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

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| THE McNAUGHTON GROUP, LLC,<br><br>Petitioner,<br><br>v.<br><br>SNOHOMISH COUNTY,<br><br>Respondent,<br><br>and<br><br>CAMWEST DEVELOPMENT, INC.,<br><br>Intervenor | )<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>)<br>) | **Case No. 06-3-0027**<br><br>***(McNaughton)***<br><br>**FINAL DECISION AND ORDER** |

*SYNOPSIS*

*McNaughton, CamWest, and other property owners/developers sought to have their lands included in the Snohomish County Southwest Urban Growth Area (**SW UGA**) as the County undertook the GMA-required ten-year-update (**TYU**) of its Comprehensive Plan and development regulations in 2005. On December 21, 2005, the County adopted a set of some twenty-five ordinances, which constituted the ten-year UGA review and update. These ordinances did not include an expansion of the SW UGA, the County Council having decided to consider the various proposals which would adjust the SW UGA as part of the County's docket for the 2006 annual concurrent review. CamWest subsequently challenged the Snohomish County Comprehensive Plan update in an action before this Board which was then settled, voluntarily withdrawn, and dismissed. CamWest IV v. Snohomish County, CPSGMHB Case No. 06-3-0018, Order of Dismissal (July 25, 2006).[1] The settlement agreement in the CamWest matter called for the County to take the actions legislatively adopted as Ordinances 06-053 and 06-054 (**CamWest Ordinances**), which amended the SW UGA to allow the CamWest proposal.*

*McNaughton brought the present challenge to the CamWest Ordinances. The crux of McNaughton's argument is that the County wrongly processed and adopted the CamWest Ordinances under the County standards applicable to the County's TYU review, not those applicable to the County's concurrent annual Docket review. The Board found and*

[1] The Board does not review settlement agreements for GMA compliance, but challenges to ordinances adopted to implement such agreements may lie within the Board's jurisdiction.

*concluded that the County's application of its adopted standards and procedures was not clearly erroneous under the particular facts of this case. The Board concluded that McNaughton failed to carry its burden in demonstrating that enactment of the CamWest Ordinances was inconsistent with County-wide Planning Policies (CPPs), the County Comprehensive Plan, or the County's adopted public process. Legal Issues 1, 4, 5 and 6 are* ***dismissed****.*

*However, the Board determined that the County* ***failed to comply*** *with RCW 36.70A.106 by not providing the required notice of the CamWest Ordinances to CTED. Unlike McNaughton's other allegations of noncompliance, this issue is based on a requirement of the statute itself rather than on the County's adherence to its own policies and regulations. The Board finds* ***noncompliance*** *and* ***remands*** *the CamWest Ordinances to the County to take action in accord with the GMA and this order.*

*The Board determined that GMA Planning Goal 6 – Property Rights – was not violated. Goal 6 requires: "The property rights of landowners shall be protected from arbitrary and discriminatory actions." The Board found that while the CamWest Ordinances were discriminatory, in that they applied to only one property and only one developer, they were not arbitrary; therefore the County's action was not "arbitrary* <u>*and*</u> *discriminatory." Legal Issue No. 7 is* ***dismissed****.*

*The Board dismissed the issue of invalidity, finding and concluding that the County's failure to comply with the statutory requirement of notice to CTED did not thwart any of the goals of the Act.*

## II. <u>PROCEDURAL BACKGROUND</u>[2]

On August 2, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from The McNaughton Group, LLC. (**Petitioner** or **McNaughton**). The matter was assigned Case No. 06-3-0027, and is hereafter referred to as *McNaughton v. Snohomish County*. McNaughton challenges Snohomish County's (**Respondent** or **County**) adoption of Ordinance No. 06-053, "Revising the Southwest Urban Growth Area and Amending Ordinance No. 03-061," and Ordinance No. 06-054, "Adopting Zoning Map Amendments Implementing Changes to the Future Land Use Map Adopted by Ordinance No. 06-053." The basis for the challenge is non-compliance with various provisions of the Growth Management Act (**GMA or Act**) and the State Environmental Policy Act (**SEPA)**.

The Prehearing Conference (**PHC**) was convened on September 5, 2006, Board member Margaret Pageler presiding. The Board granted the request to intervene by CamWest Development, Inc. (**CamWest**). At the PHC, the Board received Respondent's Index to the Record and requested, as core documents, the Countywide Planning Policies and the Land Use Element of the County Comprehensive Plan.

[2] The complete procedural history of this case is set forth in Appendix A.

On September 7, 2006, the Board issued its Prehearing Order and Order Granting Intervention. Snohomish County moved to amend the Prehearing Order and, on September 15, 2006, the Board issued its Order on Motion to Amend Prehearing Order, denying the County's request to restate the legal issues in the case.

*Motions*

In September and October, 2006, the Board received timely dispositive motions from each of the three parties and a motion to supplement the record from McNaughton. On October 30, 2006, having considered the briefs and other materials submitted by the parties, the Board issued its **Order on Motions**.

The Order on Motions **granted** Petitioner's motion to supplement the record, **denied** motions by the County and CamWest to dismiss various issues for lack of participation standing, **denied** Petitioner's motion for summary determination of various issues, **granted** the County's and CamWest's motions to dismiss Legal Issue 3 [Isolated Review] and Legal Issue 8 [SEPA], and **denied** the County's and CamWest's motions to dismiss other issues.

*Briefing and Hearing on the Merits*

Briefing on the merits was filed as noted below.

- November 16, 2006 – The McNaughton Group, LLC's Pre-Hearing Brief, with 15 Exhibits [**McNaughton PHB]**
- November 16, 2006 **–** Declaration of Sue Den in Support of The McNaughton Group LLC's Pre-Hearing Brief, with attached transcripts of segments of County Council July 19, 2006 meeting [see Index 45]
- November 30, 2006 – Intervenor CamWest's Prehearing Brief, with Appendix 1 and 2 [**CamWest Response**]
- November 30, 2006 - Intervenor CamWest's Motion to Supplement the Record, and Declaration of Justin D. Haag in Support of Intervenor CamWest's Motion to Supplement the Record, with 7 Exhibits [**CamWest Motion to Supplement**]
- December 1, 2006 – Snohomish County's Response Brief, with 16 Exhibits [later replaced with a corrected brief and corrected Attachment A]
- December 1, 2006 – Snohomish County's Motion to Supplement the Record, with Declaration of Michael Zelinski and 3 Exhibits [**County Motion to Supplement**].
- December 6, 2006 - Intervenor's Index to Exhibits and 23 Exhibits
- December 7, 2006 – The McNaughton Group, LLC's Reply [**McNaughton Reply**]
- December 8, 2006 – Snohomish County's Corrected Response Brief [**County Response**], Errata to Snohomish County Response Brief, and Table of Authorities.

No party objected to the CamWest Motion to Supplement or to the County Motion to Supplement. No party objected to the filing of Snohomish County's Corrected Response Brief, which will be designated **County Response** in this FDO.

The Hearing on the Merits was convened at 2:15 p.m., December 14, 2006, in the Chief Sealth Training Center, Suite 2000, 800 Fifth Avenue, Seattle. Board members Margaret Pageler (Presiding Officer), Edward G. McGuire, and David O. Earling and Board Law Clerk Julie Taylor attended. Petitioner McNaughton was represented by Nancy Rogers, with Andrew Lane, Michael Burnett and corporate counsel Brian Holtzclaw also in attendance. Snohomish County Prosecuting Attorneys John Moffat and Justin Kasting represented Respondent Snohomish County. Intervenor CamWest was represented by Patrick Schneider, with Tom Ehrlichman and corporate counsel Marsha Martin also in attendance.

At the HOM the Presiding Officer made oral rulings admitting documents requested in the CamWest Motion to Supplement and the County Motion to Supplement. CamWest's attorney submitted a copy of his Power Point presentation, entitled "McNaughton v. Snohomish County," that was used to highlight certain portions of his oral argument.

Court reporting services for the HOM were provided by Rebecca L. Mayse of Byers and Anderson. The Hearing was adjourned at 4:15 p.m. The Board ordered a copy of the transcript. On December 26, 2006, the Board received the transcript of the Hearing on the Merits. [**HOM Transcript**]

## II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, STANDARD OF REVIEW, AND DEFERENCE TO LOCAL JURISDICTIONS

Upon receipt of a petition challenging a local jurisdiction's GMA actions, the legislature directed the Boards to hear and determine whether the challenged actions are in compliance with the requirements and goals of the Act. *See* RCW 36.70A.280. The legislature directed that the Boards "after full consideration of the petition, shall determine whether there is compliance with the requirements of [the GMA]." RCW 36.70A.320(3); *see also*, RCW 36.70A.300(1). As articulated most recently by the Supreme Court, "the Board is empowered to determine whether county decisions comply with GMA requirements, to remand noncompliant ordinances to counties, and even to invalidate part or all of a comprehensive plan or development regulation until it is brought into compliance." *Lewis County v. Western Washington Growth Management Hearings Board (**Lewis County**)*, 157 Wn.2d 488 at 498, fn. 7, 139 P.3d 1096 (2006).

Petitioner McNaughton challenges Snohomish County's adoption of Ordinance Nos. 06-053 and 06-054. Comprehensive plans and development regulations, and amendments thereto, adopted by Snohomish County pursuant to the Act, are presumed valid upon adoption. RCW 36.70A.320(1).

The burden is on the Petitioner to demonstrate that the actions taken by Snohomish County are not in compliance with the Act. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board "shall find compliance unless it determines that the actions taken by [Snohomish County] are clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." For the Board to find the action of Snohomish County clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

The GMA affirms that local jurisdictions have discretion in adapting the requirements of the GMA to local circumstances and that the Board shall grant deference to local decisions that comply with the goals and requirements of the Act. RCW 36.70A.3201. Pursuant to RCW 36.70A.3201, the Board will grant deference to Snohomish County in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. The Supreme Court has stated: "We hold that deference to county planning actions that are consistent with the goals and requirements of the GMA . . . cedes only when it is shown that a county's planning action is in fact a 'clearly erroneous' application of the GMA." *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224, 248, 110 P.3d 1132 (2005). In *Lewis County*, the Court reaffirmed and clarified its holding in *Quadrant*: "But the GMA says that Board deference to county decisions extends only as far as such decisions comply with GMA goals and requirements. In other words, there are bounds." 157 Wn. 2d at 506, fn. 16.[3]

The scope of the Board's review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to only those issues presented in a timely petition for review. RCW 36.70A.290(1).

## III. BOARD JURISDICTION and EVIDENTIARY RULINGS

### A. Board Jurisdiction[4]

The Board finds that the Petitioner's PFR was timely filed, pursuant to RCW 36.70A.290(2); that Petitioner has standing to appear before the Board, pursuant to RCW 36.70A.280(2); and that the Board has subject matter jurisdiction over the challenged ordinances, which amend the County's comprehensive plan and development regulations, pursuant to RCW 36.70A.280(1)(a).

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[3] The *Lewis County* majority is in accord with prior rulings that "Local discretion is bounded . . . by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearing Board*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). See also, *Cooper Point Association v. Thurston County*, 108 Wash. App. 429, 444, 31 P.3d 28 (2001) ("notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent' with the requirements and goals of the GMA"); *affirmed Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn.2d 1, 15, 57 P.3rd 1156 (2002).

