

For the second compliance hearing the Board received the following submittals:

- March 24, 2008 County's Supplemental Statement of Actions Taken to Comply – **SSATC**
- May 8, 2008 Petitioners' Response to County SSATC – **Petitioners Response SSATC**
- May 14, 2008 County Reply to Comments on SSATC – **County Reply SSATC**
- May 9, 2008 County's Second Supplemental Statement of Actions Taken to Comply – **2SSATC**
- May 14, 2008 Petitioners' Motion to Supplement – **Petitioners Motion to Supplement**
- May 16, 2008 Petitioners' and Intervenor Response - **Petitioners Response 2SSATC**
- May 16, 2008 County Objection and Motion to Strike – **County Reply 2SSATC**

On May 19, 2008, the Board conducted the Second Compliance Hearing, at 10:00 a.m. at the Chief Sealth Training Center, 20th Floor, 800 Fifth Avenue, Seattle, Washington. Board Member Edward G. McGuire presided. Board members David O. Earling and Margaret A. Pageler, and Board attorney Julie Ainsworth-Taylor also attended. *Pro se* Petitioner Jerry Harless participated as did Melody Allen, representing the Suquamish Tribe, and Tom Donnelly, representing Kitsap Citizens for Responsible Planning. Lauren Rasmussen represented Intervenor Port Gamble S'Klallam Tribe. Shelley E. Kneip represented Respondent Kitsap County. Also attending the hearing were Eric Brown and Nancy Povonanno-Gennan of Kitsap County. Court reporting services were provided by Rebecca L. Mayse of Byers and Anderson, Inc. The Second Compliance Hearing adjourned at 11:50 a.m.

II. PRELIMINARY MATTERS

The first matter addressed at the Second Compliance Hearing was Petitioners' Motion to Supplement the Record with Kitsap County Resolution 078-2008 adopting the 2007 Buildable Lands Report and the 2007 Buildable Lands Report itself (**2007 BLR**). *See* Petitioners' Motion to Supplement. The Board entertained argument from the parties and then ruled that the Board would take **official notice** of Resolution 078-2008 and the 2007 BLR. These Compliance Hearing Exhibits are noted as: **CH Ex. 1** – Resolution 078-2008 and **CH Ex. 2** – 2007 BLR. In light of this ruling, the Board **denied** the County's motion to strike reference to the 2007 BLR in Petitioners' briefing.

III. THE BOARD'S PRIOR NONCOMPLIANCE ORDER

The Board's April 4, 2008, Order Finding Partial Compliance and Finding Continuing Noncompliance [RWIP] and Finding Continuing Noncompliance and Invalidity [Capital Facilities and UGAs] (**4/4/08 Order**), provided in relevant part:

- Kitsap County’s adoption of Ordinance No. 407-2008, has addressed the remand issue pertaining to the ambiguity concerning future development of Wooded Reserve areas at the end of 40-years [40-year limitation]. The Board will enter a **Finding of Compliance** on this aspect of the RWIP program. However, as discussed and detailed *supra*, pertaining to the blurring of resource and rural lands as evidenced by the disclosure statement, and to the document harmonizing RWIP with the goals of the Act the Board finds that the defects are minor; but nonetheless the Board will enter a **Finding of Continuing Noncompliance** and **remand** these matters to the County to take corrective action. Additionally, as noted *supra*, the presence of the RWIP moratorium [Ordinance No. 408-2008] eliminates the need for a determination of invalidity on the RWIP program. Consequently, the Board **rescinds** the Determination of Invalidity for the RWIP program.
- Kitsap County failed to correct the compliance deficiencies in the Capital Facilities Plan (specifically sanitary sewers) and the related UGAs within the compliance period established in the FDO. Therefore the Board enters a **Finding of Continuing Noncompliance and Invalidity** on these issues.

4/4/08 Order, at 14-16.

The Board will first address the RWIP and then the Capital Facilities and UGA remand issues.

IV. DISCUSSION

A. Remand Issue 1 – the RWIP

The Disclosure Statement:

Regarding the *Disclosure Statement*, the Board’s 4/4/08 Order stated, at 9-10:

At the HOM, the Board questioned the County as to why it retained the following language in the disclosure statement: “So long as such forestry operations are in compliance with the Washington Forest Practices Act RCW 76.09 they shall not constitute a nuisance.” The County responded that this sentence was inadvertently left in the final draft that was adopted and that the County intends to delete it. [Footnote omitted.]

