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**State of Washington  
GROWTH MANAGEMENT HEARINGS BOARD  
FOR EASTERN WASHINGTON**

KITTITAS COUNTY CONSERVATION et al.,

Petitioners,

v.

KITTITAS COUNTY,

Respondent,

BUILDING INDUSTRY ASSOCIATION OF  
WASHINGTON (BIAW), CENTRAL  
WASHINGTON HOME BUILDERS  
ASSOCIATION (CWHBA), MITCHELL  
WILLIAMS, d/b/a MF WILLIAMS  
CONSTRUCTION CO., TEANAWAY RIDGE,  
LLC, KITTITAS COUNTY FARM BUREAU

Intervenors,

ART SINCLAIR and BASIL SINCLAIR,

Amicus Parties.

Case No. 07-1-0004c

**FIRST ORDER FINDING  
COMPLIANCE AS TO LEGAL  
ISSUES 4 and 13** (RE: Application  
Nos. 06-01, 06-05, 06-06, and 06-  
13), **LEGAL ISSUE 6** (RE:  
Ellensburg UGA) **AND  
RESCINDING INVALIDITY AS TO  
LEGAL ISSUES 4 and 13** (RE:  
Application Nos. 06-01, 06-05, 06-  
06, and 06-13) **AND LEGAL ISSUE  
6 AND 14** (RE: Ellensburg UGA)

**FIRST ORDER FINDING  
CONTINUING NON-  
COMPLIANCE AS TO LEGAL  
ISSUES 2, 3, and 4** (RE:  
Application Nos. 06-03, 06-04, and  
06-17), **5, 7, 12, and 13** (RE:  
Application Nos. 06-03, 06-04, and  
06-17), **AND CONTINUING  
INVALIDITY AS TO LEGAL  
ISSUES 4 AND 13** (RE:  
Applications Nos. 06-03, 06-04, and  
06-17) and **LEGAL ISSUES 6 AND  
14** (RE: City of Kittitas UGA)

**ORDER ACKNOWLEDGING STAY  
and ABEYANCE OF COMPLIANCE  
PROCEEDINGS AS TO LEGAL  
ISSUES 1, 10, and 11**

1 **I. PROCEDURAL HISTORY**

2 August 2007 Final Decision and Order of the Board

3 On August 20, 2007, the Eastern Washington Growth Management Hearings Board  
4 (Board) issued its Final Order and Decision (FDO) in the above-captioned matter. The case  
5 represented a challenge to Kittitas County's (County) enactment of Ordinance 2006-63  
6 amending its Comprehensive Plan (CP) pursuant to RCW 36.70A.130. In the FDO, the Board  
7 found Kittitas County had complied with the GMA in some regard, but several of its actions  
8 were also non-compliant and, for some, warranted the imposition of a Determination of  
9 Invalidity. The Board concluded, in pertinent part:<sup>1</sup>

- 10 5. Kittitas County improperly enlarged the UGAs of the Cities of Ellensburg  
and Kittitas and this action is found out of compliance with the GMA.
- 11 6. Kittitas County improperly de-designated four parcels of Agricultural  
12 Resource Lands and this action is found out of compliance with the  
GMA.
- 13 7. Kittitas County has not properly required that all plats, short plats,  
14 development permits, and building permits issued for development  
15 activities on, or within five hundred feet of lands designated as  
16 resource lands contain a notice that the subject property is within or  
17 near designated resource lands and this action is found out of  
18 compliance with the GMA.
- 19 8. Kittitas County has not included in its Comprehensive Plan an  
20 explanation of how the criteria for the designation of Agricultural  
21 Resource Lands are to be considered and is out of compliance with the  
22 GMA.
- 23 9. Kittitas County has allowed improper densities in the Rural element of  
24 the County when it allowed UGNs, Gold Creek, and zonings Agricultural-  
3 and Rural 3.
- 25 10. Kittitas County has failed to adopt specific, directive policies in the CP  
26 that prospectively maintain a compliant mix of rural densities and set

<sup>1</sup> August 20, 2007 FDO, at 82-83.

1 enforceable criteria to guide the development or amendment of the  
2 zoning code or other regulations that are to implement the CP and for  
3 determining when and where the rezone applications should be  
approved and is out of compliance with the GMA.

- 4 11. Kittitas County has failed to have a variety of rural densities that  
5 complies with RCW 36.70A.070(5)(b) and is out of compliance with the  
6 GMA.
- 7 12. Kittitas County failed to revisit and revise its development regulations, in  
8 particular KCC 16.09.030, Performance Based Cluster Platting; KCC  
9 17.36, Planned Unit Development Zone; Title 16, Subdivision  
Regulations; and KCC 17.20 S Suburban Zone and KCC 17.22, S-II  
Suburban-II Zone and is therefore out of compliance with the GMA.
- 10 13. Kittitas County failed to conduct a proper area-wide or County-wide  
11 analysis of Agricultural lands to comply with RCW 36.70A.060 and .170  
12 and RCW 36.70A.020(2) and .020(10) and the criteria in WAC 365-190-  
13 050. The de-designation of the four parcels referred to in [Issue 13] is  
found out of compliance.

14 Specific to the Determination of Invalidity, the Board stated, in pertinent part:<sup>2</sup>

- 15 2. The County's failure to prepare a Capital Facilities Plan and properly  
16 prepare a land quantity analysis prior to the expansion of the UGAs  
17 within the County substantially interferes with the fulfillment of Goals 1,  
18 2, 8, 9, and 12 of the GMA. The Board concludes that these actions or  
lack of actions substantially interfere with the local jurisdiction's ability  
to engage in GMA-complaint planning.
- 19 3. The County's failure to perform the proper county-wide or area-wide  
20 assessment of agricultural lands required under RCW 36.70A.060, and  
21 .170, applying the definitions of RCW 36.70A.030(2) and (10) and the  
22 criteria in WAC 365-190-050 substantially interfere with the fulfillment  
23 of Goals 2 and 8.
- 24
- 25

26 <sup>2</sup> August 20, 2007 FDO, at 84

1 Based on these conclusions, the Board ordered, in pertinent part:<sup>3</sup>

- 2 1. Kittitas County's adoption of Ordinance No. 2006-63 is clearly  
3 erroneous and does not comply with the requirements of the GMA and  
4 is not guided by the GMA goals RCW 36.70A.020(1), (2), (8), (9), and  
5 (12), and in Issues 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, and 14 Kittitas  
6 County is found out of compliance to the extent herein ruled.
- 7 2. The Board further found and concluded the expansion of the Kittitas  
8 County UGAs and the de-designation of Agricultural Resources Lands  
9 listed in Issue Nos. 4 and 6 substantially interfered with the goals and  
10 requirements of the GMA. The Board therefore entered a determination  
11 of invalidity.
- 12 3. Therefore the Board remanded Ordinance No. 2006-63 to Kittitas  
13 County with direction to the County to achieve compliance with the  
14 Growth Management Act pursuant to this decision no later than  
15 February 18, 2008, 180 days from the date issued.