[4] Various questions of standing and jurisdiction were resolved by motion. See, Order on Motions (Oct. 30, 2006).

## B. Evidentiary Matters

At the Hearing on the Merits, Snohomish County provided the Board with a corrected final version of Snohomish County's UGA Land Capacity Analysis Technical Report, dated December 21, 2005, to be substituted for Appendix A to Snohomish County's Response Brief.

In connection with their response briefs, Snohomish County and Intervenor CamWest each filed a motion to supplement the record. McNaughton offered no objection to either motion in its Reply Brief and indicated orally at the HOM that it has no objection to the additional material.

WAC 242-02-540 provides:

> Generally, a board will review only the record developed by the city, county, or state in taking the action that is the subject of review by the board. A party by motion may request that a board allow such additional evidence as would be necessary or of substantial assistance to the board in reaching its decision, and shall state its reasons.

CamWest's Motion to Supplement attaches documents concerning the County's 2006 Docket process. CamWest asserts that the documents are necessary to rebut McNaughton's argument that the County's approval of the CamWest proposal independent of the Docket process was arbitrary and discriminatory (Legal Issue No. 7). Several of the documents have dates subsequent to the enactment of Ordinances 06-053 and 06-054, and indicate that the County continued to review the CamWest proposal through the Docket process until November 21, 2006, notwithstanding the adoption of the Ordinances in July 2006. CamWest Motion to Supplement, Ex. 3, Ex. 4.

At the HOM, the Board stated its finding that the supplemental documents proffered by CamWest may be necessary or of assistance to the Board in resolving Legal Issue No. 7 – Arbitrary and Discriminatory Treatment.[5] CamWest's supplemental exhibits are **admitted as Supplemental Exhibits 3-9.**

The County Motion to Supplement seeks to introduce the Declaration of Michael Zelinsky, a principal planner for the County's Department of Planning and Development Services (**PDS**). The Zelinsky Declaration and three attachments concern the County's notification to CTED in connection with the 2005 review and ten-year update of the County's Comprehensive Plan. The County asserts that these matters are part of the County's record for its TYU process prior to action on the Ordinances at issue here. The County asserts that the supplementation is necessary or will be of assistance to the Board in deciding whether the County complied with the GMA requirement of providing notice to CTED (Legal Issue No. 2). The Board notes that the attachments to the Zelinsky

[5] The Board's Order on Motions, at the request of McNaughton, admitted a document concerning the Docket process which, though dated after adoption of the Ordinances, may have possible relevance to McNaughton's issue of discriminatory treatment.

Declaration are already in the County's record as Index 129, 130, and 131. Without objection, the Zelinsky Declaration is **admitted as Supplemental Exhibit 10** and the attached exhibits are **admitted as already in the record.**

The PowerPoint presentation by Patrick Schneider, attorney for CamWest, entitled "McNaughton v. Snohomish County" and summarizing CamWest's legal argument presented at the HOM, is placed in the case file as **Hearing on the Merits Exhibit 1.**

Appendix C below sets forth the list of supplemental exhibits and provides exhibit numbers.

## IV. THE CHALLENGED ACTION

In 2005 Snohomish County updated its comprehensive plan, UGAs and development regulations. The UGA review assessed the land capacity of the County's UGAs to accommodate projected population growth to 2025. The UGA review, which was conducted pursuant to RCW 36.70A.130, was based upon a land capacity analysis (**LCA**). County Response, Substitute Appendix A. As a result of the County's ten-year update (**TYU**), some UGA boundaries were revised.

A number of property owners/developers requested expansion of the Southwest urban growth area (**SW UGA**) as part of the TYU; their projects were incorporated in the County's TYU analysis and staff recommendations. However, despite these requests, the County Council chose not to amend the SW UGA, opting to defer consideration of the SW UGA proposals for concurrent review as part of the 2006 Docket. Both McNaughton and CamWest were among the applicants for the 2005 SW UGA expansion whose projects were deferred for consideration in 2006.

Snohomish County enacted its 2005 Comprehensive Plan and UGA update on December 21, 2005, adopting twenty-five ordinances to effect the changes. Three Petitions for Review, challenging various aspects of the TYU, including UGA boundaries and land capacity, were timely filed with the Board:[6] *Pilchuck VI v. Snohomish County*, Case No.

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[6] The Board's Final Decision and Order in the *Pilchuck VI* case (at 4-5) explained:

> In December of 2005, Snohomish County adopted a series of ordinances updating their GMA Comprehensive Plan, Future Land Use Map (**FLUM**) and implementing development regulations (generally – the **Plan Update**). That action precipitated the filing of three separate timely Petitions for Review (**PFR**) by numerous Petitioners in March of 2006. Petitioners challenged 15 separate ordinances adopted by the County to accomplish its Plan Update.
>
> The first PFR was filed by Pilchuck Audubon Society, Futurewise, Jody McVittie, Cindy Howard, Darlene & Ken Salo, Shelly & Tim Thomas, Barbara Bailey and Lisa Stettler. The second PFR was filed by F. Robert Strahm and the third was filed by Camwest Development Inc. The Board issued several notices, setting the time for the prehearing conference and consolidating the PFRs. Several persons, cities, organizations and service districts filed for status as Intervenors [the City of Arlington, Kandace Harvey & Harvey Airfield, City of Marysville, City of Lake Stevens, Lake Stevens Sewer District and the Master Builders' Association of King and Snohomish Counties and Snohomish County Camano Association of Realtors].

06-3-0013, (filed March 3, 2006), challenging UGA boundaries for the cities of Arlington, Lake Stevens, Marysville, and Snohomish; *Strahm II v. Snohomish County*, Case No. 06-3-0014, (filed March 10, 2006), challenging land capacity analysis and adequacy of UGA to accommodate projected growth; and *CamWest IV v. Snohomish County*, Case No. 06-3-0015, (filed March 20, 2006), challenging the open space and UGA buffer provisions of the County Update. RCW 36.70A.290(5) requires the Board to consolidate, when appropriate, PFRs challenging the same comprehensive plan.

CamWest's PFR challenged two of the TYU ordinances and alleged noncompliance with GMA requirements and with Snohomish County CPPs and Comprehensive Plan provisions regarding open space, park lands, and UGA buffers. On March 22, the Board received a letter from the CamWest attorney requesting that the matter not be consolidated, as settlement negotiations were being pursued between CamWest and the County. On April 4, 2006, CamWest and Snohomish County filed a joint stipulation requesting that the CamWest matter be segregated and postponed to allow negotiation and possible settlement. The Prehearing Conference on the consolidated challenges to Snohomish County's TYU was held on April 6. On April 10, the Board issued an order segregating the CamWest PFR and granting a 90-day settlement extension.

On May 31, 2006, CamWest and Snohomish County entered into a Settlement Agreement. Index 22. The Agreement called for the County to enact ordinances amending its TYU, FLUM, and development regulations to accommodate the CamWest/Sturgell proposal. CamWest's proposal involves a 92-acre parcel known as the Sturgell Property, of which 25 acres were within the UGA.[7] The property encompasses the forested headwaters of a tributary of Little Bear Creek, a Chinook salmon spawning stream. Under the Agreement, the UGA boundary is redrawn so that 51 acres of the Sturgell Property, including the stream's headwaters, will be outside the UGA and placed in a permanent nature conservancy, subject to a conservation easement. Increased development will be allowed on 41 acres within the UGA, accommodating potentially 300 housing units. Index 22, Feb. 1, 2005 letter, at 2-3. The net UGA increase is 16 acres and net housing increase over prior zoning is 180 units. Index 25, at 6, 8.

The Ordinances prepared pursuant to the CamWest Settlement Agreement were processed by the County under the abbreviated public process provided in its regulations for the settlement of appeals - SCC 30.73.042(d)(2); .085(1)(e) - not under the more detailed and specific process in its code governing annual Docket consideration - SCC 30.74. McNaughton's attorney submitted a detailed letter of objection and testified before the County Council at its public hearing, arguing that special consideration for CamWest outside the 2006 Docket was a violation of GMA and the County's policies. Index 37 and

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> [On] April 10, 2006, four days after the PHC, the Board issued … an "Order Segregating Camwest Development LLC Petition for Review [CPSGMHB Case No. 06-3-0015] from the Consolidated Case, Granting a 90-day Settlement Extension and Prehearing Order" (**Segregation Order**). The Segregation Order separated the Camwest PFR from the consolidated proceeding, **granted** a settlement extension and established a separate schedule for the Camwest proceeding. The segregated case was assigned a new case number: CPSGMHB Case No. 06-3-0018.

[7] The project is described in Index 22 - Executive's Comments on Planning Commission Recommendations (8/17/05), at 4; Index 6 - FEIS (Dec. 2005) at 3-13.

51. On July 19, 2006, on a divided vote, the County Council adopted the CamWest Ordinances.[8]

McNaughton filed a timely PFR challenging the CamWest Ordinances. The Petitioner originally posed 9 legal issues.[9] Legal Issue 3 – Isolated Review - and Legal Issue 8 – SEPA - were dismissed in the Board's Order on Motions (Oct. 30, 2006).

In this Final Decision and Order, the Board discusses the remaining legal issues in the following order:

- Legal Issue 5 – Consistency with CPPs
- Legal Issues 4 and 6 – Consistency with County Comprehensive Plan
- Legal Issue 1 – Public Process
- Legal Issue 2 – Notice to CTED
- Legal Issue 7 – GMA Goal 6 – Property Rights
- Legal Issue 9 - Invalidity

## V. LEGAL ISSUES AND ANALYSIS

### A. Legal Issue No. 5

The Board's PHO states Legal Issue No. 5 as follows:

> **5. Consistency with Countywide Planning Policies**
> *Did the County violate the requirements of the GMA, specifically RCW 36.70A.210(1), and the County's own CPPs that were effective as of July 19, 2006: (a) when the County expanded the boundaries of the SW UGA by improperly "re-visiting" a portion of the TYU to settle a legally-questionable Growth Management Hearings Board appeal (CPP UG-14d condition 2 – the "TYU Exception"); (b) when the County expanded the boundaries of the SW UGA without showing the requisite compliance with CPP provisions other than the TYU Exception (CPP UG- 14); and (c) when the County expanded the SW UGA to include irregular boundaries, rather than identifiable physical boundaries (CPP UG-1)?*

### Applicable Law

RCW 36.70A.210(1) creates the requirement for counties to adopt County-wide Planning Policies (CPPs) as a framework to ensure consistency among city and county comprehensive plans:

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[8] On a parallel track, the CamWest/Sturgell proposal had been submitted to the 2006 Docket and continued to be considered as part of the 2006 Docket process until it was withdrawn on November 21, 2006. Apparently a court challenge was pending. CamWest Response, Appendix 2.
[9] The Legal Issues, as set forth in the PHO, are attached as Appendix B.

> … [A] "county-wide planning policy" is a written policy statement or statements used solely for establishing a county-wide framework from which county and city comprehensive plans are developed and adopted pursuant to this chapter. This framework shall ensure that city and county comprehensive plans are consistent as required in RCW 36.70A.100.

RCW 36.70A.130(3) requires review of designated urban growth areas at least every ten years:

> (3) (a) Each county that designates urban growth areas under RCW 36.70A.110 shall review, at least every ten years, its designated urban growth area or areas, and the densities permitted within both the incorporated and unincorporated portions of each urban growth area…. (b) The county comprehensive plan designating urban growth areas, and the densities permitted in the urban growth areas by the comprehensive plans of the county and each city located within the urban growth areas, shall be revised to accommodate the urban growth projected to occur in the county for the succeeding twenty-year period….