The Board is familiar with the local circumstances that have shaped Kitsap County’s policies for rural wooded lands [*Kitsap Citizens for Rural*

Preservation, et al., v. Kitsap County, CPSGMHB Case No. 94-3-0005, Final Decision and Order (Oct. 25, 1994); *Bremerton, et al., v. Kitsap County*, CPSGMHB Case No. 95-3-0039c, Finding of Noncompliance and Determination of Invalidity in *Bremerton* and Order Dismissing *Port Gamble*, (Sep. 8, 1997); and *Bremerton, et al., v. Kitsap County*, CPSGMHB Case No. 04-3-0019c, Final Decision and Order, (Aug. 9, 2004). Owners of large tracts of timberland [Footnote omitted] within the County wish to continue harvesting timber while at the same time developing residential subdivisions on portions of their own lands. Forestry practices are acknowledged by statute to be incompatible with residential development. [RCW 36.70A.060(1)(b)]. Nevertheless, some Kitsap timber owners want to be able to create residential development that is incompatible with forestry while at the same time seeking to be protected from the consequences of incompatibility. However, the fact remains that some degree of forestry is permitted in the rural areas.

The Board recognizes the County's desire to have some form of disclosure statement/plat notice as a consumer protection device. The Board also acknowledges that the County has taken significant steps to clarify the distinction between resource and rural lands. However, retention of the "shall not constitute a nuisance" language leans heavily towards protection for the timber industry, not for the consumers of residential lots in the RWIP and continues to blur the distinction between resource and rural designations. Therefore, the Board finds and concludes that the disclosure statement/plat notice aspect of the RWIP program merits a finding of **Continuing Noncompliance** and this provision will be **remanded** for the County to take corrective action.

In response to this remand issue, the County adopted Ordinance No. 411-2008, which deleted the sentence, "So long as such forestry operations are in compliance with the Washington Forest Practices Act, RCW 76.09, they shall not constitute a nuisance." from the RWIP regulations. *See* 2SSATC, at 3; and Attachment A, Ordinance No. 411-2008, Section 1, at 7.

None of the Petitioners or Intervenor commented on this remand issue. *See* Petitioners Response 2SSATC, at 1-10.

Therefore, with respect to the disclosure statement revision, the Board will enter a **Finding of Compliance** for the County on this remand issue.

The Goal Harmonizing Document:

Regarding the *Goal Harmonizing Document*, the Board's 4/4/08 Order stated, at 11:

Generally, the Board agrees with the County. The “Goal Harmonizing Document” prepared by the County explains the RWIP [and TDR] program and then methodically evaluates each of the GMA’s goals in light of the general provisions of the two programs. However, the Board finds that Petitioners make a valid point by asserting that there needs to be an explanation of how the RWIP is responding to local circumstances.

The Rural Element is required to provide for a variety of rural densities and uses. RCW 36.70A.070(5)(b). The Board construes the purpose of .070(5)(a) as acknowledging that local circumstances may lead to different approaches and programs to achieve the variety of densities and uses. Here, the County is offering the RWIP as a means of meeting the GMA requirement for a variety of densities and uses, but has not explained how the RWIP addresses the unique local circumstances in the County. To comply, the County merely needs to briefly explain what local circumstances the RWIP is designed to address. Therefore, the Board finds **Continuing Noncompliance** and will **remand** the Goal Harmonizing Document for this simple explanation to be added. The Board notes that Petitioners’ continued questioning of rural densities was addressed in the FDO in the discussion of clustering, the bottom line being that the clustering provisions yielded rural densities. [Footnote omitted.]

In response, the County modified the document to add several paragraphs explaining the “local circumstances” the RWIP program was designed to address. *See* 2SSATC, at 3; Attachment B, at 9-14. The County contends these additions merit a finding of compliance on this remand issue. 2SSATC, at 3-4.

Petitioners and Intervenor take issue with the County’s revisions to its Goal Harmonizing Document, contending that the RWIP is not in harmony with Goals 1, 2, 9 and 10. Petitioners Response 2SSATC, at 2-9. Petitioners assert that the County has done little to minimize the abundance of vested nonconforming lots – “legacy lots” – in rural Kitsap County and that the RWIP will exacerbate this problem. *Id.* at 3-4. Further, Petitioners point out that the County’s recent 2007 BLR indicates that the urban/rural split for development in the County during 2000-2005 is 57% urban to 43% rural, contrary to the Kitsap County-wide Planning Policy (CPP) target of 76% urban to 24% rural. *Id.* at 5-7. Finally, Petitioners contend that the “permanent open space in the RWIP is a misnomer,” since other uses are permitted; and the alleged interconnectivity of open spaces will not be achieved with clustering due to the discretion allowed in the permitting process. *Id.* at 7-9.

In reply the County contends that Petitioners and Intervenor are attempting to re-litigate the RWIP issues decided in the FDO and 4/4/08 Order. County Reply, at 4-6. Respondent asserts that the remand Order required the County to revise the Goal Harmonizing Document in order to articulate the local circumstances addressed by the RWIP, yet

Petitioners continue to argue about the merits of the RWIP and its anticipated effects on legacy lots and open space. *Id.*

The pre-GMA nonconforming lots – legacy lots – that Petitioners are concerned about are not unique to Kitsap County. Jurisdictions throughout Puget Sound, and the state, have such lots to contend with in their GMA planning. Establishing deadlines for development on such lots and regulations requiring lot aggregations are methods to deal with this concern that Kitsap County should consider. However, the RWIP program was not designed to address existing legacy lots; rather it is meant to provide incentives for conserving open space while allowing limited timber production and *rural* residential development on lands designated as “Rural Wooded.” Further, participation in the RWIP is limited to parcels of 20 acres or more,² and existing nonconforming lots below this threshold would not be eligible. Petitioners’ fear that development of RWIP residential clusters will spawn further development of legacy lots is speculative, but may not be unwarranted.³ Nonetheless, the County’s treatment of legacy lots is beyond the scope of the Board’s review for determining compliance on the limited remand issue for the RWIP.