16 To summarize the Board's Conclusions and Order, the County was required to take  
17 legislative action to bring itself into compliance with the GMA in regards to Legal Issues 1,  
18 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, and 14 and, the County's actions in regards to Legal Issues  
19 4 and 6 warranted a Determination of Invalidity.

20 *Appeals by the Parties to Superior Court*

21 On September 18, 2007, Kittitas County filed a Petition for Judicial Review (PFJR) of  
22 the Board's decision in this matter.<sup>4</sup> With this appeal, the County asserted several errors  
23 with the Board's Findings of Fact and/or Conclusions of Law "as to three-acre rural  
24 densities," and the County requested the Court "set aside the Final Decision and Order of  
25 the Eastern Washington Growth Management Hearings Board as to the three-acre rural  
26 density."<sup>5</sup> Therefore, the Board understands the focus of the County's appeal to be

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24 <sup>3</sup> August 20, 2007 FDO, at 85

25 <sup>4</sup> Kittitas County Superior Court, Cause No. 07-2-00549-1.

26 <sup>5</sup> Kittitas County PFJR, at 4-5 (Specifically challenging Finding of Fact No. 5 and Conclusions of Law Nos. 9 and 11; specifically denoting the basis of the County's grievance is the three-acre density).

1 grounded in the Board's holding in regards to a rural density of one dwelling unit per three  
2 acres.

3 On September 19, 2007, Intervenors Building Industry Association of Washington,  
4 Central Washington Home Builders Association, and Mitchell F. Williams (collectively,  
5 Intervenors) also filed a Petition for Judicial Review.<sup>6</sup> With this appeal, Intervenors directed  
6 the Court's attention and submitted argument in regards to Legal Issue 1 (allowing rural  
7 densities of one home per three acres (1 du/3 acres)), Legal Issue 11 (variety of rural  
8 densities), and Legal Issue 10 (KCC 16.09 Performance Based Cluster Platting and KCC  
9 17.36 Planned Unit Development Zone).<sup>7</sup> Intervenors specifically stated in their PFJR they  
were "seeking reversal of Issues 1, 10, and 11."<sup>8</sup>

10 On October 30, 2007, Intervenors filed a Motion to Stay Compliance Proceedings and  
11 a supporting memorandum with the Kittitas County Superior Court (Motion to Stay). With  
12 this filing, Intervenors noted both they and Kittitas County are seeking reversal of the  
13 Board's ruling in regards to the allowance for rural densities at 1 du/3 acres and Intervenors  
14 are also appealing the Board's decision as to KCC 16.09 (Cluster Platting) and KCC 17.36  
15 (Planned Unit Development) and the provision of a variety of rural densities.<sup>9</sup> The Motion to  
16 Stay specifically requested the Court stay compliance "only as to those issues that are  
17 presently on appeal before [the Kittitas County Superior] Court."<sup>10</sup>

18 On November 13, 2007, the Honorable Judge Scott R. Sparks issued an Order  
19 granting the Intervenors' Motion to Stay "of those issues on appeal from [the Board's] Final  
20 Decision and Order [Case No. 07-1-0004c]."<sup>11</sup> Also, on November 13, subsequent to a  
21 request filed by the parties, the Court consolidated the two petitions and the Court is now  
tracking the matter under Cause No. 07-2-00552-1.

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22  
23 <sup>6</sup> Kittitas County Superior Court, Cause No. 07-2-00552-1.

24 <sup>7</sup> Intervenors' PFJR, at 4, 5-6 (Three-Acre Density), at 7-9 (Cluster and Planned Unit Ordinances), and at 9-10  
(Variety of Rural Densities).

25 <sup>8</sup> *Id.* at 2

26 <sup>9</sup> Intervenors' Memorandum, at 2-3; Intervenors' PFJR, at 4.

<sup>10</sup> Intervenors' Motion to Stay, at 2.

<sup>11</sup> Order Granting Motion to Stay, at 2.

1  
2 On May 19, 2008, the County filed its Statement of Actions Taken to Comply (SATC).

3 On June 3, 2008, Petitioners Kittitas County Conservation, RIDGE, and Futurewise  
4 (collectively, Petitioners) filed their Comments & Legal Arguments on Kittitas County's SATC  
5 (Petitioners' Comments). On this same date, Petitioner Washington State Department of  
6 Community, Trade, and Economic Development (CTED) filed its Response to Kittitas  
7 County's SATC (CTED Response).

8 On June 6, 2008, American Forest Land Company LLC (AFLC) filed a Stipulated  
9 Motion for Intervention, to allow for them to intervene in these proceedings. The Board, on  
10 June 11, 2008, denied intervention but, as provided for in RCW 36.70A.330(2), permitted  
11 AFLC to participate in the compliance proceedings.

12 On June 17, 2008, Kittitas County filed its Response to all Petitioners' Comments on  
13 County's SATC (County Response). On this same date, Intervenors filed their Reply to  
14 Kittitas County's SATC (Intervenors' Reply) and Participant AFLC filed its Response  
15 Comments and Legal Arguments regarding Kittitas County's Compliance Statement (AFLC  
16 Reply).

17 On June 20, 2008, Petitioners filed their Reply to Responses as to Kittitas County's  
18 SATC (Petitioners' Reply). On this same date, CTED filed its Reply Regarding Kittitas  
19 County's SATC (CTED Reply).

20 On June 27, 2008, the Board held a telephonic Compliance Hearing in this matter.  
21 Present were Joyce Mulliken, Presiding Officer, and Board Members Dennis Dellwo and John  
22 Roskelley. Parties were represented as follows: Tim Trohimovich and Brock Howell for  
23 Petitioners' KCC/RIDGE/Futurewise, Alan Copsey for CTED, Neil Caulkins and Darryl Piercy  
24 for Kittitas County, Andrew Cook for Intervenors BIAW/CWHBA/Mitchell, Gregory McElroy  
25 for Intervenor Kittitas County Farm Bureau, and Eric Merryfield and Patrick Ryan for  
26 Participant AFLC.

