RCW 36.70A.110. Furthermore, the County's action **was not guided by** Goals 1, 2, and 12, which call for coordinated planning that makes capital facilities and services, including urban sanitary services, available to serve the population of the urban area. The Board is left with a firm and definite conviction that a mistake has been made.

### Conclusion

The County's re-adoption of the Kingston Sub-Area Plan was **clearly erroneous** and **does not comply** with RCW 36.70A.070(3) and .110 and **was not guided by** GMA Goal 1 – [encourage development in urban areas where infrastructure exists] – Goal 2 – [reduce sprawl], and Goal 12 – [ensure availability of adequate public facilities and services] – RCW 36.70A.020(1), (2), (12). The Board finds **continuing noncompliance**. The Board **remands** the Kingston Sub-Area Plan and the Capital Facilities Element of the Comprehensive Plan to Kitsap County to take appropriate legislative action to comply with the GMA and with this Order.

### **III. INVALIDITY**

The Board has previously held that a request for an order of invalidity is a prayer for relief and, as such, does not need to be framed in the PFR as a legal issue. *See King*

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<sup>14</sup> Alternatively, the County may determine that areas that cannot be provided with urban services should not be included in the UGA or allowed to develop to urban densities.

<sup>15</sup> The linkage to urban sprawl is explicit in the Kingston materials:

The Board notes that in the last meeting of the Kingston Sub-Area Plan Working Group, on August 3, 2005, the community discussion closed in on the necessity for sewer line construction to allow for planned infill in the existing UGA. Index 28392, at 2-5. The participants clearly identified the lack of sewer connections as a main contributor to the leap-frog development patterns characterizing the Kingston UGA. *Id.*

*KCRP VI*, FDO, at 26.

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*County v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 13, 2003) at 18. Petitioners here asked for a finding of invalidity in Legal Issue No. 5<sup>16</sup> and have now requested the Board to find the Kingston Sub-Area Plan, as readopted by Kitsap County in Ordinance 370-2006, invalid. KCRP Response, at 16-17.

### Applicable Law

The GMA's Invalidation Provision, RCW 36.70A.302, provides:

- (1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
  - (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
  - (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
  - (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.
- (2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.

### Discussion and Analysis

In the July 2006 FDO, the Board found and concluded that the County's action in adopting the Kingston Sub-Area Plan **was not guided by Goals 1, 2, and 12** of the Act.<sup>17</sup> Further, the Board concluded:

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<sup>16</sup> The PHO states Legal Issue No. 5 as follows:

*Legal Issue 5: Does adoption of Ordinance 352-2005, approving the "2005 Kingston Sub-Area Plan Update" and expanding the Kingston Urban Growth Area substantially interfere with the goals of the GMA such that this action should be held invalid by this Hearings Board?*

<sup>17</sup> Petitioners rely on the following goals:

- (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner. [Legal Issues 1, 2, 3, and 4]
- (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development. [Legal Issues 1, 2, 3, and 4]
- (12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards. [Legal Issue 4]

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The expansion of the Kingston Sub-Area UGA *interferes with the fulfillment of the goals* of the GMA, in particular RCW 36.70A.020(1), (2), and (12), because the enactment *thwarts the GMA mandate* to accommodate urban growth where urban services can be provided, to reduce low-density sprawl, and to ensure provision of urban services in urban areas.

*KCRP VI FDO*, at 30. The Board reasoned:

The Board concurs with Petitioners that the Kingston Sub-Area Plan adopted by Ordinance 352-2005 is a recipe for the kind of leap-frog development that the Legislature hoped to forestall when it enacted the GMA. While deferring the capital facilities needed to support buildout of the existing UGA at urban densities, Kitsap County has expanded the UGA to incorporate a large subdivision.... [B]ut without infill in the *existing* UGA, sprawl is perpetuated, contrary to Goal (2), and the provision of urban services becomes inefficient and more costly, contrary to Goals (1) and (12).

Both Goal (1) and (12) link compact urban development and the concurrent provision of urban services necessary to support that development. Petitioners argue that “the absence of sewer collection/transmission facilities over more than two-thirds of the [existing] UGA will doom that area to sprawl.” *KCRP PHB*, at 34. The Board agrees that the GMA imposes a duty on counties and cities to provide urban services, notably sanitary sewers, to lands included in the UGA within the 20-year planning period. Failure to do so defeats Goals (1) and (12).

*KCRP VI FDO* at 28, citations omitted.

With its July 2006 FDO, the Board declined to enter an order of invalidity, acknowledging the County’s process of updating its UGAs county-wide:

Accordingly, the Board does not enter an order of invalidity but remands Ordinance No. 352-2005 to Kitsap County to take legislative action consistent with this Order. The Board establishes a compliance schedule concurrent with the extended compliance schedule in CPSGMHB Case No. 04-3-0031c.

*KCRP VI, FDO*, at 31.

In the discussion of Legal Issue 4.B above, the Board found and concluded that Kitsap County’s re-adoption of the Kingston Sub-Area Plan in Ordinance No. 370-2006 was **clearly erroneous** and **non-compliant** with the requirements of RCW 36.70A.070(3) and .110. The Board further found and concluded that the County’s action **was not guided by the goals** of the Act, specifically Goals 1, 2, and 12. The Board is **remanding** the Kingston Sub-Area Plan and the Capital Facilities Element of the Comprehensive Plan

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with direction to the County to take legislative action to comply with the goals and requirements of the GMA as set forth in this Order.

