CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

PILCHUCK AUDUBON SOCIETY, *et al.*,	)	**CPSGMHB Consolidated Case No. 06-3-0015c**
Petitioners,	)	
	)	***(Pilchuck VI)***
v.	)	
	)	
SNOHOMISH COUNTY,	)	**ORDER FINDING COMPLIANCE [Legal Issues 2 and 6] and RESCINDING INVALIDITY [Legal Issue 2]**
Respondent,	)	
and	)	
	)	
CITY OF ARLINGTON, et al,	)	
Intervenors.	)	

Futurewise was one of the original Petitioners in this matter, filing its Petition for Review (**PFR**) challenging Snohomish County's (**County**) actions on March 3, 2006. One of the issues raised in that PFR was a challenge to the County's Ordinances No. 05-069, 05-073, and 05-090 de-designating agricultural land, rezoning and amending the Future Land Use Map (FLUM), and expanding the Arlington urban growth area (**UGA**).

The City of Arlington (**City or Arlington**) moved for and was granted intervenor status in this matter on April 10, 2006.[1] Arlington's participation was limited to briefing and argument on Ordinances Nos. 05-069, 05-073, and 05-090 as they pertained to the City's UGA or Legal Issue 6.

On June 30, 2006, the County filed its response to the Petitioners' Prehearing Brief. (**County Response**). In its Response, the County generally deferred to Arlington on Legal Issue 6.[2] On the same date, the City filed its Prehearing Brief, specifically arguing Legal Issue 6.

[1] *See* Prehearing Order and Order on Intervention (April 10, 2006) at 6.
[2] Except for some comments related to the Petitioners' failure to provide briefing in relation to the Transportation and Capital Facilities Elements of the County's plan, the County "generally [defers] to Arlington this issue." County's Response at 63.

At the Hearing on the Merits (**HOM**), the County did not argue regarding Legal Issue 6, but instead relied upon the oral arguments presented by Mr. Pieffle, attorney for the City of Arlington, to defend the County's action.[3]

On September 15, 2006, the Central Puget Sound Growth Management Hearings Board (**Board**) issued its Final Decision and Order (**FDO**) in the above-captioned matter. Among other things, in the FDO the Board found that the County erred in de-designating 6-acres of agricultural land and including it within the UGA for the City of Arlington. *See* FDO at 33-45 (specifically at 43-45); 60-66 (specifically at 66 and footnote 9). The FDO set forth a compliance schedule for the County to follow. FDO at 73-74. None of the parties to this matter appealed the Board's decision to the Courts or requested that the Board reconsider any of its determinations.

On January 8, 2007, the Board received a "Motion for a Finding of Invalidity Regarding Legal Issue Number 6" (**Motion**) from the Petitioners in the above-referenced case.

On January 10, 2007, the County submitted its objection to the motion in the form of a letter. (**County Objection**).

On January 12, 2007, the Board received the "Petitioners' Reply to Snohomish County's Letter in Response to Motion for Invalidity." (**Petitioners' Reply**).

On January 18, 2007, the Board electronically received "Snohomish County's Response to Petitioners' Motion for Finding of Invalidity as to Issue 6."[4] (**County Response**).

In addition, on January 18, 2007, the Board received a copy of a "Complaint for Writ Of Prohibition," "Summons," and "Motion and Memorandum of Authority" along with associated documentation filed by the County in Skagit County Superior Court. The Complaint requests that the Court issue a Peremptory Writ of Prohibition instructing the Board "to refuse to take any action on [Petitioners' Motion] until the Board conducts a compliance hearing in that case as currently scheduled for February 15, 2007." Motion and Memorandum at 1.

On January 18, 2007, the Board issued an "Order Convening Compliance Status Report" (**Status Conference**). A telephonic Status Report Conference was set for 2:00 p.m. January 22, 2007.