RCW 36.70A.130(2)(b) provides:

> (2)(a) Each county and city shall establish and broadly disseminate to the public a public participation program consistent with RCW 36.70A.035 and 36.70A.140 that identifies procedures and schedules whereby updates, proposed amendments, or revisions of the comprehensive plan are considered by the governing body of the county or city *no more frequently than once every year*…. Amendments may be considered more frequently than once per year under the following circumstances [not applicable here] …:
>
> (b) Except as otherwise provided in (a) of this subsection, *all proposals shall be considered by the governing body concurrently* so the cumulative effect of the various proposals can be ascertained. *However, after appropriate public participation a county or city may adopt amendments or revisions to its comprehensive plan that conform with this chapter* whenever an emergency exists or *to resolve an appeal of a comprehensive plan filed with a growth management hearings board* or with the court.

Emphasis added.

The primary Snohomish County CPP at issue here is UG-14(d), which prohibits expansions of the UGA unless one of 10 conditions is met:

> UG-14-d. Expansion of the Boundary of an Individual UGA: Expansion of the boundary of an individual UGA to include additional residential, commercial and industrial land *shall not be permitted unless* it is supported by a land capacity analysis adopted by the County Council pursuant to RCW 36.70A.110 and otherwise complies with the Growth Management Act, includes consultation with

appropriate jurisdictions in the UGA or MUGA,[10] and *one of the following ten conditions are met*, provided that conditions six through eight do not apply to the Southwest UGA:

1. The expansion is a result of the most recent buildable lands review and evaluation required by RCW 36.70A.215.
2. *The expansion is the result of the review of UGAs at least every ten years* to accommodate the succeeding twenty years of projected growth, as required by RCW 36.70A.130(3).
3. Both of the following conditions for expansion of the boundary of an individual UGA to include additional residential land: (a) Population growth within the UGA … equals or exceeds fifty percent of the additional population capacity estimated for the UGA at the start of the planning period, … (b) An updated residential land capacity analysis … confirms the accuracy of the above finding….
4. [Expansion to include additional commercial and industrial land]
5. [Expansion involving significant transfer of development rights]
6. [Not applicable to SW UGA]
7. [Not applicable to SW UGA]
8. [Not applicable to SW UGA]
9. The expansion is a response to a declaration … of a critical shortage of affordable housing ….
10. The expansion will result in the economic development of lands that no longer satisfy the designation criteria for natural resource lands ….

Emphasis supplied.

## Discussion and Analysis

*Positions of the Parties*

McNaughton argues that the CamWest Ordinances do not conform with the GMA because the County used a process and applied criteria applicable only to the TYU UGA review, not the County's process and criteria in general effect for non-TYU UGA adjustments. In McNaughton's view, the County thus violated its own CPPs and breached the GMA requirement that comprehensive plan amendments and development regulations must be consistent with the CPPs. McNaughton's position is succinctly summarized:

> The McNaughton Group, LLC believes that the July 2006 stand-alone UGA expansion could not be considered as a continuation of the TYU because it was rejected during the December 2005 TYU, that TYU is closed, and the July 2006 action encompassed a single stand-alone comprehensive plan amendment. RCW 36.70A.130(2)(b) (the "Appeal Exception"), which provided the County with authority to amend its

[10] The CamWest/Sturgell application was supported by the City of Mill Creek. Index 22; Index 117; CamWest Response, Attachment 1.

> comprehensive plan outside of the annual review process, did not provide substantive authority for the County to "re-visit" the TYU and adopt the Subject Ordinances as a continuation of the TYU. The CamWest UGA expansion and re-zone adopted in County Ordinances 06-053 and 06-054 must be measured against County policies that apply to all other UGA expansions.

McNaughton Reply, at 2.

Petitioner contends that CPP UG-14(d)(2), which allows UGA expansion as a result of the TYU process, does not apply to the CamWest Ordinances because the County's enactment of its TYU was completed on December 21, 2005. McNaughton PHB at 10. In that process, the County considered and rejected all the proposals for SW UGA expansion, including the CamWest/Sturgell proposal. CamWest then filed an appeal with this Board, challenging the TYU, specifically the Ordinances concerning the SW UGA, and the County settled the appeal through the adoption of the CamWest Ordinances; however, Petitioner asserts that the appeal did not "hold open" the TYU, so TYU criteria for UGA expansion were not properly applicable. *Id*. at 11. Petitioner contends that, although the CamWest Ordinances were enacted to resolve CamWest's challenge to the TYU, the County should have "ensured that the Subject Ordinances met the CCP requirements applicable outside of the TYU at the time of their adoption." *Id.* at 9.

Petitioner contends – and the matter is not debated by the County or CamWest - that none of the other UGA expansion provisions of CPP UG-14(d) (e.g., critical shortage of affordable housing; addition of commercial or industrial lands) are met in this case. McNaughton PHB at 13; County Response at 20; CamWest Response at 16-17. Unless the CamWest Ordinances are a result of the TYU process, they are, according to Petitioner, inconsistent with CPP UG-14(d).

Finally, Petitioner points out that CPP UG-1(e) requires that the County establish UGAs that "have identifiable physical boundaries such as natural features, roads, or special purpose district boundaries when feasible." *Id* at 14. Here, the new UGA boundaries are notably irregular.

Snohomish County responds that adoption of the CamWest Ordinances is consistent with the CPPs because the ordinances were enacted as a result of the TYU, and accordingly met the requirements of CPP UG-14(d)(2). County Response, at 17.[11] According to the County, "[i]n considering the CamWest proposal as part of the TYU, the County's intent was to place CamWest in the same position as it was at the time of the TYU." *Id.* at 18. Thus the County argues it was fair to consider CamWest's proposal using the criteria for UGA expansion applicable to TYU requests. The County asserts that nothing in the GMA compels a different outcome; therefore, the County's application of its TYU criteria in resolving a TYU challenge is not clearly erroneous.

[11] Citations throughout are to Snohomish County's Corrected Response Brief, filed December 8, 2006.

The County cites staff reports and oral testimony in the record indicating consistency with various CPPs. The County states: "The record demonstrates that the County considered applicable CPPs and determined the SW UGA boundary modification and associated rezone met those requirements." *Id.* at 20. Because the UGA adjustment met the UG-14(d)(2) criteria, the County states, it had no duty to consider other criteria as listed in UG-14(d)..

Finally, the County argues that the modified UGA boundary follows existing property lines except where a new diagonal has been introduced "roughly follow[ing] the edge of the canyon that the tributary of Little Bear Creek occupies and the modification places the most sensitive portion of the property containing the tributary and wetlands outside of the UGA in a rural classification." County Response at 22, citing Index 6, at 2-16.

Intervenor CamWest asserts that Snohomish County's TYU remained "open" and was not finalized until various challenges were resolved;[12] until that time, CamWest contends, it was appropriate for the County to apply the TYU process and criteria. CamWest Response at 16-17.

CamWest also addresses the UGA boundary question, arguing that the topography of the site supports it: "The new UGA line would roughly follow the south edge of the canyon, running in a straight line from north to southeast." *Id*. at 18, citing Index 22B (Feb. 1, 2005 letter at 6). CamWest asserts that the canyon is the identifiable physical feature of the Sturgell Property. *Id*.

*Board Discussion*

Binding Effect of CPPs. The GMA requires counties to adopt CPPs that will serve as a framework for city and county comprehensive plans. RCW 36.70A.210(1). The CPPs must, at minimum, include "policies to implement RCW 36.70A.110 [Urban Growth Areas]." RCW 36.70A.210(3)(a). Once these CPPs have been adopted, they provide a framework for consistency in county and city planning under the GMA. In one of its earliest cases, the Board ruled that "county-wide planning policies are not just procedural in their effect, but also substantive. CPPs have a substantive effect on the comprehensive plans of cities and the county adopting them." *City of Poulsbo, City of Port Orchard and City of Bremerton v. Kitsap County*, CPSGPHB Case No. 92-3-0009c, Final Decision and Order (Apr. 6, 1993), at 23. *See Strahm v. City of Everett*, CPSGMHB Case No. 05-3-0042, Final Decision and Order (Sept. 15, 2006), at 30 (CPPs have directive authority so long as they do not violate the GMA).

To provide the consistent, coordinated planning that is at the heart of the GMA, comprehensive plan amendments, including those enacted to resolve appeals and those enacted as part of the ten-year UGA review and update, must be consistent with Countywide Planning Policies. Thus the Board has held that amendments to comprehensive plans that are not consistent with a county's adopted CPPs do not comply

[12] CamWest analogizes GMA challenges of local government land use legislation to appeals of trial court decisions. The Board finds the analogy inapt and potentially misleading.

with the GMA. *LMI/Chevron v. Town of Woodway*, CPSGMHB Case No. 08-3-0012, Final Decision and Order (Jan. 8, 1999), at 44 (amendments to comprehensive plan may not cause the plan to be inconsistent with CPPs); *see also, Tacoma II v. Pierce County*, CPSGMHB Case No. 99-3-0023c, Final Decision and Order (June 28, 2000), at 10; *Snoqualmie v. King County*, CPSGMHB Case No. 92-3-0004, Final Decision and Order (Mar. 1, 1993), at 32.

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

In the Order on Motions for this matter, the Board ruled that the Appeal Exception in RCW 36.70A.130(2)(b), above, authorized the County *as a matter of procedure* to adopt the CamWest Ordinances in settlement of a GMA challenge outside the annual concurrent review process (the 2006 Docket). In declining to resolve the substantive questions on motions, the Board said:

> The Board notes that there are two statutory boundaries to the appeal exemption of RCW 36.70A.130(2)(b): "*after appropriate public participation* a county or city may adopt amendments or revisions to its comprehensive plan *that conform with this chapter* …. to resolve an appeal … filed with a growth management hearings board …." County action taken outside the annual concurrent review in order to resolve an appeal must not only actually resolve the pending matter (i.e., result in a dismissal) but must involve <u>appropriate public process</u> and must <u>conform with the GMA</u>.

Order on Motions, at 17.

The parties agree that the pivotal issue here is whether the County's adoption of the CamWest Ordinances is to be evaluated and processed in the context and under the standards of the preceding action – the ten-year-update of the urban growth area – or in the context of concurrent UGA applications – the 2006 Docket process. The Board cannot find – and the parties have not identified – any controlling provision of the GMA that directs the Copunty as to which process or criteria to use.. The GMA requires action consistent with County CPPs. While the GMA directs the adoption of CPPs, it is local governments which develop the substance and content of the CPPs by which they agree to be bound. The CPPs at issue here were developed and ratified by Snohomish County and its cities. The question then becomes - was the adoption of the CamWest Ordinances consistent with Snohomish County CPPs?

<u>Consistency with CPP UG-14(d).</u> The key Snohomish CPP provision governing UGA expansions is UG-14(d). UG-14(d) provides, in pertinent part:

> Expansion of the boundary of an individual UGA … shall not be permitted unless … one of the following ten conditions are met: … (2) The expansion is *a result of the review of UGAs* at least every ten years to accommodate the succeeding twenty years of projected growth, as required by RCW 36.70A.130(3).