On July 25, 2008, the Board issued its Order Taking Action on County's Statement of  
Actions Taken to Comply and Request for Lifting of Invalidity (Order Taking Action). With

1 this Order, the Board notified the parties that it was taking action to review the County's  
2 SATC for compliance or non-compliance with the GMA as well as the County's request for  
3 the Board's Determination of Invalidity to be lifted.

## 4 II. PRELIMINARY MATTERS

5 At the Compliance Hearing, the County sought supplementation of the Record with  
6 City of Kittitas's (City) Ordinance No. 07-11. The County noted this ordinance was not  
7 "physically" in the record because the Board of County Commissioners (BOCC) review was  
8 limited to an electronic viewing of the document. A formal Motion to Supplement was  
9 received by the Board on June 30, 2008. On July 2, 2008, Petitioners filed a response to the  
10 County's Motion, voicing no objection to the inclusion of the Ordinance, but noted portions  
11 of this document were already included via an attachment to Petitioners' June 3, 2008,  
12 response to the County's SATC. No filing was received from any other party in regards to  
13 this Motion.

14 Pursuant to WAC 242-02-540, the Record before the Board may be supplemented  
15 with additional evidence if such evidence would be necessary or of substantial assistance to  
16 the Board in reaching its decision. In addition, WAC 242-02-660 permits the Board to take  
17 Official Notice of matters of law, such as ordinances enacted by a local governmental body.  
18 Ordinance 07-11 is the City of Kittitas's July 24, 2007, adoption of its amendments and  
19 updates to its Comprehensive Plan (CP) and, according to the County, the BOCC reviewed  
20 this ordinance in conjunction with compliance proceedings.<sup>12</sup> The Board will take Official  
21 Notice of this document, as the ordinance adopting the City of Kittitas's CP, and admit it, as

22 <sup>12</sup> The County cites to pages 7 and 8 of its CP, which it contends internally references this ordinance.  
23 However, the Board finds no such reference at the cited pages, in either the County's December 2006 CP or  
24 the May 2008 CP. See *Exhibits A and B* to the County's SATC. Where reference to this document is made is  
25 within Section II of Ordinance 2008-13, the BOCC's Findings, Finding 3 which notes the City of Kittitas  
26 specifically reviewed the need for an expanded UGA and the City's comprehensive plan includes the analysis  
necessary to support the UGA expansion. *Exhibit A*, County's SATC. Then, at Section III, the County does  
ordain the adoption by reference of the City's CP and the utilization of the analysis and justification to approve  
the expansion of the City's UGA as provided by Applications 06-03 and 06-04. *Id.*

1 it pertains to the City's UGA, into the Record for these compliance proceedings as  
2 Compliance Exhibit No. 1.

### 3 III. DISCUSSION

4 In compliance proceedings where a determination of invalidity has not been entered,  
5 the burden of proof remains with the petitioners who must convince the Board that the  
6 County's efforts are not in compliance with the requirements of the GMA.<sup>13</sup> This standard  
7 rule does not apply if a County is subject to a Determination of Invalidity; there, the County  
8 has the burden of demonstrating that the action taken no longer substantially interferes  
9 with the fulfillment of the goals of the GMA.<sup>14</sup> In the instant case, the County was found  
10 both non-compliant and, in regards to the expansion of two Kittitas County UGAS and the  
11 de-designation of agricultural resource lands set forth in Legal Issues 4 and 6, the County's  
12 actions warranted a Determination of Invalidity. Therefore, as for these issues under  
13 invalidity, the County bears the burden of proof. For all other issues, the burden of proof  
14 remains with the petitioners.

15 With its SATC, the County asserts it has taken legislative actions which have brought  
16 it into compliance with the GMA (Legal Issues 3, 4, 6, 13, and 14), or has specifically  
17 appealed the issue (Legal Issues 1, 10, and 11), or that the issues are either directly or  
18 indirectly related to the issue of the 1 du/3 acre rural density, which is the subject of the  
19 appeal and stay (Legal Issues 2, 5, 7, and 12).<sup>15</sup> For those issues not specifically appealed,  
20 the County and Intervenors contend the issues "necessarily involve issues of appropriate  
21 rural densities" and, therefore, the County has "opted to wait for the appeal result before  
22 making any changes."<sup>16</sup> The County and Intervenors also reference another case filed with

23 <sup>13</sup> RCW 36.70A.320 provides that all comprehensive plans, development regulations, and amendments thereto  
24 are presumed valid upon adoption. Subsection 2 of this provision notes the burden of proof is on the  
25 petitioner to demonstrate that any action taken is not in compliance with the GMA.

26 <sup>14</sup> RCW 36.70A.320(4)

<sup>15</sup> County's SATC, at 6-8.

<sup>16</sup> *Id.*

1 the Board against the County, Case No. 07-1-0015, to support its non-action in regard to  
2 the Board's FDO.<sup>17</sup>

3 ***Impact of the Appeals to the Court and Stay***

4 A threshold matter to be addressed by the Board is the application of the court of  
5 appeals and stay to the compliance proceedings currently before this Board. As noted  
6 *supra*, Intervenor specifically appealed Legal Issues 1, 10, and 11. Thus, in regards to these  
7 three Legal Issues, the Board acknowledges the appeal, the subsequent issued stay in  
8 regards to Consolidated Cause No. 07-2-00552-1 and, with this order, will issue an Order of  
9 Abeyance in regards to the compliance proceedings related to these Legal Issues. The  
10 Board will not, as Intervenors request, rescind the compliance for those issues appealed.<sup>18</sup>  
11 The Stay issued by the Court does not bring the County into compliance on those issues  
12 under appeal; it means only that the County does not have to take any legislative action on  
13 those issues until such time as a decision is rendered by the Court. During the pendency of  
14 the court proceedings the County remains in a non-compliant status but, as Intervenors  
15 correctly note, are not required to take action in response to the Board's FDO. Therefore,  
16 abeyance of the compliance schedule, essentially a temporary suspension, is the more  
17 appropriate terminology.

18 For those issues not subject to court action, the County is required to bring itself into  
19 compliance with the GMA as noted by the Board's August 20, 2007, FDO and failure to do  
20 so warrants a finding of continuing non-compliance. The County and Intervenors contend

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21 <sup>17</sup> County SATC, at 6; Intervenors' Response, at 5 (citing to *KCC/RIDGE/Futurewise v. Kittitas County, et al*,  
22 Case No. 07-1-0015, Final Decision and Order (March 21, 2008)). Case No. 07-1-0015 challenged the  
23 County's development regulations and pertained, in part, to density and was appealed and subsequently  
24 stayed by Kittitas County Superior Court. The Board notes several appeals filed in Kittitas County Superior  
25 Court in regards to Case No. 07-1-0015 - Cause Nos. 08-2-00231, 08-2-00224, 08-2-00239, 08-2-00210, and  
26 08-2-00195 – all consolidated and tracked under Cause No. 08-2-00195, for which two stays were issued by  
the Court. Although the County and Intervenors assert the stays are "instructive and applies to this case"  
(see Intervenors' Reply, at 5), the Board disagrees that a stay issued in a separate matter has any binding  
applicability to the instant case.