---

[3] At the HOM, Mr. Moffat states: "Turning now to Issue 6, which is the Arlington UGA, the County's going to defer to Arlington in this issue. Mr. Peiffle's come all the way down here from Arlington just on this one issue, so we're not going to steal his thunder, and the County supports his arguments." HOM Transcript at 55.

[4] The Board's rules allow a motion to be brought at any time and allow 10 days for a response. WAC 242-02-532, WAC 242-02-534. The Board received hard copy of the County's filing on January 22, 2007.

On January 19, 2007, the Board received, electronically,[5] "Petitioner's Filing in Response to Board's Request for Supporting Documentation" (**Futurewise Documents**). Attached to the filing were the following documents: A. Arlington City Council Agenda 12/18/06; B. Minutes of Arlington City Council Meeting 1/2/07; and C. Arlington City Council Agenda 1/8/07.

On January 19, 2007, the Board also received, electronically,[6] a letter from Mr. Pieffle, on behalf of the City of Arlington, indicating the City would participate in the Status Conference and outlining its actions since the FDO.

On January 19, 2007, the Board also received, electronically,[7] a letter from Jason Cummings and John Moffat [Snohomish County Prosecutors] indicating that the County had taken legislative action to comply with the GMA in this matter and adopted Ordinance No. 06-140 [passed 1/10/07, pertaining to Legal Issue 6] and Resolution 06-016 [passed 11/22/06, pertaining to Legal Issue 2]. Copies of the Ordinance and Resolution were attached (**County Pre-SATC Filing**).

On January 22, 2007 at 2:00 p.m. the Board convened the telephonic Status Report Conference (**SRC**). Board Members Edward G. McGuire [Presiding Officer], David O. Earling and Margaret A. Pageler participated for the Board. Keith Scully and Tim Trohimovich participated on behalf of Petitioner Futurewise. John Moffat and Jason Cummings participated on behalf of Respondent Snohomish County. Steve Peiffle, Alan Johnson, Brad Collins, and Bill Blake participated on behalf of Intervenor City of Arlington. Julie Taylor, Board Law Clerk, Linda Stores, Board Administrative Officer, and Moani Russell, Board Extern from Seattle University also attended. Tom Ehrlichman, a former party to the original *Pilchuck VI* matter, also phoned in.

At the SRC, the Board asked: 1) the Respondent County to provide any supplementation to its Pre-SATC Filing – *i.e.* its SATC and Remand Index – by noon, January 25, 2007; 2) the Petitioner Futurewise to file any comment on the SATC by 5:00 p.m. January 26, 2007; 3) the Intervenor Arlington to file a copy of Resolution 742, and attachments, by 5:00 p.m. January 26, 2007; 4) the Respondent and Intervenor may file replies to Petitioner's Comments on the SATC at the rescheduled Compliance Hearing; and 5) the Board rescheduled the Compliance Hearing for Monday, January 29, 2007 at approximately 2:30 p.m.. At that time, the Board indicated it would also take up the County's compliance in relation to the two noncompliant matters – Legal Issue 2[8] and Legal Issue 6.

---

[5] The Board received hard copy of this filing on January 22, 2007.

[6] The Board received an initial copy of the letter and a "corrected" copy of the letter the same day. The Board received hard copy of the letter on January 22, 2007.

[7] The Board received hard copy of this filing on January 22, 2007.

[8] The County's Pre-SATC Filing included a copy of Resolution 06-016 which reinstated the prior Plan Policies pertaining to sewer in the rural area. *See* Attachment, Resolution 06-016.

On January 22, 2007, the Board issued an "Order Rescheduling Compliance Hearing" that reflected the submittal deadlines and new compliance hearing date discussed at the SRC.

On January 25, 2007, the Board received: 1) "Snohomish County's Statement of Actions Taken to Comply," including the Remand Index, (**SATC**), and 16 attached exhibits; 2) the County also provided a "Table of Attachments Snohomish County SATC," with two additional exhibits; 3) the City of Arlington provided a copy of Resolution 742 and attachments – *i.e.* submittal to the BRB.