The sum of McNaughton's position is that Snohomish is not justified in settling CamWest's appeal by adopting Ordinances under CPP UG-14(d)(2) – as a result of the TYU – but must satisfy some other criterion of UG-14(d). Neither party purports to find anything in the GMA itself that resolves the question of what decision criteria to apply in settling a challenge to a TYU. The County states that, in response to CamWest's appeal of the TYU, the County reconsidered the CamWest/Sturgell proposal under RCW 36.70A.130(2) – the exceptional process for settlement of appeals - and treated it substantively in the same light - "as a legislative action undertaken by the County as part of the TYU," applying CPP UG-14(d)(2). County Response at 17. McNaughton acknowledges: "The primary question for the Board is which UGA expansion policies [CPPs] controlled this stand-alone UGA expansion – those policies for the TYU or those Policies for all other UGA expansions." McNaughton Reply, at 1.

The parties concur that none of the other nine conditions of UG-14(d) are met in this case – the area has not achieved 50% population growth (UG-14(d)(3)); there is no significant TDR component (UG-14(d)(5)); the proposal will not meet an affordable housing emergency (UG-14(d)(9)); the proposal does not involve a conversion of resource lands (UG-14(d)(10)) or a commercial/industrial expansion (UG-14(d)(4)); and so forth. Thus, unless the CamWest Ordinances are "a result of the review of UGAs every ten years," they are not consistent with CPP UG-14(d).

The Board asks - is the UGA expansion enacted in the CamWest Ordinances "a result of the review of UGAs" undertaken by Snohomish County as its TYU? McNaughton argues that the "result of the review" was the County's December 21, 2005, TYU adoption, which then became closed and final on that date. The County counters that one "result of the review" was that CamWest appealed, causing the County to reconsider and amend its TYU.

The Board finds that the County's interpretation and application of its own CPPs was reasonable, when it treated the CamWest Ordinances as a reconsideration and amendment of the challenged TYU. Here, linkage to the TYU is rational, as that is what CamWest appealed; therefore, CPP UG-14(d)(2) is an appropriate CPP criteria for the County to apply. The Board notes that the CamWest settlement was processed promptly, while the full record of the TYU process was still current and available for re-analysis.[13] The Board finds nothing in the GMA or in the CPPs that compels a different outcome, and so concludes that the choice was within the County's discretion. The Board is not persuaded that the County's action in adopting the CamWest Ordinances was inconsistent with UG-14(d).

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[13] Settlement ordinances enacted after protracted settlement extensions or hiatus in the courts would likely raise different issues.

The Board shares McNaughton's concern that this decision widens the GMA loophole already opened with the Appeal Exception to concurrent annual review.[14] The Board's Order on Motions acknowledged the "risk of abuse" that is possible if "proponents can achieve isolated consideration of development applications by simply filing GMA challenges and negotiating settlements behind closed doors and in isolation from consideration of cumulative impacts." Order on Motions, at 17. The County may want to consider amending its CPPs to avoid exposing itself to multiple appeals filed simply to extort favorable settlements.[15]

Consistency with CPP UG-1(e). Snohomish County's first CPP provision to implement urban growth areas lists ten criteria for UGAs, briefly paraphrased as follows:

> UG-1 Establish Urban Growth Areas which:
>
> a. when aggregated, at a minimum shall accommodate the county's 20 year urban allocated population projection;
> b. include all cities within Snohomish County;
> c. can be supported by an urban level of service …;
> d. are based on the best available data and plans regarding … net developable lands;
> e. *have identifiable physical boundaries such as natural features*, roads, or special district boundaries when feasible;
> f. do not include designated resource lands …;
> g. *have been evaluated for the presence of geographic and critical environmental areas*;
> h. *where possible include designated greenbelts or open space* within their boundaries and *on the periphery of the UGA to provide separation from adjacent urban areas* and resource lands;
> i. will consider the vision of each jurisdiction regarding the future of their community during the next 20 years; and
> j. are large enough … to accommodate the planned growth.

Emphasis supplied.

McNaughton objects to the irregular UGA boundary created by the CamWest Ordinances and contends that the redrawn UGA does not meet the criterion of UG-1(e) for "identifiable physical boundaries." McNaughton PHB at 14.

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[14] The *Quadrant* court commented in reviewing another GMA loophole: "If FCCs are 'legislatively created loopholes,' it is the job of the legislature and not the boards nor the courts to determine whether such a result is good public policy. [Petitioners'] argument is not a legal one but a disagreement with legislative policy." *Quadrant, supra*, 154 Wn.2d at 247.

[15] McNaughton suggests that the County's interpretation "would result in a flood of 'placeholder' appeals, with frustrated parties filing appeals of GMA decisions merely to 'lock in' the regulations in effect at the time of the challenged decision. The effect would be for local jurisdictions to make land use planning decisions through 'settlements' of questionable placeholder Board appeals rather than through the traditional legislative process." McNaughton Reply, at 10.

The Board notes that the primary change that makes the redrawn UGA irregular is the result of placing 51 acres of sensitive lands into a permanent nature conservancy outside the UGA. The Board agrees that the resulting "gap tooth" pattern on the northern boundary of the new UGA is not typical; however, this boundary follows the existing parcel lines and is the result of removing the most sensitive portion of the Sturgell Property from the UGA. In effect, this change promotes consistency with UG-1(g) and (h).

The Board finds that the record supports the County's assertion that the new diagonal boundary across the center of the property is based on "identifiable physical boundaries such as natural features," in that it roughly follows the canyon of the Little Bear Creek tributary headwaters. Index 6, at 2-16; Index 22B (Feb. 1, 2005, letter at 6). The Board is not persuaded that the County's action in adopting the CamWest Ordinances was inconsistent with UG-1(e).

In sum, the Board finds that in adopting the CamWest Ordinances, the County had a choice of CPP provisions to apply, first, in expanding the SW UGA and, second, in drawing its boundary. The Board is not persuaded that the County's choices were clearly erroneous. The Board recognizes that the Appeal Exception to the GMA rule of concurrent annual review carries opportunities for land use legislation by deal-making; however, this loophole must be addressed by the Legislature, not the Board.

### Conclusion

The Board finds and concludes that Petitioner **has not carried its burden** in demonstrating that the County's adoption of the CamWest Ordinances was inconsistent with CPP UG-14(d) or UG-1(e). The Board is not persuaded that the County failed to comply with RCW 36.70A.210 by adopting Ordinances No. 06-053 and 06-054. The Board concludes that the County's interpretation and application of its CPPs – in particular, CPP UG-14(d) and UG-1(e) – was within its discretion in these circumstances. Legal Issue No. 5 is **dismissed.**

### B. Legal Issues 4 and 6

The Board's PHO states Legal Issues 4 and 6 as follows:

> **4. Conformity of County's Action with the Comprehensive Plan**
> *Did the County violate the requirements of the GMA, specifically RCW 36.70A.120, when it modified UGA boundaries out of conformity with its comprehensive plan in order to settle a Growth Management Hearings Board appeal of questionable legal merit?*
>
> **6. Consistency with County Comprehensive Plan**
> *Did the County violate the requirements of the GMA, specifically RCW 36.70A.070 when it expanded the boundaries of the SW UGA inconsistent with*

*Comprehensive Plan Policies LU 1.A.5, LU 1.A.9, LU 1.A.10, LU 1.A.11, and LU 1.C.1?*

## Applicable Law

The GMA requires comprehensive plan amendments to be enacted in conformity with the comprehensive plan and to create an internally-consistent scheme.

RCW 36.70A.120 provides that each GMA-planning county "shall perform its activities and make capital budget decisions in conformity with its comprehensive plan." RCW 36.70A.070A.070 [preamble] provides: "The plan shall be an internally consistent document and all elements shall be consistent with the future land use map." RCW 36.70A.130(1)(d) provides: "Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan."

## Discussion and Analysis

The parties concur that Legal Issues 4 and 6 involve Snohomish County comprehensive plan provisions which essentially parallel and implement the CPPs cited in Legal Issue No. 5. In fact, the parties make identical arguments regarding noncompliance with the Plan provisions as were made regarding noncompliance with the CPPs. Here, the Board reaches the same result.

Snohomish County's General Policy Plan (**GPP**) is the County comprehensive plan. McNaughton urges that the CamWest Ordinances were "stand-alone" enactments, not an amendment within the TYU. As a "stand-alone" UGA expansion, McNaughton asserts, the CamWest Ordinances did not satisfy the criteria for UGA expansions in the Snohomish County General Policy Plan – GPP LU 1.A.11.

GPP LU 1.A.11 is the GPP Land Use policy that roughly parallels CPP UG-14(d). It provides that UGA expansions are not allowed except when there has been a land capacity analysis and one of nine conditions is met. LU 1.A.11 provides:

> Expansion of the boundary of an individual UGA … shall not be permitted unless it is supported by a land capacity analysis adopted by the County Council pursuant to RCW 36.70A.110 …. In addition, one of the following nine conditions must be met: (1) *The expansion is the result of the review of UGAs at least every ten years* to accommodate the succeeding twenty years of projected growth, as required by RCW 36.70A.130(3).

Emphasis supplied.

Is the UGA expansion enacted in the CamWest Ordinances "the result of the review of UGAs" undertaken by Snohomish County in its TYU? Similar to its arguments concerning Legal Issue 5, McNaughton argues that the "result of the review" was the County's December 21, 2005 TYU adoption, which became closed and final on that date.

The County counters that one "result of the review" was that CamWest appealed, causing the County to reconsider and amend its TYU. As set forth under Legal Issue 5, *supra*, the Board finds the County's application of its own planning policies in these circumstances to be a reasonable interpretation.

McNaughton further contends that the County erred in "rely[ing] on a land capacity analysis and reasonable measures reports prepared for the big picture TYU process when adopting a stand-alone UGA expansion seven months after the TYU was closed." McNaughton Reply, at 16. McNaughton does not provide any information indicating in what respect the LCA might be deficient, inaccurate or outdated. The County responds that the LCA for the SW UGA was prepared with a view to accommodating a number of changes to the SW UGA. Although the County Council chose not to adopt the requested expansions in 2005 but to defer requests to the 2006 Docket, the Council adopted the LCA that supported such expansions. County Response, at 24, citing Ex. NN to Ordinance No. 05-069 [Appendix A to County Response]. Therefore, in reconsidering the TYU as a result of CamWest's appeal, the County reasonably relied on the previously-prepared LCA. The Board finds that McNaughton has not carried its burden in demonstrating that the County's action was clearly erroneous.

McNaughton argues that the UGA boundary change fails to "follow topographical and physical features," as required by GPP LU 1.C.1. The Board addressed this question under the parallel CPP provision, UG-1(e), and found that the primary redrawn boundary across the Sturgell property roughly follows the ridge of a ravine and the remainder of the adjusted boundary follows parcel lines. Legal Issue 5, *supra*.

The Board has concluded that the County's application of its CPPs – treating the CamWest settlement as "a result of the review of UGAs at least every ten years" – was not clearly erroneous. Legal Issue 5, *supra*. The Board similarly concludes that the County's application of its parallel GPP policies was not clearly erroneous.