<sup>18</sup> Intervenors' Response, at 5-6

1 the court appeals and stays,<sup>19</sup> despite failing to cite specifically to the other issues in their  
2 petitions to the Court, “necessarily involve issues of appropriate rural density” and therefore  
3 no action is required by the County.<sup>20</sup> Or, in the alternative, Intervenors contend Legal  
4 Issues 2, 5, and 12 were appealed because the County asserted error in regards to both  
5 Finding of Fact No. 5, which stated the County was not protecting rural character and was  
6 permitting low-density rural sprawl, and Conclusion of Law No. 9, which referenced Urban  
7 Growth Nodes (UGNs) and the Gold Creek Resort.<sup>21</sup> However, what Intervenors failed to  
8 recognize is that for all of the findings and conclusions for which the County asserts error, it  
9 qualified those statements by including specific language – *as to three-acre densities* – and  
10 further limited the appeal when it stated the relief it seeks is for the Court to set aside the  
11 “Final Decision and Order of [the Board] *as to three-acre rural density*.”<sup>22</sup> Therefore, the  
12 County’s appeal did not address the claims raised by Legal Issues 2, 5, or 12 and therefore,  
both the appeal and the stay are not applicable.

13 Intervenors further contend Legal Issue 7 was also appealed and stayed because, in  
14 the FDO, the Board “explicitly stated that Issues 7 and 11 cover the same legal issues.”<sup>23</sup>  
15 Intervenors also contend Issue 7 is “almost identical to Issues 1 and 10” and implicit in  
16 each of the issues is whether the County failed to revise its CP and development regulations  
17 to prevent urban densities in rural and agricultural areas.<sup>24</sup> First, Intervenors misread the  
18 Board’s FDO; no where in the Board’s analysis of Legal Issue 7 is it “explicitly stated” that  
19 Issue 7 and 11 are the same. Rather reference is made as to Legal Issue 11 solely to direct  
20 the reader to further analysis on the issue of land use designation criteria. If Legal Issue 7  
21 and 11 were the same, as Intervenors contend, the Board would have addressed the issues  
22 concurrently, which it did not.

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23 <sup>19</sup> As noted *supra*, the County and Intervenors assert the appeals pending and the stays issued in EWGMHB  
Case No. 07-1-0004c and Case No. 07-1-0015 are applicable to the instant compliance proceedings.

24 <sup>20</sup> County’s SATC, at 6-7; Intervenors’ Reply, at 2-3.

<sup>21</sup> Intervenors’ Response, at 9-10 (citing to County’s PJR) at 4.

25 <sup>22</sup> County’s PJR, at 4-5.

<sup>23</sup> Intervenors’ Response, at 7-8 (citing to August 20, 2007 FDO, at 41)

26 <sup>24</sup> *Id.* at 8-9.

1 The parties did not appeal nor did the Court grant a stay on any other substantive  
2 ruling of this Board contained in the August 2007 FDO other than Legal Issues 1, 10, and  
3 11 and the related issue of three-acre rural densities. The County and Intervenors attempt  
4 to succumb issues which were not specifically appealed into those appealed by asserting  
5 the "issues were similar" or that they "necessarily involve issues of appropriate rural  
6 densities." As aggrieved parties to the Board's FDO, both the County and the Intervenors  
7 had the right to appeal all issues for which they believed error had occurred. They failed to  
8 do so and the Board will not expand the foundation of the parties' appeal beyond those  
9 issues the parties themselves specifically set forth in their petitions. Nor, will the Board  
10 extend the Court's stay beyond that which was granted.

11 As to the parties' reference to appeals and stays pending before the Court in Case  
12 No. 07-1-0015, the actions of the Court in regard to those appeals have no bearing on this  
13 case, as those appeals were based on alleged violations of the GMA founded on a distinct  
14 and separate legislative enactment by the County.<sup>25</sup> Furthermore, although the Court has  
15 consolidated the present appeals (07-2-00549-1 and 07-2-00552-1), the Court has not  
16 consolidated the appeals arising from Case No. 07-1-0015 with those relative to Case No.  
17 07-1-0004c. The Board reviews each and every case brought before it based on the facts  
18 and circumstances pertaining to the legislative enactment under challenge and determines  
19 compliance or non-compliance after reviewing the Record before the County at the time it  
20 took action. Two separate cases on two separate legislative enactments are based on a set  
21 of distinct facts and circumstances and supported by a Record unique to those enactments.  
22 The Board will not merge cases just because the parties believe they encompass the same  
23 overarching subject matter.

24 **CONCLUSION:**

25 As to the application of the court appeals and the stay, the Board reads "all issues on  
26 appeal" as those specifically appealed by Kittitas County and/or the Intervenors – three-

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<sup>25</sup> Case No. 07-1-0004c challenged the County's adoption of Ordinance 2006-63. Case No. 07-1-0015 challenged the County's adoption of Ordinance 2007-22.

1 acre densities (Issue 1), Issue 10 (variety of rural densities), and Issue 11 (KCC 16.09 and  
2 17.36). Thus, the Board recognizes the Appeals and Stay filed in regards to Case No. 07-1-  
3 0004c in relationship to Legal Issues 1, 10, and 11, and shall note abeyance for the County  
4 in regards to compliance on those issues.

5 For those issues not subject to court action for which the County took no action –  
6 Legal Issues 2, 5, 7, and 12 - the County was required to comply with the Board's August  
7 20, 2007, FDO and failure to do so warrants a finding of continuing non-compliance. The  
8 Board notes the statement made by the County as to its compliance efforts and does not  
9 dispute that the County and its citizen committees have worked diligently and in good faith  
10 on the issues and stand ready to implement compliant regulations. However, compliance is  
11 not founded on working copies or draft proposals; compliance is determined only after the  
12 jurisdiction has taken action through its governing body by adopting ordinances or  
13 resolutions which implement the GMA.

14 The Board reiterates, the court appeal and stay pertaining to Case No. 07-1-0015,  
15 although involving parts of the Kittitas County Comprehensive Plan and Development  
16 Regulations, is a separate and distinct matter and is simply not applicable to the compliance  
17 proceedings in this instant matter.