On January 26, 2007, the Board received "Petitioner Futurewise and Pilchuck Audubon Society's Objection to Finding of Compliance" (**Futurewise Comment – SATC**), with two attached exhibits – Tab 2 and Tab 273 from the Remand Index.

On January 26, 2007, the Board received "Brief of Intervenor City of Arlington Re: Compliance Hearing" (**Arlington Comment – SATC**), with no attached exhibits.

On January 29, 2007, prior to the commencement of the Compliance Hearing, the Board received: 1) "Snohomish County's Reply Re: Statement of Actions Taken to Comply" (**County Reply**), with one attached exhibit; and 2) Declaration of Steven J. Peiffle [Regarding specific Arlington Municipal Code provisions in effect from December 1998 until September 2003.] (**Peiffle Declaration**).

On January 29, 2007, at approximately 2:30 p.m. the Board convened the Compliance Hearing. Board members Edward G. McGuire, Margaret A. Pageler and David O. Earling were present. Keith Scully represented Petitioners. John Moffat and Jason Cummings represented Respondent Snohomish County. Steven J. Peiffle represented Intervenor City of Arlington. Mayor Margaret Larson, Alan Johnson, Brad Collins and Bill Blake, all from the City of Arlington, also attended. Julie Taylor, Board Law Clerk, Moani Russell, Board Extern, and Linda Stores, Board Administrative Officer, also attended. Court Reporting services were provided by Shelly M. Hoyt of Byers and Anderson. The Compliance Hearing adjourned at approximately 4:15.

The Board ordered a transcript of the Compliance Hearing. On January 31, 2007, the Board received the Compliance Hearing Transcript (**CH Transcript**).

DISCUSSION

Legal Issue 2 – Sewer Extensions Beyond the UGA for Churches and Schools:

In the Board's September 15, 2006 Final Decision and Order, the Board found the County's General Plan Policies LU Policy 1.C.4 and UT Policy 3.B.1 noncompliant with RCW 36.70A.110(4)[9] and remanded to the County with direction to strike the noncompliant provisions. The Board also entered a Determination of Invalidity regarding these Policies. *See* FDO, at 45-53 and 73.

In response to the Board's FDO, on November 22, 2006, the County adopted Resolution 06-016. Resolution 06-016 stated:

> The County Council recognizes the Final Decision and Order issued by the Board and acknowledges the legal effect of the Severability Clause contained in Amended Ordinance No. 05-069. If it has not already been accomplished, the County Code Reviser is directed to reflect the Board's Final Decision and Order where appropriate in the GMPP. The County Council further directs the Clerk of the Council to publish this resolution.

Resolution 06-016, at 3. The County did not pursue an accelerated compliance hearing to rescind invalidity and find compliance.

In their January 26, 2007 filing, Petitioners stated, "Petitioners have no objection to a finding of compliance regarding Resolution 06-016, regarding the Board's FDO addressing sewer service in the rural area." Futurewise Comment – SATC, at 2.

The Board finds and concludes that the County's adoption of Resolution 06-016 complies with the requirements of RCW 36.70A.110(4) and removes substantial interference with GMA Goals 1 and 2. Therefore, the Board will **rescind** the Determination of Invalidity and enter a **Finding of Compliance** pertaining to Legal Issue 2.

Legal Issue 6 – De-designation of Agricultural Land and its inclusion in the Arlington UGA:

The Board observed in the *Pilchuck VI* FDO that:

---

[9] The Board also found CPP OD-4 noncompliant with RCW 36.70A. 110(4) and stated:

> Further, CPP OD-4 is likewise noncompliant with RCW 36.70A.110(4) is unenforceable and inoperative, and shall remain so, until the County and its cities next amend the Snohomish County CPPs, at which time, the provisions of CPP OD-4 that violate RCW 36.70A.110(4) shall be stricken.