Likewise, whether the County is achieving its urban/rural growth target is beyond the scope of this remand proceeding. However, the Board notes that the prior Buildable Lands Report indicated that from 1995-1999 the split was 43% urban and 57% rural. Thus, the change from 2000-2005 to 57% urban and 43% rural is a move in the right direction – encouraging growth in the urban areas.⁴ Again, the Petitioners’ arguments do not go to the remand issue of modifying the Goal Harmonizing Document to reflect local circumstances.

Also, the Board notes that the time to have challenged the uses permitted in the permanent open space of the RWIP was at the Hearing on the Merits or at the prior compliance hearing. Thus the Board finds that Petitioners’ argument is not within the scope of this limited remand proceeding.

The Board’s August 15, 2007 FDO and 4/4/08 Order addressed the merits of the County’s RWIP program. The arguments offered by Petitioners in this proceeding continue to attack the merits of the RWIP. For the Goal Harmonizing Document, the Board’s remand was specific to expanding the County’s explanation of the local circumstances supporting the need for the RWIP. This the County has done. *See* 2SSATC, at 3; Attachment B, at 9-14. Consequently, the Board will enter a **Finding of Compliance** for the County on this remand issue.

² *See* Kitsap County Code 17.301.080B; Ordinance No. 411-2008, Section 1, at 2.

³ The Board notes that the County’s 2007 BLR indicates that “84% of all new permitted housing in the rural areas was located on pre-existing lots.” 2007 BLR, at 1. However, the BLR does not indicate lot size or how many of these lots were nonconforming.

⁴ Additionally, the County indicates “the [CPP urban/rural split] target may be reaffirmed or explicitly modified through the KRCC process during the next five year population distribution review.” *See* 2007 BLR, at 1-2.

B. Remand Issue 2 – the Capital Facilities Plan and UGAs

Capital Facilities and UGAs – The August 15, 2007 FDO:

The Board stated, in its August 15, 2007 FDO:

3. As discussed *supra*, the Plan Update [Ordinance No. 370-2006], specifically the Capital Facility Plan, at Appendix A, **does not comply** with the requirements of RCW 36.70A.070(3) and .020(12), since it does not demonstrate that adequate public facilities and services [*sanitary sewer*] will be available within the planning period for the population within certain expanded urban growth areas.
4. . . .
5. Additionally, as discussed *supra*, the Board has found that the continued validity of the Capital Facility Plan in Appendix A, related to certain sanitary sewer provisions, in the 10-Year Plan Update [Ordinance No 370-2006], substantially interferes with the fulfillment of Goal 12 – RCW 36.70A.020(12). . . . Consequently, the Board has entered a **determination of invalidity** with respect to these noted Plan Update . . . provisions.

FDO, at 65.

In its September 13, 2007 Order on Reconsideration, the Board further stated:

3. The Board hereby enters a **determination of invalidity** for the *Silverdale* UGA expansion, *Central Kitsap* UGA expansion, *West Bremerton* UGA expansion, *Gorst* UGA expansion and the *Port Orchard* UGA expansion, for substantially interfering with the fulfillment of Goal 12 – RCW 36.70A.020(12). Further, the Board refines its determination of invalidity for the County’s Capital Facilities Element, Appendix A, pertaining to sanitary sewers, to be limited to those provisions dealing with those entities (*i.e.* Kitsap County, Port Orchard and Bremerton) that allegedly provide sanitary sewer service to these five UGA expansion areas.

Order on Reconsideration, at 4.

Thus, the Capital Facilities Plan, as it related to sanitary sewers, and five UGA areas [Silverdale, Central Kitsap, West Bremerton, Gorst, and Port Orchard] were determined by the Board to be noncompliant and invalid.

The County was unable to meet the compliance deadline indicated in the FDO. Consequently, the 4/4/08 Order found continuing noncompliance and invalidity on this remand issue. Although the County's work on this issue was not completed within the compliance schedule, the County had taken action to address it by the first compliance hearing and submitted its SSATC at that hearing. As a result, the Board accelerated the second compliance hearing while allowing adequate time for Petitioners and Intervenors to comment on the SSATC and time for the County to reply.