18 ***Legal Issue 3– Agricultural and Forest Land Designation Criteria***

19 With Legal Issue 3, the Board found the County non-compliant in three regards: (1)  
20 criteria for the designation of agricultural lands of long-term commercial significance did not  
21 clarify how the criteria are to be considered; (2) the County did not have mandatory criteria  
22 for the designation of forest lands of long-term commercial significance; and (3) the County  
23 has failed to provide the notice required pursuant to RCW 36.70A.060, with specific  
24 direction for mineral resource lands.<sup>26</sup>

25 \_\_\_\_\_  
26 <sup>26</sup> August 20, 2007 FDO, at 27-28.

1        1. Criteria for Agricultural Land

2            The County states it has clarified and prioritized criteria for agricultural lands in  
3 response to the FDO, and Kittitas County CP, at Section 2.3(C), addresses resource lands  
4 and sets procedures for both designating and de-designating agricultural lands and policies  
5 to guide the County at Pages 32-37.<sup>27</sup> Petitioners, although noting the County's agricultural  
6 designation criteria represents a significant improvement, contends the criteria continues to  
7 violate the GMA. Futurewise points out six alleged violations:

- 8            1. Criteria fails to address whether land is characterized by urban growth  
9 or primarily devoted to commercial agricultural production;
- 10           2. Criteria omits the consideration of growing capacity, productivity, and  
11 soil composition and fails to make the consideration of prime and  
12 unique soils mandatory;
- 13           3. Additional criteria adopted by the County goes beyond the definition of  
14 long-term commercial significance;
- 15           4. Criteria does not have standards from which it may be objectively  
16 applied;
- 17           5. De-designation criteria does not include consideration of prime and  
18 unique soils, whether the land is characterized by urban growth or  
19 whether it primarily devoted to agricultural production;
- 20           6. Policy GPO 2.114B is inconsistent with designation criteria established  
21 elsewhere, The Board does not provide how the criteria is to be  
22 applied, emphasizes water availability, and fails to include both unique  
23 farmland and farmland of statewide importance.<sup>28</sup>

24            In essence, the Board reads Petitioners' assertions as being the County's criteria fails  
25 to adequately encompass the definition of agricultural lands as provided for in the GMA,  
26 fails to properly consider the soil and development related impacts, fails to provide  
operational guidance, and provides for additional criteria which are not consistent with the  
GMA's conservation mandate.

              In response, the County argues it has incorporated the necessary definitions and  
criteria, citing to Section 2.3(C), which requires compliance with WAC 365-190-050 and

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25        <sup>27</sup> County's SATC, at 6 (Citing to Page 8 of Ordinance 2008-13, Attachment 2)

26        <sup>28</sup> Petitioners' Response, at 11-14.

1 states the intent of the section is to comply with RCW 36.70A.060.<sup>29</sup> The County contends  
2 by citing to WAC 365-190-050 it has “swept in” consideration of growing capacity,  
3 productivity, and soil composition, as well as the consideration of prime and unique soils.  
4 It further asserts there is no requirement under the GMA to define the factors and any  
5 additional criteria adopted was developed by the local Agricultural Advisory Committee and  
6 is authorized by WAC 365-190-050(3).<sup>30</sup> Lastly, the County states the potential for irrigation  
7 is not an exclusionary factor and there is no requirement to include farmlands of statewide  
8 significance within a designation of agricultural lands of long-term commercial significance  
(Ag Land of LTCS).<sup>31</sup>

9 In reply, Futurewise reiterates the arguments presented in its Response Brief and  
10 highlights the County’s misplaced reliance on WAC 365-190-050, its failure to establish  
11 standards for application of the criteria, and its failure to address all types of soils, including  
12 farmland of statewide significance.<sup>32</sup>

13 **BOARD ANALYSIS:**

14 The Board notes that the GMA, through RCW 36.70A.020(8), .060, and .170, direct  
15 counties and cities to protect agricultural lands by:

- 16 1. *Designating* agricultural lands of long-term commercial significance;
- 17 2. Assuring the *conservation* of agricultural land;
- 18 3. Assuring that the use of adjacent lands *does not interfere* with their  
19 continued use for agricultural purposes;
- 20 4. Conserving agricultural land in order to *maintain and enhance* the  
21 agricultural industry; and
- 22 5. *Discouraging* incompatible uses.<sup>33</sup>

23  
24 <sup>29</sup> County’s Response, at 6

<sup>30</sup> *Id.*

25 <sup>31</sup> *Id.* at 6-7.

<sup>32</sup> Futurewise Reply, at 6-11.

26 <sup>33</sup> *King County v. Central Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 588 (2000).

1 The question of the meaning of agricultural lands, under the GMA, was recently  
2 clarified by the Supreme Court in *Lewis County v. Western Washington Growth*  
3 *Management Hearings Board*.<sup>34</sup> In that case, the proper definition of agricultural land was  
4 set forth with the Court holding:

5 We hold that agricultural land is land:

- 6 a. not already characterized by urban growth;
- 7 b. that is primarily devoted to the commercial production of agricultural  
8 products enumerated in RCW 36.70A.030(2), including land in areas  
9 used or capable of being used for production based on land  
10 characteristics, *and*
- 11 c. that has long-term commercial significance for agricultural production,  
12 as indicated by soil, growing capacity, productivity, and whether it is  
13 near population areas or vulnerable to more intense uses.<sup>35</sup>

14 This definition emphasizes the three required elements of agricultural lands – that it  
15 is *not already characterized by urban growth*, that it is *primarily devoted to* the commercial  
16 production of agricultural products, and has *long-term commercial significance for*  
17 agricultural production. Therefore, the first requirement is to find lands not already  
18 characterized by urban growth and which are currently being used or capable of being used  
19 for agriculture. After making that finding, the final inquiry before land is designated as  
20 agricultural land is whether the land has long-term commercial significance for agricultural  
21 production. The meaning of *long-term commercial significance* seeks to address the  
22 economic viability of the property. This requires an assessment of five different factors,  
23 three generally related to the quality or capability of its soils and two based on  
24 development-related impacts from the surrounding area.<sup>36</sup> These five factors are: growing  
25 capacity, productivity, soil composition, proximity to population areas, and the possibility of  
26 more intense uses of the land.

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<sup>34</sup> *Lewis County v. Western Washington Growth Management Hearings Board*, 157 Wn.2d 488 (2006).

<sup>35</sup> *Lewis County*, 157 Wn.2d at 502.