### Conclusion

The Board finds and concludes that Petitioner **has not carried its burden** in demonstrating that the County's adoption of the CamWest Ordinances was inconsistent with GPP LU 1.A.11 or other cited GPP policies LU 1.A.5, LU 1.A.9, LU 1.A.10, LU 1.A.11, and LU 1.C.1. The Board is not persuaded that the County violated RCW 36.70A.120 or RCW 36.70A.070 by adopting Ordinances No. 06-053 and 06-054. The Board concludes that the County's interpretation and application of its GPP policies – in particular, LU 1.A.11 – was within its discretion in these circumstances. Legal Issue Nos. 4 and 6 are **dismissed.**

### C. Legal Issue 1

The Board's PHO states Legal Issue 1 as follows:

### 1. Public Participation

*Did the County violate the requirements of the GMA, specifically RCW 36.70A.020(11), RCW 36.70A.140, and the County's adopted public participation process, when the Council considered and adopted significant substantive changes to the FLUM for the SW UGA without providing Petitioner or the general public meaningful opportunity to review and comment on the proposed changes, or following its own internal participation procedures?*

## Applicable Law

RCW 36.70A.020(11) establishes citizen participation as one of the planning goals of the GMA: "Encourage the involvement of citizens in the planning process."

RCW 36.70A.140 provides more detailed requirements:

> Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments. … Errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed.

RCW 36.70A.130(2) requires local governments to establish a public participation program for consideration of "updates, proposed amendments, or revisions of the comprehensive plan." RCW 36.70A.130(2) refers to the once-yearly amendments, the ten-year review ["update" referenced in subsection (1)], and amendments to resolve an appeal.

> (2)(a) Each county and city shall establish and broadly disseminate to the public a public participation program consistent with RCW 36.70A.035 and 36.70A.140 that identifies procedures and schedules whereby updates, proposed amendments, or revisions of the comprehensive plan are considered by the governing body of the county or city no more frequently than once every year. "Updates" means to review and revise, if needed, according to subsection (1) of this section, and the time periods specified in subsection (4) of this section.
>
> (b) Except as otherwise provided in (a) of this subsection, all proposals shall be considered by the governing body concurrently so the cumulative effect of the various proposals can be ascertained. However, after appropriate public

> participation a county or city may adopt amendments or revisions to its comprehensive plan that conform with this chapter whenever an emergency exists or to resolve an appeal of a comprehensive plan filed with a growth management hearings board or with the court.

The Snohomish County Public Participation Program adopted pursuant to the GMA requirements is codified in SCC chapters 30.73 –"Type 3 Decisions – Legislative" – and 30.74 – "Growth Management Act Public Participation – Docketing." Attachments 1 and 2, McNaughton PHB.

SCC chapter 30.73 is the County's adopted process for Type 3 legislative decisions. SCC 30.73 requires a staff report by PDS, Planning Commission review, including a public hearing and recommendation by the commission to the County Council, and County Council review, public hearing and final decision. For amendments to resolve appeals, SCC 30.73 specifies that Planning Commission review is not required and the once-per-year limitation on plan amendments does not apply. SCC 30.73.040(2)(d); SCC 30.73.085(1)(e).

SCC chapter 30.74 is the County's adopted process for annual concurrent review – "docketing." This chapter sets out specific criteria to be included in the required staff analysis of the docket proposals.

## Discussion and Analysis

*Positions of the Parties*

Petitioner points out that the Appeal Exception to the annual concurrent review requirement for comprehensive plan amendments specifically calls for "appropriate public participation." RCW 36.70A.130(2)(b). Petitioner argues that the County failed to follow its own adopted procedures and enacted the CamWest Ordinances after a truncated and non-compliant public process.

McNaughton argues that the County was obligated to apply the public participation standards applicable to docketed proposals and could not merely "piggy-back" on the TYU process. McNaughton's argument focuses on the lack of a staff report meeting the specific requirements of SCC 30.74.030(1) and .060(2)(d-f).[16] McNaughton points out

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[16] SCC 30.74.030(1) provides:

> The department shall conduct an initial review and evaluation of proposed amendments, and assess the extent of review that would be required under the State Environmental Policy Act (SEPA) prior to county council action. The initial review and evaluation shall include any review by other county departments deemed necessary by the department, and shall be made in writing.

SCC 30.74.060(2) provides:

> The department shall prepare a report including a recommendation on each proposed amendment and forward the report to the planning commission. The department will recommend approval if all the following criteria are met:

that the CamWest/Sturgell proposal was considered as part of the 2006 Docket until November 2006. In the course of that process, a staff analysis was prepared as required by SCC 30.74. See Supp. Ex. 1; McNaughton PHB, at 5, fn. 2, Attachment 3. The Docket analysis prepared by County staff concluded that the CamWest/Sturgell proposal did not meet certain CPP criteria. McNaughton PHB, at 4-5, citing Supp. Ex. 1, at 10-11.

The County responds that its adoption of the CamWest Ordinances was not through the docketing procedure and thus was not subject to SCC 30.74. County Response at 9. Nevertheless, the County asserts that its process did include the requisite staff report. Index 24, Memorandum from Senior Planner Steve Skorney to Council Chair Kirke Sievers, June 16, 2006. The County points out that the Skorney memorandum (Index 24) provides environmental and policy analysis; indicates that the CamWest/Sturgell proposal is supported by the Land Capacity Analysis adopted by the County as part of the TYU; cross-references the Addendum to the FEIS on the TYU; and analyzes the proposal for compliance with CPPs and the GMA. County Response at 8, citing Index 24 and Appendix A.

*Board Discussion*

The bedrock of GMA planning is public participation.[17] The GMA's public participation provisions require cities and counties to adopt specific procedures to ensure "early and continuous" public involvement. Thus, a jurisdiction's failure to follow the public participation procedures it has adopted pursuant to RCW 36.70A.140 constitutes non-compliance with the statute. See generally, *McVittie V v. Snohomish County*, CPSGMHB Case No. 00-3-0016, Final Decision and Order (Apr. 12, 2001), at 16-25; see also, *Fallgatter VI v. City of Sultan*, CPSGMHB Case No. 06-3-0017, Order on Motions (June 29, 2006), at 4 (an issue which alleges that the city did not comply with its own public participation requirements adopted pursuant to RCW 36.70A.140 is within the Board's jurisdiction).

It is significant to note that McNaughton does not contend that there was inadequate notice of the process the County used to consider the CamWest Ordinances. Nor does McNaughton complain that it did not have opportunity to make its views known. Rather, it challenges the quality of the staff report as not meeting the standards set forth in SCC

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(a) The proposed amendment and any related proposals on the current final docket maintain consistency with other plan elements or development regulations;
(b) All applicable elements of the comprehensive plan, including but not limited to the capital plan and the transportation element, support the proposed amendment;
(c) The proposed amendment more closely meets the goals, objectives and policies of the comprehensive plan than the relevant existing plan or code provision;
(d) The proposed amendment is consistent with the countywide planning policies;
(e) The proposed amendment complies with the GMA; and
(f) New information is available that was not considered at the time the relevant comprehensive plan or development regulation was adopted that changes underlying assumptions and supports the proposed amendment.

[17] See generally, *1000 Friends of Washington, et al v. McFarland*, Slip Opinion Docket No.76581-2 (Dec 21, 2006) (highlighting the importance of the GMA's public participation requirements).

30.74 – the County's Docket process. According to McNaughton, a detailed report, providing all the information called for in the docketing process, would have enabled the public and County officials to understand the proposal and participate effectively in the public process. See eg., HOM Transcript at 15-16, 68, 70-10.

In the present case, Snohomish County reconsidered the CamWest/Sturgell proposal in settlement of an appeal of the TYU. While the County's 2006 Docket was subject to one set of procedures and review criteria - SCC 30.74, the County determined that ordinances to resolve an appeal of the TYU were not part of its docketing process and so applied its general public process for Type 3 legislation - SCC 30.73. The CamWest/Sturgell proposal had been considered and analyzed in the development of the TYU, and was recommended to the County Council for adoption when the TYU was enacted in December 2005. In reconsidering the TYU in the face of CamWest's subsequent challenge, the County could reasonably incorporate and rely on information already in its record that supported CamWest's application. It wasn't required to write on a blank slate. Nevertheless, PDS provided a staff memo summarizing the project and analyzing its consistency with County CPPs and with comprehensive plan policies relevant to the TYU. Index 24.

The Board has concluded that the County's application of its CPPs – treating the CamWest Ordinances as "a result of the review of UGAs at least every ten years" – was not clearly erroneous. Legal Issue 5, *supra*. Similarly, the GMA does not require the County in this instance to apply its public participation process that is specific to Docket proposals. The Board finds that the County followed its adopted public process for Type 3 legislative proposals undertaken to resolve an appeal; the County's application of its own procedures is entitled to deference here. The Petitioner has **not carried its burden** in demonstrating non-compliance with RCW 36.70A.020(11) and .140.

### Conclusion

The Board finds and concludes that Petitioner has not carried its burden in demonstrating that the County's process violated its adopted Public Participation Program. The Board is not persuaded that the County failed to comply with RCW 36.70A.140 or was not guided by .020(11). Legal Issue No. 1 is **dismissed.**

### D. Legal Issue No. 2

The Board's PHO states Legal Issue No. 2 as follows:

> **2. Notice to CTED**
> *Did the County violate the requirements of the GMA, specifically RCW 36.70A.106 when the Council adopted amendments to the Snohomish County Comprehensive Plan (in the form of an amended FLUM for the SW UGA) without giving 60 days prior notice to the Department of Community, Trade, and Economic Development?*

## Applicable Law

RCW 36.70A.106 provides:

> (1) Each county and city proposing adoption of a comprehensive plan or development regulations under this chapter shall notify the department of its intent to adopt such plan or regulations at least sixty days prior to final adoption. State agencies including the department may provide comments to the county or city on the proposed comprehensive plan, or proposed development regulations, during the public review process prior to adoption.
>
> (2) Each county and city planning under this chapter shall transmit a complete and accurate copy of its comprehensive plan or development regulations to the department within ten days after final adoption.
>
> (3)(a) *Any amendments for permanent changes to a comprehensive plan or development regulation that are proposed by a county or city to its adopted plan or regulations shall be submitted to the department in the same manner as initial plans and development regulations under this section.* Any amendments to a comprehensive plan or development regulations that are adopted by a county or city shall be transmitted to the department in the same manner as the initial plans and regulations under this section.

Emphasis supplied.

## Discussion and Analysis

*Positions of the Parties*

McNaughton contends that the County was obligated to notify CTED of its intent to adopt the CamWest Ordinances before taking action, pursuant to RCW 36.70A.106. McNaughton PHB, at 6.

The County relies on notification it provided to CTED in May and November 2005 as part of its TYU. Index 129 and 131. McNaughton points out that the May 2005 submittal did not include the CamWest/Sturgell proposal, which was added later in the year. McNaughton PHB, at 7, citing Index 129. The November 2005 submittal did include the Executive's Memorandum concerning the CamWest/Sturgell proposal (Index 22). However, McNaughton contends that this November submittal was superseded when the County, after taking action on December 21, 2005, filed with CTED the TYU ordinances actually adopted. This submittal did not include CamWest/Sturgell or the other SW UGA amendments. McNaughton PHB at 7, citing Index 131.

McNaughton reasons that, having notified CTED that "after performing the required coordinated concurrent review and considering the cumulative impacts, [the County Council] determined that the CamWest proposal and all other SW UGA expansion proposals were not appropriate for inclusion in the TYU," the County was obligated to provide new notice to CTED when it decided to consider the CamWest/Sturgell proposal as a "separate stand-alone amendment." *Id.* at 8.