The County's Remand Action and Position of the Parties:

In its SSATC, the County explained that it enacted Ordinance No. 409-2008, which adopted changes to certain provisions of the County's Comprehensive Plan, changed provisions in the Capital Facilities Plan, and added several technical addenda to the CFP for sewer service in the five expanded UGA areas.⁵ The County also renewed the preexisting moratorium until September 7, 2008 for the five UGA expansion areas. *See* Ordinance No. 410-2008.

The Comprehensive Plan amendments: 1) associate the Gorst UGA with the City of Bremerton which is planning to serve the area; 2) commit the County to work with the City of Port Orchard and the West Sound Utility District to ensure the respective UGAs are served within the 20-year planning period; and 3) incorporate the new Central Kitsap Wastewater Facilities Plan, which describes how the County will serve Silverdale and Central Kitsap UGAs. SSATC, at 6.

The amendments to the Capital Facilities Plan – Appendix A – clarify the entities responsible for providing sewer service for the various areas of the County and update the inventories of existing systems, including locations and capacities. Bremerton is identified as the provider of sewer service for the West Bremerton and Gorst UGAs; Port Orchard and the West Sound Utility District are indicated as the sewer providers for the Port Orchard UGA. The County provides sewer service to the Silverdale and Central Kitsap UGAs.⁶ *Id.* at 7.

The several technical addenda address the sanitary sewer systems serving the various UGAs. The Silverdale and Central Kitsap UGAs are intended to be covered by the "Central Kitsap Wastewater GMA Compliance Plan" (**CKW Plan**). The CKW Plan extends to 2025 and contains the necessary components of a Capital Facilities Plan as identified in RCW 36.70A.070(3), including a needs assessment and financing of needed improvements. This document also recognizes that, in some instances, properly

⁵ *See* Ordinance No. 409-2008, Sections 2 [Land Use], 3 [Port Orchard/Central Kitsap Subarea], 4 [Silverdale Subarea], 5 [Appendix A – 6-year capital facilities plan], and 6 [incorporating the Technical Addenda, Attachments A, B, C and D].

⁶ The County is also in discussions with the City of Bremerton regarding the transfer of certain sewer facilities serving the West Bremerton UGA to the City.

functioning septic systems may be continued so as to allow limited groundwater supplies to be recharged. Also alternative technologies such as water reuse and biosolids disposal are discussed as potential options for the County in ensuring that wastewater facilities will be adequate and available to serve the UGAs within the 20-year planning period. *Id.* at 8-13; and Attachment A to Ordinance No. 409-2008.

For West Bremerton and Gorst UGAs, the City of Bremerton will provide sewer service. The technical addenda incorporated in the County's CFP includes: 1) the "City of Bremerton Sewer UGA Planning" (**Bremerton UGA Sewer Plan**) which addresses needed improvements and financing strategies; and 2) City of Bremerton Resolution 3049 providing assurances that Bremerton will provide sanitary sewer service for the West Bremerton and Gorst UGAs. *Id.* at 13-15; and Attachment B to Ordinance No. 409-2008.

For the Port Orchard UGA, the County identifies two service providers of sanitary sewer – the City of Port Orchard and the West Sound Utility District (formerly Karcher Creek Sewer District). The technical addenda incorporated into the County's CFP include: 1) "City of Port Orchard Comprehensive Sanitary Sewer Plan Update" (**Port Orchard UGA Sewer Plan**) which identifies needs and funding options; 2) Port Orchard Resolution 034-07 where the City commits to serving its portion of the UGA area; 3) "Karcher Creek Sewer District 2007 Comprehensive Sewer Plan" (**Sewer District UGA Plan**) which identifies needs and funding options; and 4) West Sound Utility District Resolution 02-07, committing the District to providing service for its portion of the area. *Id.* at 15-16; and Attachments C and D to Ordinance No. 409-2008. The County also notes that a petition for a ULID [utility local improvement district] was submitted to the County to bring service closer to existing areas. *Id.* at 16.

The County contends that the sum of these actions demonstrate that the County can ensure that the needed sanitary sewer services will be adequate and available to support development within the planning horizon – 2025. Consequently, the County urges the Board to enter a finding of compliance on the Capital Facilities Element and UGA remand issues. *Id.* at 17.

Although Petitioners and Intervenor agree that the County has undertaken more sewer planning since the FDO than it had previously done, they continue to assert that the County's actions fail to comply with the GMA. Petitioners Response SSATC, at 1-3. Petitioners argue that the County's efforts "fail to demonstrate that sanitary sewers will be adequate and available within *existing* UGAs (prior to the most recent UGA expansions invalidated by the Board) *within the twenty year planning period* immediately following initial designation of each particular UGA." *Id.* at 3, (emphasis supplied). The premise to this argument is that sanitary sewers are inadequate within existing UGAs; therefore, the expansion areas must also be deficient. Additionally, Petitioners assert that the County is using a "rolling" twenty year period to skirt the GMA's requirement to provide the necessary facilities. *Id.* at 4-5. Petitioners claim that the latest effort of the County is geared toward having services provided in the five UGA expansion areas by 2025, but

ignores deficiencies in the *existing* UGAs which are required to be served by either 2012, 2017, or 2025, depending upon the date of the initial UGA designation. *Id.* at 6-10. In support of their argument, Petitioners identify an area in the City of Bremerton, along Marine Drive, and an area in the Port Orchard UGA along SE Salmonberry Road that have neither existing sewer nor planned sewer capacity. *Id.* at 7.