<sup>36</sup> RCW 36.70A.030(10)

1           When considering growing capacity, productivity, and soil composition, the focus is  
2 on the quality of the land itself and jurisdictions must use the USDA soil classification  
3 system which incorporates these three considerations.<sup>37</sup> If the property contains a soil type  
4 the U.S. Department of Agriculture (USDA) has determined suitable for agricultural  
5 production, then it qualifies for *potential* treatment as land with long-term commercial  
6 significance, *subject to* the considerations of development-related impacts. The Board notes  
7 that although the presence of agricultural soils weighs heavily on the designation of  
8 agricultural land, soils alone do not mandate designation; the GMA requires an analysis of  
9 more than just soils to identify and designate agricultural lands – the GMA requires  
10 consideration of development-related impacts.

11           When evaluating the proximity of the land to population areas as well as its  
12 vulnerability for more intensive uses, counties and cities are to consider the development-  
13 related factors enumerated in WAC 365-190-050(1).<sup>38</sup> These factors consider not only the  
14 availability of public facilities and services but the intensity of neighboring land uses, some  
15 of which may be incompatible with agricultural uses. The GMA does not assign or dictate  
16 the weight of each factor and, therefore, a jurisdiction has discretion regarding how to  
17 apply them.<sup>39</sup> Discretion is also afforded to a jurisdiction in defining the factors, consistent  
18 with the goals and requirements of the GMA; however, the factors should be consistently  
19 applied by the local government on a jurisdiction-wide basis so as to prevent decision-  
20 making in an arbitrary fashion.<sup>40</sup> In contrast to the analysis of capacity, productivity, and  
21 soils, the focus of these two factors is on the development prospects of the site and, as the  
22 Supreme Court found in *Lewis County*, may potentially pertain to factors not specifically  
23 enumerated in RCW 36.70A.030(10), so long as these considerations are within the

24 <sup>37</sup> WAC 365-190-050(1)

25 <sup>38</sup> *Lewis County*, 157 Wn.2d at 502; *see also Redmond*, 136 Wn.2d at 55.

26 <sup>39</sup> *Id.* at 502-503.

<sup>40</sup> *Id.* at 502-503.

1 mandates of the GMA and pertain to the characteristics of the agricultural land to be  
2 evaluated.<sup>41</sup>

3 Based on the foregoing, there is no doubt the GMA sees agricultural lands and the  
4 industry that relies on them as something special given the duty set forth to *designate*  
5 agricultural land<sup>42</sup> and *conserve*<sup>43</sup> such land in order to *maintain* and *enhance*<sup>44</sup> the  
6 agricultural industry. The pressure to convert these lands, especially in areas impacted by  
7 population growth and development, is constantly an issue before local jurisdictions. The  
8 Board recognizes that the counties and cities of Washington face a multitude of difficult and  
9 demanding challenges when determining how their communities will grow, but these  
10 challenges must be addressed within the mandates of the GMA so as to serve the “public’s  
11 interest in the conservation and the wise use of our lands.”<sup>45</sup> Washington’s limited,  
12 irreplaceable natural resource lands are at the forefront of this mandate. With the GMA’s  
13 mandate to conserve, maintain, and enhance those natural resource lands with long-term  
14 commercial significance and the industry relying on them guiding their evaluation, the  
15 Board reviews the County’s actions in regard to the definition, designation, and  
16 conservation of agricultural lands of long-term commercial significance in Kittitas County.

16 As do Petitioners, the Board commends Kittitas County on its attempts to design a  
17 process to support the retention of the agricultural industry by conserving, through the  
18 designation process, those agricultural lands with long-term commercial significance.  
19 However, the County’s efforts remain non-complaint with the GMA’s mandate for these  
20 lands. As noted *supra*, the Supreme Court has clearly articulated the definition of

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21 <sup>41</sup> *Id.* (Finding that it was not clearly erroneous for the County to weigh the farm industry’s anticipated land  
22 needs above all else, noting that if the industry cannot use the land then the possibility of more intense uses  
23 of the land is heightened); *Id.* at 505 (Holding that the farmer’s non-farm economic needs are not a logical or  
24 permissible consideration because it does not relate to a characteristic of farmland to be evaluated in  
25 determining long-term commercial significance).

24 <sup>42</sup> See, RCW 36.70A.170.

25 <sup>43</sup> See, RCW 36.70A.060.

26 <sup>44</sup> See, RCW 36.70A.020(8).

<sup>45</sup> RCW 36.70A.010

1 agricultural lands and *all of the elements* must be explicitly incorporated within the County's  
2 CP.

3 The County's designation criteria is set forth at Page 33 of its CP and provides:

4 Designation of agricultural lands of long-term significance shall comply with  
5 WAC 365-190-050 and shall also consider the combined effects of proximity to  
6 population areas and the possibility of more intense uses of the land. Classifications  
7 of prime and unique soils as mapped and identified by the Soil Conservation  
8 Service, local conservation district and local agricultural stabilization and  
9 conservation service committee, as well as the county sponsored agricultural  
advisory committee along with the following additional criteria may also be  
considered in designating lands of long-term significance for the production of food  
or other agricultural products:

10 A) Land Settlement Patterns. Agricultural lands are best located where  
11 they can function free of more intense development. In determining  
12 designation, the following should be considered:

- 13 i. Availability of agriculture infrastructure
- 14 ii. Land use patterns and compatibility with agricultural practices
- 15 iii. Intensity of nearby land uses
- 16 iv. Proximity to urban areas
- 17 v. History of nearby land development
- 18 vi. Predominant parcel size
- 19 vii. Proximity of public facilities and services
- 20 viii. Compatibility and proximity to critical areas

21 B) Economic Viability

- 22 i. Land values under alternative uses
- 23 ii. Proximity to markets, manufacturing and processing facilities
- 24 iii. Proximity to transportation
- 25 iv. Market factors such as fuel, water and other costs which directly  
26 impact profitability
- v. Tax status and other administrative expenses directly related to  
agricultural production
- vi. Ability to maintain the "Right to Farm" Ordinance.

23 The County contends its CP cites to RCW 36.70A.060 and WAC 365-190-050, thereby  
24 incorporating the needed language. However, 36.70A.060 addresses the requirement to  
25 adopt development regulations to assure the use of lands adjacent to natural resource lands  
26

1 does not interfere with the continued use of the lands for the intended purpose – this  
2 section of the GMA does not address the designation of the land nor does it encompass the  
3 definition.