FDO, at 53.

> [T]he Board notes that Amended Ordinance No. 05-073, entitled "Revising the Existing Urban Growth Area for the City of Arlington," does not appear to include the 'Foster Farm' site. Several pages of the Ordinance discuss de-designation of a 1.5 acre parcel located on 188th Street NE and 47th Avenue NE and the inclusion of this parcel within the UGA; Section II of the Ordinance states only that these areas and two others, neither of which are the Foster Farm, are to be added to the UGA. CD 5, at 12; and Ex. A – Map of Arlington UGA expansion. As Petitioner noted, the Foster Farm seems to have been a last minute addition to the Arlington UGA since it only appears in an amendment to the FLUM. Pilchuck PHB, at 27.

FDO, at 66, Footnote 49. It appears that this observation was correct, especially in light of the fact that there was precious little documentation in the record to support the County's action of de-designating the Foster Farm property from agricultural land and including it in the UGA. It largely fell upon the City of Arlington to argue on behalf of the County's action in Legal Issue 6. While the City attempted in its briefing to address the CTED criteria [to support de-designation] and the locational requirements of RCW 36.70A.110, there was a limited record and sparse, if any, "de-designation" or UGA analysis by the County to support its actions. The result was the Board's finding that both actions were noncompliant with the GMA. *See* FDO, at 33-45 and 60-66. Additionally, the Board expressed concern with the apparent severing of the "farm center" from the bulk of the agricultural land in the valley. *See* FDO, at 44-45.

Petitioners' January 8, 2007 "Motion for a Finding of Invalidity Regarding Legal Issue Number 6" painted an alarming and bleak picture of what was, or was not, occurring related to this Legal Issue. The Board determined that these allegations were serious in nature, thus causing the Board to act quickly to assess the situation. It became apparent to the Board in reviewing the materials submitted for the January 22, 2007 Status Report Conference, that the County was pursuing efforts to comply with the GMA and the Board's FDO and that both Petitioners and the City of Arlington were also pursuing avenues to resolve the controversy. However, Petitioners continued to question whether the County's adoption of Ordinance No. 06-140 had complied with the GMA, and they remain concerned that a possible annexation of the property in question in Legal Issue 6 may occur before the Board issues an Order. Although Petitioner chose to "cry wolf" in filing the January 8, 2007 Motion, Petitioner now concedes, "I do not believe anyone has been negotiating in bad faith. I don't believe that the County's attorneys, City's attorneys or any political member is operating in bad faith." *See* CH Transcript, at 48.

In its SATC, the County quotes Mayor Larson's testimony at the County Council's public hearing on Ordinance No. 06-140, "The Foster annexation is not about adding land to the City of Arlington. It is about preserving our gateway and more importantly protecting 50

acres of the Stillaguamish River floodplain from residential development." SATC, at 1. This characterization of the issue provides the underpinning for the County's action.

The County goes on to explain that unlike its prior effort, the County has now conducted a "de-designation" analysis, including findings, and amended the original Arlington UGA Ordinance [05-073], among others, to reflect its pursuit of saving agricultural land in the Stillaguamish valley. SATC, at 3-5. Snohomish County then outlines its process, including the record submittals, the public hearing and the ultimate adoption of Ordinance No. 06-140, with findings that respond to each of the ten CTED criteria. *See* SATC, at 9-20. The County next summarizes its action, contending that the 6-acre Foster property no longer can be considered to have long-term commercial significance and that the land is adjacent to urban growth, therefore meeting the locational criteria for being included in the UGA. In the context of Legal Issue 6, the Board agrees with the County.

The legal focus of the Board's inquiry is whether the 6-acres continue to meet the GMA's definition of long-term commercial significance. RCW 36.70A.030(10) states,

> Long-term commercial significance includes the [1] growing capacity, [2] productivity, and [3] soil composition of the land for long-term commercial production, in consideration with the land's [4] proximity to population areas, and [5] the possibility of more intense uses of the land.