The County responds, first, that it was entitled to rely on the November 2005 notice to CTED to satisfy its GMA obligations. County Response, at 12, citing Index 131 (11/15/05 transmittal letter to CTED enclosing CD including Executive's 8/19/05 memorandum to Council (Index 22.B.3), at 4). The County reasons: "The fact that the County Council did not actually adopt [the CamWest proposal] until eight months later in a different ordinance does not change the fact that the County had given CTED notice…." *Id*. at 13.

Second, the County asserts that CTED did not provide any comments on the County's TYU ordinances when first submitted and so it was reasonable for the County to presume that CTED would have had no objections. County Response, at 14. The County submits the Declaration of [Senior Planner] Michael Zelinski indicating that "CTED failed to comment on any of the approximately 25 ordinances comprising the TYU despite the County having sent them to CTED twice, along with two other separate e-mails." County Response at 14, citing Index 129, 130, 131. The County argues that once CTED is notified of intent to adopt an amendment, "the fact that the proposal was eventually adopted at a different time and in a different ordinance … does not matter." County Response, at 13.

CamWest adds that the County was entitled to rely on its November 2005 notice to CTED because the subsequent CamWest Ordinances were merely amendments to the TYU and within the scope of notice provided to CTED in the course of the TYU process. CamWest Response, at 14-15.

McNaughton replies: "Under the County and CamWest's logic, the CTED notice proposal for the TYU could be read to satisfy the GMA's notice requirements for all of the 2006 Docket proposals that had been considered and rejected in the TYU. This is an absurd result." McNaughton Reply, at 13.

*Board Discussion*

Here, the Board concurs with McNaughton. Most of the legal issues raised by McNaughton in this dispute turn on Snohomish County's interpretation and application of its own CPPs, comprehensive plan policies, and adopted procedures. Legal Issue No. 2, by contrast, goes directly to an unambiguous requirement of the statute: RCW 36.70A.106 – notification to CTED of proposed comprehensive plan amendments 60 days prior to adoption. RCW 36.70A.130(2)(b) specifies that comprehensive plan amendments enacted to settle an appeal must comply with the GMA.

The Board has recognized that "CTED must be fully apprised and fully aware of the substance of any proposed amendment." *Home Builders Ass'n of Kitsap County v. Bainbridge Island*, CPSGMHB Case No. 00-3-0014, Final Decision and Order (Feb. 26, 2001) at 6-7. In this case, CTED was not notified of the pending comprehensive plan amendments until the County sent copies of the CamWest Ordinances to the Department after their adoption. McNaughton PHB, at 7.

The Board notes that the CamWest/Sturgell proposal was included in the Executive's Memo (Index 22.B.3) transmitted to CTED on a CD (Index 131) on November 15, 2005, just 35 days prior to enactment of the 25 TYU ordinances. Subsequently, the County provided CTED copies of the adopted TYU ordinances (see, Index 130) which denoted the rejection of the CamWest/Sturgell and other SW UGA proposals.

The County and CamWest both rely on Board decisions indicating that a jurisdiction, after providing initial notice, need not supply CTED with every subsequent amendment prior to adoption. *WHIP v. City of Covington*, CPSGMHB No. 01-3-0026, Final Decision and Order (July 31, 2003), at 31 ("the sixty-day notice of intent to adopt is in anticipation of potential changes following review and comment"); *Children's Alliance and Low Income Housing Institute v. City of Bellevue*, CPSGMHB No. 95-3-0011, Final Decision and Order (July 25, 1995)(not required to submit "a copy of each and every revision that a comprehensive plan or development regulation undergoes during the legislative process"); *Ostrom Co. v. Whatcom County (**Ostrom**)*, WWGMHB No. 05-2-0017, Final Decision and Order (Feb. 14, 2006), at 22 ("the statute anticipates that the adopted enactment may differ from the draft initially sent to CTED").

The present case is plainly distinguishable. What is at issue here are not iterations of an ordinance during the legislative process, but ***new*** ordinances proposed and adopted without any notice being afforded to CTED. It is undisputed that Ordinance Nos. 06-053 [amending the County's Plan] and 06-054 [amending the County's development regulations] were not submitted to CTED sixty days prior to their adoption. The Board has no alternative but to remand to the County to complete this important review step.

Both the Eastern and Western Washington Growth Management Hearings Boards have remanded ordinances when the enacting jurisdiction failed to give the required notice to CTED. *Cameron Woodard Homeowners Ass'n v. Island County*, WWGMHB Case No. 02-2-0004, Order on Dispositive Motion (June 10, 2002), at 2 ("There is no room for interpretation of this statute as the language is direct and specific"); *City of Spokane Valley v. City of Liberty Lake*, EWGMHB Case No. 03-1-0007, Order on Compliance (March 18, 2005), at 15; *City of Liberty Lake v. City of Spokane Valley*, EWGMHB Case No. 03-1-0009, Order on Motions (March 23, 2004), at 3; *Bauder v. City of Richland*, EWGMHB Case No. 01-1-0005, Final Decision and Order (Aug. 16, 2002), at 6 ("This failure is not merely procedural. We do not have the authority to overlook a failure to comply with this notice. It is clear that if a board finds a failure to comply, it must remand the matter to the City to cure the noncompliance"). The Western Board's most recent decision in *Ostrom, supra*, states: "The statutory requirement to notify the department of the intent to adopt at least 60 days prior to final adoption applies *each time*

any implementing regulation or amendment is proposed for adoption." FDO, at 19 (emphasis supplied).

The fact that the CamWest Ordinances were enacted to settle a Board appeal does not excuse the notice requirement. The Board's cases frequently involve requests for settlement extensions to accommodate the 60 days needed to comply with the jurisdiction's obligation to notify CTED before adopting an ordinance to settle a GMA dispute.

Both the Eastern Board in *Bauder* and the Western Board in *Cameron Woodard* concluded that it was not sufficient that the challenged ordinances were submitted to CTED subsequent to their adoption in order to comply with the statute.

While the Legislature designed the GMA to operate on a "bottom up" basis, with local jurisdictions devising their own plans and procedures, the statute requires CTED to review local plans and proposed amendments, and empowers CTED to comment and advise jurisdictions. The Boards see only those local plans that are challenged, but CTED has a broad perspective arising out of its statutory responsibility. As the Eastern Board commented in *City of Spokane Valley, supra*, at 15: "The Legislature directed CTED to properly review the substance of all proposed amendments submitted by local government entities. The Board does not wish to undermine the statutorily mandated 60-day timeframe that CTED needs to carry out its duty under the GMA." Therefore the Board has no authority to assume that CTED would not comment or to decide that the County's failure to provide the statutory notice is harmless error.

The Board finds that the County failed to comply with RCW 36.70A.106. The County's action was **clearly erroneous;** the Board is left with a definite and firm conviction that a mistake has been made. The Board does not have the authority to overlook a failure to comply; the remedy prescribed in the GMA is to remand a non-compliant action to the County to cure the non-compliance.

In order to comply with the GMA, the County must submit Ordinance Nos. 06-053 and 06-054 to CTED. The submittal should be accompanied by a notice indicating that 60 days are available for review and that comments by state agencies, including CTED, will be considered as if adoption of the ordinances had not yet occurred. Alternatively, the County may request expedited review under RCW 36.70A.106(3)(b). The County has 100 days from the date of this order to complete this process and file a statement of actions taken in response to agency comments, if any. If no comments are received, the Board will determine whether a compliance hearing is necessary and may issue an order of compliance without further hearing.

## Conclusion

The Board finds that Snohomish County failed to notify CTED of the intent to adopt Ordinances 06-053 and 06-054 sixty days prior to enactment, as required by RCW

36.70A.106. The Board concludes that the County is **out of compliance** for its failure to notify CTED of its intent to amend its Comprehensive Plan.

The Board **remands** Ordinances 06-053 and 06-054 to Snohomish County to be submitted to CTED for review and comment. Following the 60-day review period (or shorter time if expedited review is granted), the County shall file a statement of actions taken in response to agency comments, if any. If no comments are received, the Board, upon receipt of the statement of actions taken to comply, will determine whether a compliance hearing is necessary and may issue an order of compliance without further hearing. The County will have 100 days from the date of this Order to comply with this Order and bring itself into compliance with RCW 36.70A.106.

### E. Legal Issue No. 7 – "Arbitrary and Discriminatory"

The Board's PHO states Legal Issue No. 7 as follows:

> **7. Arbitrary and Discriminatory Action**
> *Did the County violate the requirements of the GMA, specifically RCW 36.70A.020(6): (a) when the County chose to selectively "re-visit" the TYU and amend the boundaries of the SW UGA to accommodate one developer's proposal – the CamWest Proposal – while failing to "re-visit" other proposals considered but rejected by the Council as part of the TYU; (b) when the County chose to selectively "re-visit" the TYU and amend the boundaries of the SW UGA to allow one proposal – the CamWest Proposal -- the opportunity to vest prior to the update of the County's critical areas regulations, while all other UGA proposals, if approved by the Council in November or December 2006, will not likely have the opportunity to become vested until after the critical areas regulations have been updated; and (c) when the County chose to selectively "re-visit" only one proposal – the CamWest Proposal – out of the entire selection of proposals that were considered in the TYU in response to the CamWest Appeal, which challenged the Council ordinance adopting the TYU as a whole?*

### Applicable Law

RCW 36.70A.020(6) establishes the protection of property rights as one of the planning goals of the GMA:

> (6) Property rights. Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

### Discussion and Analysis

In reviewing a Goal 6 challenge, the Board asks four questions: 1) whether the Board has jurisdiction to consider the challenge; 2) whether the local government took landowner rights into consideration in its procedure; 3) whether the challenged action was arbitrary; and 4) whether the challenged action was discriminatory. *Keesling III v. King County*

***(Keesling III)***, CPSGMHB Case No. 05-1-0001, Final Decision and Order (July 5, 2005) at 23.

1. Is the challenge within the Board's jurisdiction? YES

The Board lacks jurisdiction to review constitutional challenges. Here, however, Petitioner is not alleging that the County's action infringes constitutionally-protected property rights.[18] McNaughton PHB, at [19-24]. Petitioner's challenge focuses on the "arbitrary and discriminatory" element of Goal 6, over which the Board has jurisdiction.

2. Did the County consider landowner rights in its procedure? YES

"For procedural compliance, the Board looks for evidence that the property rights goal has been included in the jurisdiction's debate and consideration when taking action on a comprehensive plan or development regulation." *Keesling III*, *supra*, at 29. In *Keesling III* case, the Board found that the County "took note of citizen concerns" and "proposed and passed responsive amendments." *Id.*

McNaughton argues that "the County's failure to follow its public participation process and to prepare updated documentation … prevented the County Council from effectively considering the impact of the Subject Ordinances on the landowner rights of persons with proposals on the 2006 docket." McNaughton PHB at 19. McNaughton contends that the County ignored the property rights of all the applicants for SW UGA expansion except CamWest. McNaughton cites to the dissenting comments of County Council member Gary Nelson, who said:

> …I have major exceptions to crafting a proposal and doing it outside of all of the other proposals that were submitted for the southwest UGA. I think it's very unfair. I believe that it, in essence, is one that has to be looked upon by the other property owners as one getting special treatment by a legislative body … I believe that the other property owners need the same kind of equal treatment … I don't agree with this process and hopefully other property owners who had a status in this UGA will see through this and will potentially raise their objections accordingly.