4 The Board agrees with the County that using the land capability classification  
5 systems established by the Soil Conservation Services (SCS) incorporates a consideration of  
6 the growing capacity, productivity, and soil composition of the land and therefore it is not  
7 necessary to specifically set the phrase out in the CP. The problem is the County's  
8 designation process fails to require the use of soils when it states these classifications *may*  
9 *also be considered*. Use of the SCS land classification system is required. In addition, the  
10 County's CP is devoid of any reference as to which of the eight classes of soil it has  
11 incorporated as defined categories of agricultural land for long-term commercial significance  
12 leaving the reader to wonder what types of soils the County qualifies as prime and unique  
13 farmlands.

14 The County has also included criteria which is not specifically stated in WAC 365-190-  
15 050, including the availability of agricultural infrastructure, proximity to transportation,  
16 various market factors, administrative expenses, and the "Right to Farm" ordinance.<sup>46</sup> The  
17 County contends it has authority pursuant to WAC 365-190-050(3) to adopt such criteria;  
18 however, that section of the WAC addresses the classification of agricultural lands of local  
19 importance – not Ag Land of LTCS. Although the ability to include outside criteria was  
20 addressed in the *Lewis County* case, the Court did note such considerations are within the  
21 mandates of the GMA and pertain to the characteristics of the agricultural land to be  
22 evaluated. The additional factors adopted by the County are not limited in this regard, but  
23 rather address the influences of the market on an individual farmer's ability to operate.

24 The County has adopted a different set of criteria for the de-designation of  
25 agricultural land which is set forth on Page 34 of the CP and provides:  
26

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<sup>46</sup> County CP, at 33.

1 De-Designation of agricultural lands of long-term significance shall be  
2 considered for those lands which no longer meet the basic criteria established  
3 in WAC 365-190-050, and should also consider A & B above as well the  
4 following factors:

- 4 A) Agricultural productivity under normal activity
- 5 B) Effect on neighboring agricultural activities
- 6 C) Long-term economic conditions
- 7 D) Compatibility with alternative land uses
- 8 E) Availability and proximity of public services
- 9 F) Proximity to UGA and other areas of more intense development
- 10 G) Change in circumstances

11 Because these criteria rely on the foundational criteria to designate Ag Lands of LTCS  
12 which the Board has already concluded do not conform to the GMA's definition and, also  
13 include additional factors which are not consistent with the GMA's mandate to conserve  
14 lands in order to maintain and enhance the agricultural industry, the County's de-  
15 designation criteria are non-compliant with the GMA as well.

16 Lastly, the Board notes the County's continued concern in regard to water  
17 availability. This Board has noted in previous holdings that the availability of water can not  
18 be used as an exclusionary factor when determining agricultural designations. Within its CP,  
19 the County has established only two types of land suitable for designation as long-term  
20 commercial agricultural – irrigated croplands and non-irrigated grazing lands.<sup>47</sup> Although  
21 the Board is well aware of the limiting nature the availability of water can have on crop  
22 production, the GMA's definition of agricultural is not limited to simply crop production or  
23 grazing but encompasses several types of non-crop, non-grazing operations and, not all  
24 crops require irrigation.<sup>48</sup>

25 **CONCLUSION:**

26 Kittitas County's designation criteria must contain provisions that specifically reflect  
the GMA's definition of agricultural lands as set forth by the GMA and interpreted by the

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<sup>47</sup> County's CP, at 34

<sup>48</sup> See, RCW 36.70A.030(2).

1 Court. The GMA's requirements for agricultural lands are clearly set forth in RCW  
2 36.70A.020(8), .060, and .170 with definitions contained at RCW 36.70A.030(2) and  
3 .030(10). Guidelines for making the required determinations are provided in WAC 365-190.  
4 The Supreme Court has provided further guidance in the meaning and application of these  
5 provisions through a variety of cases cited in this decision and numerous holdings of this  
6 Board and our colleagues at the Western Washington and Central Puget Sound Boards  
7 provide assistance to jurisdictions in this regard as well.

8 Therefore, the Board finds and concludes the County's agricultural designation and  
9 de-designation criteria as set forth in the Kittitas County's CP is non-compliant with the  
10 GMA, RCW 36.70A.020(8) and 36.70A.170. The County's criteria must encompass all of  
11 the definitional elements for Ag Lands of LTCS and require the consideration of soils and  
12 development related factors when determining whether the land has enduring qualities so  
13 as to be designated as a resource land with long-term commercial significance, thereby  
14 ensuring the conservation of such lands for the maintenance and enhancement of the  
15 agricultural industry within Kittitas County.

## 16 2. Criteria for Forest Lands

17 With the August 20, 2007, FDO, the Board found Kittitas County failed to establish  
18 any criteria for the designation of forest lands. The County states it adopted criteria for the  
19 designation and de-designation of forest lands and that these criteria are prioritized with  
20 some criteria being mandatory and others optional.<sup>49</sup> As with agricultural lands, Petitioners  
21 contend the County failed to incorporate all of the required elements within its CP. Namely,  
22 the first two prongs – not characterized by urban growth and primarily devoted to timber  
23 production. Petitioners further assert internal inconsistency between the criteria.

24 The County contends it "incorporated by reference WAC 365-190-040 and -060" and,  
25 although using "different words" brings in the concepts set forth in those provisions.<sup>50</sup>

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26 <sup>49</sup> County's SATC, at 6.

<sup>50</sup> County's Response, at 7.

1 Participant American Forest Land Company (AFLC) argues Petitioners adopt a narrow and  
2 restrictive view of the GMA. AFLC contends the GMA sets forth objectives and minimum  
3 guidelines for the County to follow and allows the County “considerable flexibility to craft  
4 and consider regionally relevant factors.”<sup>51</sup> AFLC further asserts the County’s designation  
5 criteria reference the applicable GMA provisions, including 36.70A.

6 **BOARD ANALYSIS:**

7 The designation criteria for forest lands is similar to that of agricultural lands – *the*  
8 *lands are not to be characterized by urban growth, primarily devoted to timber production*  
9 *on land that can be economically and practically managed for timber production, and have*  
10 *long-term commercial significance for the commercial production of timber.*<sup>52</sup> When  
11 evaluating whether forest land is *primarily devoted* to timber production, the County *shall*  
12 *consider* the following factors:

- 12 a. The proximity of the land to urban, suburban, and rural settlements;
- 13 b. Surrounding parcel size and the compatibility and intensity of adjacent  
14 and nearby land uses;
- 14 c. Long-term local economic conditions that affect the ability to manage  
15 for timber production; *and*
- 15 d. The availability of public facilities and services conducive to conversion  
16 of forest land to other uses.<sup>53</sup>

17 RCW 36.70A.030(10) sets forth the definition for *long-term commercial significance*  
18 and includes:

- 19 1. The growing capacity, productivity, and soil composition of the land for  
20 long-term commercial production, *in consideration with*
- 21 2. The land’s proximity to population areas and the possibility of more  
22 intense uses of the land.