In reply, the County counters that Petitioners are raising entirely new issues and that the County adhered to the direction provided in the Board's FDO by addressing the provision of sanitary sewer service in the five expanded UGA areas. County Reply SSATC, at 1-5. The County notes that Petitioners find little fault with the County's work on remand, but rather focus on alleged deficiencies within preexisting UGAs that were not part of the original appeal, or part of the Board's FDO. *Id.* at 6-9. The County notes that the two alleged noncompliant existing areas are served by other jurisdictions, not the County, and therefore Petitioners' challenge is misplaced. *Id.* at 10-11. The County urges the Board to find compliance on its remand action. *Id.* at 15.

The County took varying approaches to the different UGAs at issue; consequently, the Board will examine the merits of each area respectively.

Silverdale and Central Kitsap UGAs:

Regarding the Silverdale and Central Kitsap UGA, the Board stated in the FDO:

Given that the Central Kitsap UGA and the Silverdale UGA are reliant upon sanitary sewer service from the County and the County acknowledges that by 2025, over 7,000 residents in that sub-area will likely go unsewered and un-served, the Board finds and concludes that the County has not complied with the provisions of RCW 36.70A.020(12) and .070(3). *The County may choose to rethink or redraw the UGAs in these areas, accommodate a lesser OFM population [within the range projected], modify its urban densities to increase the efficiency of the existing sewer system without extensions for new development, or draw up a plan to service the area.* This is not to say that the Board is requiring each existing residence to be connected, but that the service provider should have the capacity (*i.e.* treatment facilities, trunk lines) to make adequate service available to the area.

FDO, at 26, (emphasis supplied).

As a threshold question, the Board addresses whether the Board's FDO was limited only to the proposed UGA expansion areas, or whether the remand pertained to the entire area of the UGAs, including existing areas. In short, assessment of the ability to provide sanitary sewer service to a proposed expansion area for a UGA requires that the service provider(s) evaluate the UGA as a whole, including existing as well as proposed expansion area.

First, the Board notes that its FDO did in fact speak to *existing* areas as well as the expanded UGAs.

The Board finds and concludes that the County's adoption of Ordinance No. 370-2006, specifically the CFP at Appendix A, was **clearly erroneous**. Additionally, the Board finds and concludes that the County **has not complied with RCW 36.70A.020(12) and 36.70A.070(3)**'s mandate to provide necessary services to support *existing* and new *development within the UGAs within the 20-year planning period*.

FDO, at 26-27, (italics supplied).

Second, the Board explained the importance of the County being confident that services can be provided to areas it was considering for inclusion in a UGA, whether the County or another service provider would supply the services necessary to support urban development. *See* FDO, at 24.

Third, the FDO suggested several choices for the County in addressing the remand issue:

- Rethink or redraw the UGAs;
- Accommodate a lesser OFM population;
- Modify urban densities to increase the efficiencies of existing sewer without extensions for new development; or
- Draw up a plan to serve the area.

Each option, by necessity and implication, involves reassessing the *entire UGA* – existing and proposed expansion areas – to evaluate service capabilities within the planning horizon. The County chose the last option – Draw up a plan to serve the area – and produced the CKW Plan. The CKW Plan encompasses the *entire* Silverdale and Central Kitsap UGAs – the existing UGAs and proposed expansion areas. *Compare* Plates 1 and 2 of the CKW Plan *with* the County's Comprehensive Plan Land Use Maps – Figure 2.1 and 2.2. The County contends that the CKW Plan ensures that sewer service will be adequate and available to support development in the Silverdale and Central Kitsap UGAs within the 20-year planning horizon. SSATC, at 8-13.

Review of the maps for the Central Kitsap UGA Conceptual Plan for Wastewater Conveyance and the Silverdale Conceptual Plan for Wastewater Conveyance (Plates 1 and 2, respectively, in the CKW Plan) illustrate the locations of existing, replacement and future lift stations, force and gravity mains and collectors. Both maps show facilities extending throughout the length and width of the respective UGA borders and parcels located in relative proximity to the existing, replacement or future facilities. It appears to the Board that the CKW Plan, if executed, will ensure that sanitary sewer facilities will be adequate and available to support existing and new urban development in the Silverdale and Central Kitsap UGAs.

The only criticism Petitioners offer for either of these UGAs is that Table SS.2 (Ordinance No. 409-2008, at 16) indicates that “in 2012 there will be an unserved population of 11,305 persons in the Central Kitsap Sewer Service Area [UGA] and 179 in Navy Yard City.” Petitioners Response, Footnote 15, at 7. Petitioners contend that 2012 is the end of the 20-year planning horizon since the UGAs were initially designated in the County’s 1994 and 1996 Plans. *Id.* at 6.