Attachment 14, McNaughton PHB at 23; Index 120 (Public Hearing of 7/16/06).

The County responds that the colloquy among County Council members demonstrates that the County reviewed and considered the question of property interests of other applicants when it made its decision to approve the CamWest Ordinances. County Response, at 38.

The Board has consistently held that the GMA obligation to consider Goal 6 in enacting comprehensive plans and development regulations is an obligation to review the potential

[18] Thus, CamWest's argument that McNaughton has a mere business interest, not a property right, is beside the point. CamWest Dispositive Motion at 17-18; CamWest Response, at 19.

impacts of enactments on landowners, not an obligation to defer to particular participants. See eg., *Shulman v. Bellevue*, CPSGMHB Case No. 95-3-0076, Final Decision and Order (May 13, 1996), at 12; *Keesling III*, at 30; see *MBA CamWest III v. City of Sammamish*, CPSGMHB Case No. 05-3-0045, Final Decision and Order (Feb,. 21, 2006), Pageler concurring, at 41 ("The record indicates that the Planning Commission and City Council discussed and wrestled with these [property rights] arguments, amply complying with Goal 6 procedural requirements"). The Board finds that the County Council considered property rights in enacting the CamWest Ordinances.

3. Was the County's action arbitrary? NO

McNaughton's assertion that the County's action was arbitrary boils down to opposition to the County's treatment of the CamWest/Sturgell proposal as an amendment to and reconsideration of the TYU. McNaughton PHB, at 21-22. "The County's adoption of the Subject Ordinances was arbitrary because the County approved the CamWest Proposal without any examination of that Proposal's compliance with applicable CPPs, CPs, and DRs, instead taking action on the assumption of authority to act under the guise of the TYU." McNaughton Reply, at 19.

The Board has determined that the County's interpretation of its procedure and application of its CPPs to consider settlement of the CamWest challenge as a result of the TYU review was not clearly erroneous. The Board therefore finds and concludes that the County's action in adopting the CamWest Ordinances was not arbitrary.

4. Was the County's action discriminatory? YES

The clear language of Goal 6 requires that an action must be both arbitrary <u>and</u> discriminatory to overcome the presumption of validity. *Shulman, supra,* at 8; *Keesling III*, at 30. Having found that the County's adoption of the CamWest Ordinances was not arbitrary in relation to landowner rights, the Board need not reach the question of discrimination.

However, the Board has generally held that zoning and other development regulations are not discriminatory when they apply equally to all lands of a particular classification. See, e.g., *Keesling III*, at 32 (application of ordinances to all rural lands); *Abbey Road v. City of Bonney Lake*, CPSGMHB No. 05-3-0048, Final Decision and Order (May 15, 2006), at 13 ("Goal 6 is not thwarted since the rezoning action … is not targeted to a few individual property owners"). In the present case, while a number of SW UGA proposals were equally considered and rejected as part of the TYU and then equally subject to reconsideration in the 2006 Docket, the CamWest Ordinances allow only the CamWest/Sturgell proposal to move forward. As CamWest was at pains to point out in its Dispositive Motion, the CamWest Ordinances, in particular Ordinance 05-054, concern only one property and one property developer. CamWest Motion to Dismiss, at 17-18.

In this context, the County's and CamWest's appeal to the unique merits of the CamWest project is hardly germane. County Response, at 42-43, CamWest Response, at 20-21. If anything, it underlines McNaughton's argument that all of the SW UGA proposals, whether considered in the TYU or on the 2006 Docket, should have been reviewed together and under the same criteria. As McNaughton argues, a direct comparison of all the proposals might have shown that others also had beneficial features[19] and would have demonstrated how CamWest was getting favorable treatment. McNaughton Reply, at 20.

At the HOM, McNaughton noted:

> The UGA boundaries were amended relying on the ten-year update's CPPs but failing to consider similarly-situated property owners. … We have multiple landowners who were all in the same boat at the close of the TYU. All were offered the same rescue barge, that is, "You'll all be on the 2006 docket. We'll consider you. We will take actions … to consider your proposals under one of the non-TYU exceptions for expansion of UGA boundaries." And yet one of those landowners was removed from the docket, for, again, special consideration and discriminatory act, … using the TYU exception in order to approve its UGA boundary expansion before others.

HOM Transcript, at 25.

In sum, the County's choice of settling the CamWest challenge by amending its TYU to allow CamWest's proposal to move forward in advance of the 2006 Docket was discriminatory. The Board finds and concludes that the County's adoption of the CamWest Ordinances <u>was</u> discriminatory; however, it was not arbitrary.

### Conclusion

Petitioner **has not carried its burden** in demonstrating that the County's adoption of Ordinance 05-053 and 05-054 was not guided by or that it thwarted Goal 6 – RCW 36.70A.020(6) Property Rights. Legal Issue No. 7 is **dismissed.**

### F. Legal Issue No. 9 – Invalidity

As articulated most recently by the Supreme Court, "the Board is empowered to determine whether county decisions comply with GMA requirements, to remand noncompliant ordinances to counties, and even to invalidate part or all of a comprehensive plan or development regulation until it is brought into compliance." *Lewis County v. Western Washington Growth Management Hearings Board (**Lewis County**)*, 157 Wn.2d 488 at 498, fn. 7, 139 P.3d 1096 (2006). An order of invalidity may be appropriate upon the Board's finding that a County's noncompliant action substantially

[19] At the HOM, CamWest's attorney asserted that the beneficial features of the CamWest/Sturgell proposal were unique, but in fact, the record before the Board did not include information about the other projects in the 2006 Docket for the SW UGA. HOM Transcript, at 64-65.

interferes with the goals of the GMA.[20] The Board has previously held that a request for invalidity is a prayer for relief and, as such, does not need to be framed in the PFR as a legal issue. *See King County v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 13, 2003) at 18.

McNaughton states Legal Issue 9: "Did the County substantially interfere with the fulfillment of the goals of the GMA, specifically *RCW 36.70A.020(1), (2), (6), and (11),* such that the Subject Ordinances should be deemed wholly invalid?" McNaughton has alleged that the County's action substantially interfered with Goals 1 and 2 regarding urban sprawl, Goal 6 regarding protection of property rights, Goal 7 regarding fair processes, and Goal 11 regarding public participation. HOM Transcript, at 24.

In the present matter, the only provision of the GMA which the Board finds to have been violated by Snohomish County is RCW 36.70A.106, the requirement to submit proposed comprehensive plan amendments to CTED for a 60-day review period prior to adoption. The Board remands the CamWest Ordinances to Snohomish County for submission to CTED as required by the statute. However, the Board finds and concludes that the County's noncompliance with RCW 36.70A.106 *does not substantially interfere* with or thwart any of the goals of the Act cited by Petitioner. Therefore the Board declines to enter an order of invalidity. Legal Issue No. 9 is **dismissed.**

## V. ORDER

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

- Petitioner has **not carried the burden of proof** in demonstrating that the County's adoption of Ordinance Nos. 06-053 and 06-054 is noncompliant with RCW 36.70A.140, .120, .210(1) or .070, or that they substantially interfere with GMA Goals – RCW 36.70A.020(1), (2), (6), or (11). Legal Issue Nos. 1, 4, 5, 6, 7, and 9 are **dismissed**.
- In adopting Ordinance Nos. 06-053 and 06-054, Snohomish County **failed to comply** with RCW 36.70A.106. The Board **remands** Ordinances 06-053 and 06-

[20] 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.

054 to Snohomish County to be submitted to CTED for review and comment pursuant to RCW 36.70A.106. Following the 60-day review period (or shorter time if expedited review is granted), the County shall file a **Statement of Actions Taken to Comply (SATC)**, indicating the County's actions in response to agency comments, if any. At that time, the Board will determine whether a compliance hearing is necessary. If no comments are received, but after receipt of the SATC, the Board may issue an order of compliance without further hearing.

- The County will have 100 days from the date of this Order to comply with this Order and bring itself into compliance with RCW 36.70A.106. By no later than **May 7, 2007**, the County shall file with the Board and serve on the parties its **Statement of Actions Taken to Comply.** Petitioner and Respondent have five days from the filing of the SATC to provide any responsive briefing, or, on the stipulation of the parties, the Board may enter a final order without further hearing.

So ORDERED this 29th day of January, 2007.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
David O. Earling
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.[21]

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[21] 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

## APPENDIX A

### Chronology of Proceedings in CPSGMHB Case No. 06-3-0027

On August 2, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from The McNaughton Group, LLC. (**Petitioner** or **McNaughton**). The matter was assigned Case No. 06-3-0027, and is hereafter referred to as *McNaughton v. Snohomish County*. Board member Margaret Pageler is the Presiding Officer for this matter. Petitioner challenges Snohomish County's (**Respondent** or **County**) adoption of Ordinance No. 06-053, "Revising the Southwest Urban Growth Area and Amending Ordinance No. 03-061," and Ordinance No. 06-054, "Adopting Zoning Map Amendments Implementing Changes to the Future Land Use Map Adopted by Ordinance No. 06-053." The basis for the challenge is non-compliance with various provisions of the Growth Management Act (**GMA or Act**) and the State Environmental Policy Act (**SEPA)**.

On August 7, 2006, the Board issued a Notice of Hearing, setting a date for Prehearing conference and a tentative schedule for this case.

On August 9, 2006, the Board received a Notice of Appearance on behalf of Snohomish County from Janice E. Ellis, Snohomish County Prosecuting Attorney.

On August 10, 2006, the Board received a Notice of Appearance from Tom Ehrlichman on behalf of proposed intervenor CamWest Development Inc. On August 28, 2006, the Board received CamWest Inc.'s Motion to Intervene and the Declaration of Bruce Knowlton and attached exhibits. On September 1, 2006, the Board received Respondent Snohomish County's Response to CamWest Development, Inc's Motion to Intervene, indicating no objection.

The Prehearing Conference was convened on September 5, 2006, at 10:00 a.m. at the Board's offices. Board member Margaret Pageler presided and Board member Ed McGuire and law clerk Julie Taylor were also in attendance. Nancy Bainbridge Rogers and Andrew Lane represented Petitioner, with Brian Holtzclaw, corporate counsel, also in attendance. John Moffatt and Justin Kasting represented Respondent. Intervenor CamWest Development, Inc. (**CamWest**) was represented by Tom Ehrlichman, with corporate counsel Marsha Martin and property owner David Johnston also present.

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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)

At the outset of the PHC, the Board discussed the potential intervention by CamWest. The PO orally granted CamWest's Motion to Intervene on the side of Snohomish County. The Board then discussed with the parties the possibility of settling or mediating their dispute to eliminate or narrow the issues.

At the PHC, the Board received Respondent's Index to the Record. The Board reviewed its procedures for the hearing, including the composition of the Index to the record below; filing of core documents, exhibit lists and supplemental exhibits; dispositive motions; the Legal Issues to be decided; and a Final Schedule. The Core Documents requested are the Countywide Planning Policies and the Land Use element of the County Comprehensive Plan.

On September 7, 2006, the Board issued its Prehearing Order and Order Granting Intervention.

On September 11, 2006, the Board received Respondent Snohomish County's Objection to and Motion to Amend Prehearing Order.