A Capital Facilities Element which lacks a coherent plan for providing urban sanitary services in existing urban areas, whether sewer mains or alternative technologies, is clearly erroneous. The statutory deadline for this work has long passed. Particularly in light of the public health, safety and environmental risks, the lack of a compliant CFE for urban sanitation in the Kingston Sub-Area – including collection and transmission, as well as treatment – is a serious deficiency.

In sum, upon review of Ordinance 370-2006 and the submissions of the parties, the Board finds and concludes that Kitsap County’s continued reliance on a non-compliant CFE in its re-adoption of the Kingston Sub-Area Plan **substantially interferes** with the fulfillment of the goals of the GMA, in particular RCW 36.70A.020(1), (2), and (12), because the enactment thwarts the GMA mandate to accommodate urban growth where urban services can be provided, to reduce sprawl, and to ensure provision of urban services in urban areas. Accordingly, the Board enters an **order of invalidity**.

RCW 36.70A.302(1)(c) requires the Board, in entering such an order, to “specif[y] ... the particular part or parts of the plan ...” to be invalidated. The Board’s order of invalidity applies to Goal 10 of the Kingston Sub-Area Plan, Comprehensive Plan, at 12-5, and to the Kingston Wastewater Facilities provisions of the CFP, Comprehensive Plan, App. A, at 61-62, 64-65. *These Plan sections are incomplete, in that they lack provisions to make urban sanitary services available [whether sewer or alternative technologies] throughout the Kingston UGA within the twenty-year planning period.*

### **Conclusion**

The Board makes a finding of **continuing noncompliance** and issues an order of **remand**. The Board further **enters an order of invalidity** with respect to Goal 10 of the Kingston Sub-Area Plan, Comprehensive Plan, at 12-5, and to the Kingston Wastewater Facilities provisions of the CFP, Comprehensive Plan, App. A, at 61-62, 64-65.

### **IV. ORDER**

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board Orders and case law, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

1. Kitsap County’s adoption of Ordinance 370-2006, its ten-year UGA update and updated Comprehensive Plan, incorporating the Kingston Sub-Area Plan, resolved the issues of non-compliance in the Board’s July 26, 2006, FDO. With respect to Legal Issues 1, 2, 3, and 4.A, the County’s action is **not clearly erroneous** and **complies** with RCW 36.70A.215, .130(3), and .115, and with the Board’s FDO.

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2. With respect to Legal Issues 1, 2, 3, and 4A, the Board enters an **Order of Partial Compliance [re Kingston Sub-Area Plan]**.
3. With respect to Legal Issue 4B, Kitsap County's adoption of Ordinance 370-2006, re-adopting the Kingston Sub-Area Plan and adopting the 2007-2012 CFP, was **clearly erroneous** and **does not comply** with the requirements of RCW 36.70A.070(3) and .110, and **is not guided** by and **substantially interferes** with GMA goals RCW 36.70A.020(1), (2), and (12) and with the requirements of the Act.
4. The Board enters an **Order of Continuing Noncompliance** with respect to the lack of a plan to provide urban services in the entire Kingston Sub-Area UGA in the twenty-year planning period, as set forth in the FDO.
5. Having found noncompliance, the Board also enters an **Order of Invalidity [re: Kingston Wastewater Facilities Plan]** with respect to Goal 10 of the Kingston Sub-Area Plan and to the Kingston Wastewater Facilities provisions of the 2007-2012 CFP, as set forth in this Order.
6. The Board **remands** the Kingston Sub-Area Plan and 2007-2012 CFP to Kitsap County with direction to the County to take legislative action to comply with the requirements of the GMA as set forth in this Order.
7. The Board sets the following schedule for the County's compliance:
  - The Board establishes **September 17, 2007**, as the deadline for the County to take appropriate legislative action.
  - By no later than **September 24, 2007**, the County shall file with the Board an original and four copies of the legislative enactment described above, along with a statement of how the enactment complies with this Order (**Statement of Actions Taken to Comply - SATC**). By this same date, the County shall also file a **Compliance Index**, listing the procedures (meetings, hearings etc.) occurring during the compliance period and materials (documents, reports, analysis, testimony, etc.) considered during the compliance period in taking the compliance action.
  - By no later than **October 8, 2007**,<sup>18</sup> the Petitioners may file with the Board an original and four copies of Response to the County's SATC.
  - By no later than **October 15, 2007**, the County may file with the Board a Reply to Petitioners' Response.

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<sup>18</sup> October 8, 2007, 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). The Compliance Hearing is limited to determining whether the County's remand actions comply with the Legal Issues addressed and remanded in this Order. *06307 KCRP VI v. Kitsap County (March 16, 2007)*

- Each of the pleadings listed above shall be simultaneously served on the other party to this proceeding.
- Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **October 22, 2007, at 10:00 a.m.** The hearing will be held at the Board's offices. If the parties so stipulate, the Board will consider conducting the Compliance Hearing telephonically. If the County takes the required legislative action prior to the September 17, 2007, deadline set forth in this Order, the City may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 16th day of March, 2007.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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David O. Earling  
Board Member

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Edward G. McGuire, AICP  
Board Member

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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.<sup>19</sup>

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<sup>19</sup> Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate Court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

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