This assertion is without merit for two reasons. First, as the County correctly notes, the County’s Comprehensive Plan was found compliant in 1998; therefore, the 20-year planning horizon for this area ends in 2018, not 2012 as asserted by Petitioners. County Response SSATC, at 7; *See also Kitsap Citizens for Responsible Planning & Harless v. Kitsap County (KCRP VI)*, CPSGMHB Case No. 06-3-0007, Order Finding Compliance, (Nov. 5, 2007)⁷ and *Kitsap County v. CPSGMHB*, 138 Wn. App. 863, 879-880, 158 P.3d 638 (2007). Second, the Board notes that Table SS.2 indicates that there will be no unsewered population in 2025. Therefore, sometime between 2012 and 2025 the remaining unsewered population will have adequate service made available. The GMA’s requirement for a six-year financing plan [covering 2012-2018 for the unexpanded Central Kitsap UGA and the 2019-2025 financing plan for this recent UGA expansion] and the GMA requirement to reassess the land use element if probable funding falls short of meeting existing needs, provide the necessary safeguards to assure the County’s UGA, land use and capital facilities elements are coordinated and consistent. RCW 36.70A.070(3)(d) and (e).

The Board finds and concludes that the adoption of Ordinance No. 409-2008, as it relates to the Silverdale and Central Kitsap UGAs, **complies** with RCW 36.70A.020(12) and RCW 36.70A.070(3). The Board will enter a **Finding of Compliance** and **Rescind the Determination of Invalidity**.

Gorst UGA:

Regarding the Gorst UGA, the Board stated in the FDO:

Regarding the Gorst UGA, the Board finds and concludes that the County has not indicated how or who will address the septic system failure issue [footnote omitted] for the Gorst area. Thus, *the County should either retract the UGA, increase densities, or obtain assurances that sanitary sewer service will be adequate and available within the 20-year period for these areas.*

⁷ In that Order the Board also concluded, at 9:

[A]reas included in [UGA] *expansion areas* must have adequate urban services available within 20 years of the area’s date of inclusion in the UGA.

FDO, at 26, (emphasis supplied).

Again, the Board notes that of the choices mentioned, each involve a reassessment of the entire UGA – existing and proposed expansion areas. Since the County does not serve the Gorst area, it worked with Bremerton, the sanitary sewer service provider, to obtain assurances that sanitary sewer would be adequate and available for the entire Gorst UGA within the 20-year planning horizon. The Bremerton UGA Sewer Plan and Bremerton Resolution 3049 discussed *supra*, evidence this assurance. The Board notes that the Bremerton UGA Sewer Plan includes the entire Gorst UGA. *Compare* Bremerton UGA Sewer Plan, Figures 1 and 4 *with* the County’s Comprehensive Plan Land Use Maps – Figure 2.1 and 2.2.

Petitioners offer no comment or criticism of this remand action by the County.

The Board finds and concludes that the adoption of Ordinance No. 409-2008, as it relates to the Gorst UGA [including Attachment B], **complies** with RCW 36.70A.020(12) and RCW 36.70A.070(3). The Board will enter a **Finding of Compliance** and **Rescind the Determination of Invalidity**.

West Bremerton and Port Orchard UGAs – sanitary sewer:

Regarding the West Bremerton and Port Orchard UGAs, the Board stated in the FDO:

For the West Bremerton and Port Orchard UGAs, again, *the County should retract UGAs, increase densities, or obtain assurances that sanitary sewer service will be adequate and available within the 20-year planning period for these areas.* While the Board’s analysis has focused on sewer services, other capital facilities may be similarly deficient in providing *service to existing residents* in the UGA. The CFE must take into account, through its inventory and plan, the urban services needed *throughout the UGA*, not just on its developing fringe, over the 20-year planning period.

FDO, at 26 (emphasis supplied).

Here again, the Board notes that each of the choices offered in the FDO requires consideration of the entire UGA areas. As it did with the Gorst UGA, the County, which does not serve either area, sought and obtained assurances that sanitary sewer would be adequate and available within the 20-year planning horizon for the West Bremerton and Port Orchard UGAs.

For the West Bremerton UGA, the City of Bremerton provided the assurance. The Bremerton UGA Sewer Plan and Resolution 3049 discussed *supra*, evidence this assurance. The Board notes that the Bremerton UGA Sewer Plan includes the entire West

Bremerton UGA. *Compare* Bremerton UGA Sewer Plan, Figures 1 and 3 *with* the County's Comprehensive Plan Land Use Maps – Figure 2.1 and 2.2.