See also Orton Farms v. Pierce County, CPSGMHB Case No. 04-3-0007c, FDO, (Aug. 2, 2004), at 25-26. Components of these last two factors (4 and 5) are further detailed in the 10 criteria set forth in CTED's WAC 365-190-050(1).[10]

Futurewise contends that the County analysis focused on the CTED criteria and undervalued the importance of the first three factors that identify the inherent attributes of the land. Petitioner also claims a close analysis of the 10 CTED components of long-term commercial significance "militate in favor of leaving the land agriculture." Futurewise Comment – SATC, at 8. Petitioner then contrasts *its assessment* of the 10 CTED criteria to the Findings detailed in Ordinance No. 06-140, at 8-15, specifically, at 11-14. Quite simply, Petitioner draws different conclusions than the County. However, as set forth in the Ordinance Findings, the SATC, and the record, the record supports the County's conclusion to de-designate the 6-acre Foster Farm property. Although there is evidence to support Petitioners' conclusions there is also evidence to support the County's conclusions. Nonetheless, the Board is not persuaded that the County's choice was clearly in error.

---

[10] The ten listed factors that may be considered are: the availability of public facilities, tax status, the availability of public services, relationship or proximity to urban growth areas, predominant parcel size, land use settlement patterns and their compatibility with agricultural practices, intensity of nearby land uses, history of land development permits issued nearby, land values under alternative uses, and proximity to markets. See WAC 365-190-050(1)(a through j).

Likewise, the Board now agrees with the County regarding the inclusion of this land in the UGA. Though debatable, the record documents and supports the County's conclusions regarding how this land meets the GMA's locational factors making it appropriate for urban designation. *See* Ordinance No. 06-140, at 18. Again, the Board is not persuaded that the County's action was clearly erroneous.

A critical factor in the Board's decision is the County's balancing of GMA goals and requirements. In *Upper Green Valley Preservation Society v. King County* (***Green Valley***), CPSGMHB Case No. 98-3-0008c, Final Decision and Order, (Jul. 29, 1998), at 16, [affirmed by the Supreme Court in *King County v. CPSGMHB*, 142 Wn.2d 543; 14 P.3d 133 (2000)], the Board described an "agricultural conservation imperative that imposes an affirmative duty on local governments to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural resource industry." This agricultural conservation mandate must be balanced against another GMA imperative – locating urban growth in the urban growth area. Attaining a balance among these GMA mandates is a difficult task. However, here, the cooperative effort of the County and its cities to undertake a Transferable Development Rights Program illustrates a viable mechanism for local governments to work with landowners to balance these GMA requirements. Here, Snohomish County, the City of Arlington, Petitioners, and the landowner all agree on the merits of preserving the 50+ acres in the Stillaguamish Valley as Agriculture. To accomplish preserving these agricultural lands, the County's decision to add 6+ acres on the upland bench to the Arlington UGA is a decision on which the Board will defer to the County.

The Board notes that the concern it articulated in the FDO pertaining to the severance of the farm center or operational headquarters from the agricultural land in the valley appears also to be foremost in the parties' minds. Futurewise has acquiesced that including five of the six acres in the UGA is acceptable, but is urging that one acre be maintained as Agriculture, and is advocating for an access easement from the upland to the lowland. Ex. 73, at 2-3; and Ex. 79, at 2. The County Council also discussed the access easement question with the City of Arlington in its public hearings. Ex. 77, at 1-3; Ex.78, at 1-3. The City of Arlington noted in its brief that,

> The testimony of Arlington's Mayor Margaret Larson, Bill Blake and Laurin Foster's letter made it clear that it was understood the de-designation and any proposed annexation would require selling the development rights in the flood plain; retaining one acre of barns and outbuildings to support the agricultural and agri-tourism activities on the bottom land; and an easement for farm equipment to access 59th Avenue and avoid having to travel on State Highway 530. Ex. 78, at pp.1-2; Ex. 77, at p. 3; Ex. 41. These were conditions supported by the City. These conditions, which would result in the preservation of the agricultural land, were not contained in the record in September. In addition, it was

> apparent the City had not adequately explained to the Board the nexus between the de-designation of Mr. Foster's agreement to participate in the transfer of development rights (TDR) program, as a result of which the development rights will be sold and the bottom land permanently preserved for agricultural purposes.