On September 12, 2006, the Board received the following core documents:

**Core 1** – Countywide Planning Policies
**Core 2** – Land Use Element of the County Comprehensive Plan

On September 15, 2006, the Board received The McNaughton Group LLC Response to Respondent Snohomish County's Objection and Motion to Amend Prehearing Order.

On September 15, 2006, the Board issued its Order on Motion to Amend Prehearing Order.

On September 20, 2006, the Board received a Notice of Appearance from Patrick J. Schneider of Foster Pepper PLLC as co-counsel with Tom Ehrlichman for Intervenor CamWest.

*Motions*

On September 25, 2006, the Board received the following motions:

- The McNaughton Group's Motion to Supplement the Record **(Motion to Supplement)**, with two attachments: a February 23, 2006 memorandum and a July 24, 2006 SEPA notice
- The McNaughton Group's Dispositive Motion on Legal Issues 3 and 5 **(McNaughton's Dispositive Motion)**
- Intervenor CamWest's Dispositive Motion **(CamWest Dispositive Motion)** and Declaration of Wendy Clement
- Respondent Snohomish County's Dispositive Motion **(County's Dispositive Motion)** with 7 exhibits

On September 26, 2006, the Board received Snohomish County's Amended Index to the Administrative Record.

On October 10, 2006, the Board received the following responses:

- The McNaughton Group's Response to Snohomish County's and Camwest Development, Inc.'s Dispositive Motions
- Intervenor CamWest's Response to McNaughton's Dispositive Motion
- Snohomish County's Response to CamWest's Dispositive Motion
- Snohomish County's Response to the McNaughton Group's Motion to Supplement the Record
- Snohomish County's Response to the McNaughton Group's Dispositive Motion

On October 16, 2006, the Board received:

- Camwest's Rebuttal to McNaughton's and Snohomish County's Responses to Dispositive Motion
- The McNaughton Group's Reply re Dispositive Motion on Legal Issues 3 and 5
- The McNaughton Group's Reply re Motion to Supplement the Record
- Snohomish County's Reply re Dispositive Motions

On October 30, 2006, the Board issued its Order on Motions. The Order granted Petitioner's motion to supplement the record, denied various motions to dismiss for lack of participation standing, denied Petitioner's motion for summary determination of various issues, granted motions to dismiss Legal Issues 3 and 8, and denied motions to dismiss Legal Issues 5, 7, and 9.

*Briefing and Hearing on the Merits*

Briefing on the merits was filed as noted below.

- November 16, 2006 – The McNaughton Group, LLC's Pre-Hearing Brief, with 15 Exhibits [**McNaughton PHB]**
- November 16, 2006 **–** Declaration of Sue Den in Support of The McNaughton Group LLC's Pre-Hearing Brief, with attached transcripts of segments of County Council July 19, 2006 meeting [see Index 45]
- November 30, 2006 – Intervenor CamWest's Prehearing Brief, with Appendix 1 and 2 [**CamWest Response**]
- November 30, 2006 - Intervenor CamWest's Motion to Supplement the Record, and Declaration of Justin D. Haag in Support of Intervenor CamWest's Motion to Supplement the Record, with 7 Exhibits [**CamWest Motion to Supplement**]
- December 1, 2006 – Snohomish County's Response Brief, with 16 Exhibits
- December 1, 2006 – Snohomish County's Motion to Supplement the Record, with Declaration of Michael Zelinski and 3 exhibits [**County Motion to Supplement**].
- December 6, 2006 - Intervenor's Index to Exhibits and 23 Exhibits
- December 7, 2006 – The McNaughton Group, LLC's Reply [**McNaughton Reply**]

- December 8, 2006 – Snohomish County's Corrected Response Brief [**County Response**], Errata to Snohomish County Response Brief, and Table of Authorities.

No party objected to the CamWest Motion to Supplement or to the County Motion to Supplement. No party objected to the filing of Snohomish County's Corrected Response Brief, which will be designated **County Response** in this FDO.

The Hearing on the Merits was convened at 2:00 p.m., December 14, 2006, in the Chief Sealth Room, Suite 2000, 800 Fifth Avenue, Seattle. Board members Margaret Pageler (Presiding Officer), Edward G. McGuire, and David O. Earling and Board Law Clerk Julie Taylor attended. Petitioner McNaughton was represented by Nancy Rogers, with Andrew Lane, Michael Burnett and corporate counsel Brian Holtzclaw also in attendance. Snohomish County Prosecuting Attorneys John Moffat and Justin Kasting represented Respondent Snohomish County. Intervenor CamWest was represented by Patrick Schneider, with Tom Ehrlichman and corporate counsel Marsha Martin also in attendance.

At the HOM, the Presiding Officer made oral rulings admitting documents requested in the CamWest Motion to Supplement and the County Motion to Supplement. Snohomish County submitted a correct copy of the December 21, 2005, Snohomish County UGA Land Capacity Analysis Technical Report, to be substituted as Substitute Appendix A to Snohomish County's Response Brief. CamWest submitted a copy of the Power Point presentation title "McNaughton v. Snohomish County," used by their attorney to highlight certain portions of his oral argument.

Court reporting services were provided by Rebecca L. Mayse of Byers and Anderson. The Hearing was adjourned at 4:15 p.m. The Board ordered a copy of the transcript.

On December 26, 2006, the Board received the transcript of the Hearing on the Merits. [**HOM Transcript**]

## APPENDIX B

**Legal Issues CPSGMHB Case No. 06-3-0027 – McNaughton v. Snohomish County**

**Public Participation**

1. Did the County violate the requirements of the GMA, specifically *RCW 36.70A.020(11), RCW 36.70A.140, and the County's adopted public participation process*, when the Council considered and adopted significant substantive changes to the FLUM for the SW UGA without providing Petitioner or the general public meaningful opportunity to review and comment on the proposed changes, or following its own internal participation procedures?

**Notice to CTED**

2. Did the County violate the requirements of the GMA, specifically *RCW 36.70A.106* when the Council adopted amendments to the Snohomish County Comprehensive Plan (in the form of an amended FLUM for the SW UGA) without giving 60 days prior notice to the Department of Community, Trade, and Economic Development?

**Isolated Review of Proposed Amendments to the Comprehensive Plan – [Dismissed on Motions]**

3. Did the County violate the requirements of the GMA, specifically *RCW 36.70A.130(2)(b)*: (a) when the Council selectively "revisited" the TYU for the purpose of settling a Growth Management Hearings Board appeal; and (b) when, in response to an appeal challenging the Ordinance adopted by the Council to implement the TYU (Ordinance 05-069), the Council selectively "revisited" only a portion of the entire TYU to amend the boundaries of the SW UGA for one developer's benefit without revisiting any of the other proposals considered as part of the TYU?

**Conformity of County's Action with the Comprehensive Plan**

4. Did the County violate the requirements of the GMA, specifically *RCW 36.70A.120*, when it modified UGA boundaries out of conformity with its comprehensive plan in order to settle a Growth Management Hearings Board appeal of questionable legal merit?

**Consistency with Countywide Planning Policies**

5. Did the County violate the requirements of the GMA, specifically *RCW 36.70A.210(1), and the County's own CPPs* that were effective as of July 19, 2006: (a) when the County expanded the boundaries of the SW UGA by improperly "re-visiting" a portion of the TYU to settle a legally-questionable Growth Management Hearings Board appeal (CPP UG-14d condition 2 – the "TYU Exception"); (b) when the County expanded the boundaries of the SW UGA without showing the requisite compliance with CPP provisions other than the TYU Exception (CPP UG- 14); and (c) when the County expanded

the SW UGA to include irregular boundaries, rather than identifiable physical boundaries (CPP UG-1)?

**Consistency with County Comprehensive Plan**

6. Did the County violate the requirements of the GMA, specifically *RCW 36.70A.070* when it expanded the boundaries of the SW UGA inconsistent with Comprehensive Plan Policies LU 1.A.5, LU 1.A.9, LU 1.A.10, LU 1.A.11, and LU 1.C.1?

**Arbitrary and Discriminatory Action**

7. Did the County violate the requirements of the GMA, specifically *RCW 36.70A.020(6)*: (a) when the County chose to selectively "re-visit" the TYU and amend the boundaries of the SW UGA to accommodate one developer's proposal – the CamWest Proposal – while failing to "re-visit" other proposals considered but rejected by the Council as part of the TYU; (b) when the County chose to selectively "re-visit" the TYU and amend the boundaries of the SW UGA to allow one proposal – the CamWest Proposal -- the opportunity to vest prior to the update of the County's critical areas regulations, while all other UGA proposals, if approved by the Council in November or December 2006, will not likely have the opportunity to become vested until after the critical areas regulations have been updated; and (c) when the County chose to selectively "re-visit" only one proposal – the CamWest Proposal – out of the entire selection of proposals that were considered in the TYU in response to the CamWest Appeal, which challenged the Council ordinance adopting the TYU as a whole?

**SEPA – [Dismissed on Motions]**

8. Did the County violate the requirements of the State Environmental Policy Act ("*SEPA*"), RCW 43.21C.010 et seq., and its implementing regulations, WAC 197-11-010 et seq., when the County only required an Addendum to the EIS for the CamWest Proposal, rather than requiring a supplemental EIS?

**Invalidity**

9. Did the County substantially interfere with the fulfillment of the goals of the GMA, specifically *RCW 36.70A.020(1), (2), (6), and (11)*, such that the Subject Ordinances should be deemed wholly invalid?

## APPENDIX C
## SUPPLEMENTAL EXHIBITS

Supp. Ex.3 Council Motion No. 06-080, A Motion of the Snohomish County Council Approving the Final List of Amendments to the GMA Comprehensive Plan and GMA Development Regulations of the 2006 Annual Docket, including CamWest's proposal on the final docket, dated April 19, 2006 (unsigned copy).

Supp. Ex. 4 Snohomish County Planning Commission Notice of Public Hearing and Deliberations, 2006 Final Docket. Hearing date: Tuesday, October 24, 2006, at Snohomish County Public Administration Building, Everett, WA.

Supp. Ex. 5 Snohomish County Planning Commission Meeting Agenda for Tuesday, October 24, 2006 Hearing.

Supp. Ex. 6 Letter from Tom Ehrlichman dated October 2, 2006, to Snohomish County Planning Commission, regarding CamWest/Sturgell Proposal 2006 Docket.

Supp. Ex. 7 Snohomish County Department of Planning and Development Services Staff Report, dated October 10, 2006, regarding 2006 GMA Comprehensive Plan Final Docket for Planning Commission Public Hearing held on October 24, 2006, with accompanying maps.

Supp. Ex. 8 Determination of Significance and Adoption of Existing Environmental Documents, dated September 29, 2006, regarding adoption of EIS (Final and Draft) of 10-Year Update to GMA Comprehensive Plan, and Addendum No. 1 to EIS, by Snohomish County Department of Planning and Development Services.

Supp. Ex. 9 Minutes of Snohomish County Planning Commission Regular Session, October 24, 2006, deliberations approving the CamWest Proposal as part of 2006 Docket.

Supp. Ex.10 Declaration of Michael Zelinski with attachments: (A) letter to David Andersen, CTED, from Zelinsky, May 25, 2006; (B) letter to David Andersen from Zelinsky, Nov. 17, 2005; and (C) e-mail from Zelinsky to David Andersen Sept. 1, 2005 and Oct. 5, 2005 with attachments.

HOM Ex. 1 Power Point presentation of Patrick Schneider for Intervenor CamWest