For the Port Orchard UGA, which is served by two different providers, the assurances are given by the City of Port Orchard and the West Sound Utility District. The Port Orchard UGA Sewer Plan and Port Orchard Resolution 034-07 discussed *supra*, evidence the commitment of the City of Port Orchard; and the Sewer District UGA Plan and West Sound Utility District Resolution 02-07 discussed *supra*, evidence the commitment of the Utility District. The Board notes that the Port Orchard Sewer UGA Plan and the Sewer District UGA Plan cover the entire Port Orchard UGA. *Compare* Port Orchard UGA Sewer Plan, Figures 2, 5, 6, 9 and 10; and Sewer District UGA Plan, various maps *with* the County's Comprehensive Plan Land Use Maps – Figure 2.1 and 2.2.

However, Petitioners raise two objections, one apparently to the *original* Bremerton UGA and another to the Port Orchard UGA. First, Petitioners contend that an area within the city limits of Bremerton, along Marine Drive, has neither existing nor planned sewer service; therefore the County's compliance efforts should be found noncompliant. Petitioners Response SSATC, at 6-7. The County correctly notes, first, that this area is within the City of Bremerton, which the GMA requires to be designated as a UGA; second, the Bremerton UGA Sewer Plan includes a pump station at the access point to Marine Drive to make the sewer accessible; and third, Petitioners' complaint should be lodged against the City, not the County. County Reply SSATC, at 10-11. The Board agrees with the County.

Petitioners raise a second objection, claiming that an area along SE Salmonberry Road in the Port Orchard UGA is neither presently sewered nor proposed for sewer by the West Sound Sewer District; therefore, the County's compliance effort should be found noncompliant. Petitioners Response SSATC, Footnote 17, at 7. In the Sewer Districts' defense, the County notes that the District's Sewer Plan shows existing and proposed sewer on three sides of the area noted by Petitioners, which illustrates that service can be made available, and that the northern portion of the area is a wooded County Park requiring limited service. The County contends that Petitioners have not carried their burden of proof on this issue. County Reply SSATC, at 11. Again, the Board agrees with the County – **Petitioners have not carried their burden of proof** in demonstrating noncompliance with the GMA on this remand issue.

The Board finds and concludes that the adoption of Ordinance No. 409-2008, as it relates to the West Bremerton and Port Orchard UGAs [including Attachment B, C and D], **complies** with RCW 36.70A.020(12) and RCW 36.70A.070(3). The Board will enter a **Finding of Compliance** and **Rescind the Determination of Invalidity**.

III. FINDING OF COMPLIANCE

Based upon review of the GMA, the August 15, 2007 FDO, the September 13, 2007 Order on Motion to Reconsider, the October 25, 2007 Order on Motion to Clarify, Modify or Rescind, the April 4, 2008 Compliance/Noncompliance Order, Ordinance No. 409-2008 and Attachments, Ordinance No. 411-2008, the SATC, the SSATC, the 2SSATC, the briefing filed by the parties, the arguments of the parties, and having deliberated on the matter, the Board enters a **Finding of Compliance** and **Rescission of Invalidity** for Kitsap County in CPSGMHB Case No. 07-3-0019c.

IV. ORDER

Based upon review of the GMA, the August 15, 2007 FDO, the September 13, 2007 Order on Motion to Reconsider, the October 25, 2007 Order on Motion to Clarify, Modify or Rescind, the April 4, 2008 Compliance/Noncompliance Order, Ordinance No. 409-2008 and Attachments, Ordinance No. 411-2008, the SATC, the SSATC, the 2SSATC, the briefing filed by the parties, the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

- Kitsap County's adoption of Ordinance No. 409-2008, and Attachments A-D, has removed substantial interference with the GMA's Goals 12 [RCW 36.70A.020(12)]. Therefore, the Board **rescinds the determination of invalidity**.
- Kitsap County's adoption of Ordinance Nos. 409-2008, with Attachments A-D and Ordinance No. 411-2008 corrected the compliance deficiencies found by the Board and the County now **complies** with the goals and requirements of the GMA [RCW 36.70A.020(12), RCW 36.70A.070(3), and RCW 36.70A.070(5)] as set forth in the Board's August 15, 2007 Final Decision and Order, September 13, 2007 Order on Motion to Reconsider, and the April 4, 2008 Order Finding Partial Compliance [TDRs] and Finding Continuing Noncompliance [RWIP] and Finding Continuing Noncompliance and Invalidity [Capital Facilities and UGAs]. The Board therefore enters a **Finding of Compliance** for the matter of *Suquamish Tribe, Kitsap Citizens for Responsible Planning and Jerry Harless v. Kitsap County [Port Gamble S'Klallam Tribe – Intervenor]* with respect to the Petitioners' challenge.
- CPSGMHB Case No. 07-3-0019c is **closed**.

So ORDERED this 5th day of June, 2008.

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 242-02-832.⁸

⁸ Pursuant to RCW 36.70A.300 this is a final order of the Board.

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

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

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

APPENDIX A

On August 15, 2007, the Central Puget Sound Growth Management Hearings Board issued its Final Decision and Order (**FDO**) in the above captioned case. In the FDO the Board found the County's Capital Facility Plan, Rural Wooded Incentive Program, and Transfer of Development Rights Program noncompliant with the GMA. The Board entered a determination of invalidity for all three noncompliant provisions. A compliance schedule was established in the FDO. *See FDO*, at 64-67.