Arlington Comment – SATC, at 4-5. The property owner as well appears to be in accord.[11]

It appears to the Board that the negotiations and discussions among Petitioners, the City and the landowner have been fruitful in devising ways to preserve the 50+ lowland acres as agriculture and preserving some of the barns and outbuildings on the upland and providing necessary access from the upland to the lowland acreages. The Board trusts these negotiations and agreements will continue to be productive.

A copy of this Order is being transmitted to the Governor's Office.

ORDER

Based upon review of the Board's September 15, 2006 FDO, provisions of the GMA, case law, prior Board Orders, the briefing and exhibits submitted by the parties, the arguments provided at the compliance hearing, and having deliberated on the matter, the Board ORDERS:

- Snohomish County's adoption of Resolution 06-016 pertaining to the deletion and removal of LU Policy 1.C.4 and UT Policy 3.B.1 from the County's General Policy Plan [GMA Comprehensive Plan] has removed substantial interference with GMA Goals 1 and 2 and complied with the requirements of RCW 36.70A.110(4). The Board now **rescinds the Determination of Invalidity** and enters a **Finding of Compliance** pertaining to Legal Issue 2 as originally decided in the Board's September 15, 2006 FDO.

- Snohomish County's adoption of Ordinance No. 06-140 pertaining to the de-designation of approximately 6-acres of property agricultural land and including that land in the Arlington UGA complies with the requirements of RCW 36.70A.170 and .110. The Board now enters a **Finding of Compliance** pertaining to Legal Issue 6 as originally decided in the Board's September 15, 2006 FDO.

[11] "My preferred method is to commercially develop the upper 6 acres. If I am allowed to do this, I will be able to sell TDRs from the lower 51 acres, which will keep the lower 51 acres in agricultural open space." Ex. 41, at 2 (1/5/07 Letter from Laurin Foster to the Snohomish County Council).

So ORDERED this 2nd day of February, 2007.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____

Edward G. McGuire, AICP
Board Member [Board Member McGuire files a separate concurring opinion.]

_____

Margaret A. Pageler
Board Member

_____

David O. Earling
Board Member

Concurring Opinion of Board Member McGuire

I concur with the conclusions of my colleagues as set forth in this Order. However, I write separately to comment on the confusion created by one of the City of Arlington's actions. The City, as a party to this proceeding, was well aware that the inclusion of the 6-acre Foster Farms property in the Arlington UGA had been found *noncompliant* with the GMA by the Board in the September 15, 2006 FDO. Although the County was the Respondent, I believe the City was bound by that decision.

Yet on December 18, 2006, more than three weeks *before* the County acted by adopting Ordinance No. 06-140, and almost two months *before* the scheduled compliance hearing, the City of Arlington passed Resolution 742 [Notice of Intent to Annex] asking the Snohomish County Boundary Review Board to review the Foster Farm property annexation "as expeditiously as possible." *See* City of Arlington Resolution 742, at 1. The City does not argue that it was compelled to act within a time certain on the annexation proposal. Even if a statutory deadline for action was specified, the City could have alerted the BRB to the status of the pending litigation. Nowhere in the Resolution does the City indicate that the Foster Farm property in question had been found noncompliant with the GMA [RCW 36.70A.110], particularly as it relates to the area being within the UGA. Nor do any of the materials submitted by the City to the BRB reference the Board's FDO. In this context, I can understand why Petitioners' filed their motion to sound the alarm.