On September 13, 2007, the Board issued its "Order on Motion for Reconsideration." The Board granted Petitioners' motion for reconsideration and invalidated five UGA expansion areas⁹ that were unsupported by urban services – sewer service – in the Capital Facility Plan. *See 9/13/07 Order*.

On October 25, 2007, the Board issued its "Order on Motion to Clarify, Modify or Rescind." The Board denied the County's request to modify the Board's decision pertaining to the five UGA expansion areas. *See 10/25/07 Order*.

On January 29, 2008, the Board issued its "Order Denying Motion for Extension of Compliance Period." The County stated that it needed more time to comply regarding the CFP and UGAs and asked that the 180-day deadline set forth in the FDO be extended. Citing statutory limitations, the Board denied the County's request. *See 1/29/08 Order*.

On March 24, 2008, the Board conducted the Compliance Hearing. At the hearing the County filed "Kitsap County's Supplemental Statement of Actions Taken to Comply;" "Respondent's Supplemental Compliance Index to the Record," noting 49 items; and 7 attached Exhibits.¹⁰

On April 4, 2008, the Board issued its "Order Finding Partial Compliance and Finding Continuing Noncompliance [RWIP] and Finding Continuing Noncompliance and Invalidity [Capital Facilities and UGAs]."

On May 7, 2008, the Board received "Petitioners' Response to Kitsap County's March 24, 2008 Supplemental Statement of Actions Taken to Comply." This filing was timely and was filed in response to the Capital Facilities and UGA remand issues.

On May 14, 2008, the Board received "Respondent's Reply to Petitioners' Response to the County's Supplemental Statement of Actions Taken to Comply." This filing was timely.

⁹ The invalidated UGA expansion areas are: Silverdale, Central Kitsap, West Bremerton, Gorst, and Port Orchard.

¹⁰ The attached Exhibits to the SSATC are as follows: Ordinance No. 409-2008 [**Ex. I** – Index #24]; Central Kitsap Wastewater GMA Compliance Plan, February 2008 [**Ex. A**]; City of Bremerton Resolution No. 3049 and City of Bremerton Sewer UGA Planning, February 2008 [**Ex. B**]; City of Port Orchard Resolution No. 034-07 [**Ex. C**]; West Sound Utility District Resolution 02-07 [**Ex. D**]; Ordinance No. 410-2008 [**Ex. II** – Index #49]; and Comment letter from Danny Horovitz [Index #20].

On May 7, 2008, the County filed “Kitsap County’s Second Supplemental Statement of Actions Taken to Comply,” with two attached Exhibits.¹¹ This filing was timely.

On May 13, 2008, the Board received “Petitioners’ Suquamish Tribe and Kitsap Citizens for Responsible Planning and Intervenor Port Gamble S’Klallam Tribe’s Motion to Supplement the Second Supplemental Compliance Index to the Record,” with two attached proposed Exhibits.¹²

On May 14, 2008, the Board received “Petitioners’ Suquamish Tribe and Kitsap Citizens for Responsible Planning and Intervenor Port Gamble S’Klallam Tribe’s Response to Kitsap County’s Second Supplemental Statement of Actions Taken to Comply.”

Also, on May 14, 2008, the Board received “Kitsap County’s Opposition to Petitioners’ Motion to Supplement the Record Re: County’s Second Statement of Actions Taken to Comply and Motion to Strike.”

On May 19, 2008, the Board conducted the Second Compliance Hearing, at 10:00 a.m. at the Chief Sealth Training Center, 20th Floor, 800 Fifth Avenue, Seattle, Washington. Board Member Edward G. McGuire presided. Board members David O. Earling and Margaret A. Pageler, and Board Attorney Julie Ainsworth-Taylor also attended. *Pro se* Petitioner Jerry Harless participated as did Melody Allen, representing the Suquamish Tribe, and Tom Donnelly, representing Kitsap Citizens for Responsible Planning. Lauren Rasmussen participated for Intervenor Port Gamble S’Klallam Tribe. Shelley E. Kneip represented Respondent Kitsap County. Also attending the hearing were Eric Brown and Nancy Povonanno-Geennan of Kitsap County. Court reporting services were provided by Rebecca L. Mayse of Byers and Anderson, Inc. The Second Compliance Hearing adjourned at 11:50 a.m.

¹¹ The attached Exhibits to the SSATC2 are as follows: Ordinance No. 411-2008, amending the RWIP [**Ex. A**]; and Rural Wooded Incentive and TDR Programs – GMA Evaluation – the “Goal Harmonizing Document” [**Ex. B**].

¹² The attached proposed Exhibits are: Resolution 078-2008, Adopting the County’s 2007 Buildable Lands Report; and the 2007 Buildable Lands Report.