22 In determining which forest lands should be designated as having long-term  
23 commercial significance for the commercial production of timber, the County is required to

24 \_\_\_\_\_  
25 <sup>51</sup> AFLC Response at 5-7.

<sup>52</sup> RCW 36.70.030(8); RCW 36.70A.170(b).

26 <sup>53</sup> RCW 36.70A.030(8)

1 consider the guidelines established by CTED which, in relationship to forest lands, are set  
2 forth in WAC 365-190-060.<sup>54</sup> WAC 365-190-060 provides that in classifying forest lands the  
3 County *should use* the private forest land grades of the Department of Revenue, which  
4 incorporates the consideration of growing capacity, productivity, and soil composition.  
5 Discretion as to which of the land grades constitutes forest land of LTCS is granted to the  
6 County, with this determination based on local and regional physical, biological, economic,  
7 and land use considerations. However, it specifically states that the presence of lower land  
8 grades within an area of predominantly higher land grades need not preclude designation  
9 as forest land.<sup>55</sup> In evaluating the effects of the proximity to population areas and the  
possibility of more intense uses, the County *shall consider*.<sup>56</sup>

- 10 1. The availability of public services and facilities conducive to the
- 11 conversion of forest land,
- 12 2. The proximity of forest land to urban and suburban and rural
- 13 settlements; Forest lands of long-term commercial significance are
- 14 located outside the urban and suburban areas and rural settlements,
- 15 3. The size of the parcels: Forest lands consist of predominantly large
- 16 parcels.
- 17 4. The compatibility and intensity of adjacent and nearby land use and
- 18 settlement patterns with forest lands of long-term commercial
- 19 significance,
- 20 5. Property tax classification: Property is assessed as open space or
- 21 forest land pursuant to Chapter 84.33 or 84.34 RCW,
- 22 6. Local economic conditions which affect the ability to manage
- 23 timberlands for long-term commercial production, *and*
- 24 7. History of land development permits issued nearby.

20 Therefore, at a *minimum*, the designation process [and a correlating de-designation  
21 process] should include these considerations. The question for the Board is whether the  
22 criteria established by the County satisfies the parameters set forth in the GMA and the  
23

24  
25 <sup>54</sup> RCW 36.70A.170(2) Kittitas County "shall consider the guidelines established pursuant to RCW 36.70A.050"

<sup>55</sup> WAC 365-190-060

<sup>56</sup> WAC 365-190-060(1)-(7)

1 WAC and furthers the GMA's mandate to conserve forest lands in order to maintain and  
2 enhance the natural resource industry that relies on these lands.

3 Kittitas County's Commercial Forest Land Use is set forth in its Comprehensive Plan  
4 at pages 37 to 44. This section of the CP sets forth a narrative in regards to commercial  
5 forestry within Kittitas County and the procedure and criteria to be followed for the  
6 designation and de-designation of forest lands. GPO 2.131 provides that the classification  
7 and designation of forest resource lands *should be*:

8 [B]ased on the criteria and procedures established in WAC 365-190-040 and -  
9 060, with special consideration given to the determination of whether forest  
10 resource lands considered for designation are viable as long-term commercial  
11 significant forest resource lands.

12 This policy goes on to provide the following "Designation Considerations:"

- 13 1. Define the current status of the industry
- 14 2. Define the needs of the industry within Kittitas County
- 15 3. Define the Region and Regional needs as it relates to the industry  
16 within Kittitas County
- 17 4. Define viability within local and regional circles (i.e. 100 miles, 200  
18 miles, 300 miles)
- 19 5. How much Commercial Forest Lands are needed to support local and  
20 regional needs of the industry.

21 As for *designation*, this appears to be the totality of the County's criteria. These  
22 provisions provide that the County should consider WAC 365-190-040 and WAC 365-190-  
23 060, but the County has put "special consideration" on whether or not the land is viable for  
24 long-term commercial significance. No reference is made to the required definitional  
25 elements for forest lands. GPO 2.131 goes on to state various designation considerations  
26 which are related to the economic viability of the industry, both in regards to local and  
regional needs. The GMA mandates the designation of forest lands which have long-term  
significance for commercial production of timber and further mandates the consideration of  
the provisions of WAC 365-190. The problem with these provisions, as Petitioners point  
out, is that GPO 2.131 is worded in a permissive as opposed to a mandatory manner,

1 leaving the entire process open to a discretionary application. In addition, the manner in  
2 which the additional "designation considerations" is presented within this policy is confusing  
3 to the Board as there is no guidance as to whether these considerations are conducted prior  
4 to or in conjunction with the consideration of the WAC provisions.

5 As for *de-designation*, the process and criteria for de-designation of lands currently  
6 maintained in the Commercial Forest zone designation is the dominant feature of the  
7 County's CP. The County specifically sets forth de-designation criteria, noting that the  
8 criteria are not ranked in order of importance or value. An application for de-designation  
9 may proceed on one or more criteria. The Board notes this statement is contrary to the  
10 County's SATC which asserts the criteria have been prioritized with certain criteria being  
11 mandatory while others are optional. The process, found on Page 39 of the CP, provides

11 for the evaluation of parcels within the Commercial Forest zone as to:

- 12 • Long-term economic conditions
- 13 • Compatible land use alternatives
- 14 • Ownership goals and objections
- 15 • Availability of public services
- 16 • Site productivity
- 17 • Change in circumstances

18 The CP goes on to set forth factors to be evaluated for each of these criteria, with  
19 these considerations and evaluating factors reflecting, in part, the factors set forth in WAC  
20 365-190-060. However, additional consideration is given to "ownership goals and  
21 objections" and a "change in circumstances," which the Board finds fall outside of the  
22 parameters for determining the long-term commercial significance of the land. The Board  
23 notes consideration of ownership goals is to address regional benefits that may result,  
24 including higher property taxes and economic stimulus. The Board reminds the County that  
25 the Supreme Court has held the GMA establishes a mandate in regards to natural resource  
26 lands that is not displaced by general planning goals, such as economic development.<sup>57</sup>

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<sup>57</sup> See *King County v. CPSGMHB*, 142 Wn.2d 543; 14 P.3d 133 (2000) (Comparing the agricultural mandate with the GMA goal for Open Space and Recreation).

1 **CONCLUSION:**

2 The GMA requires, at a minimum, the County to include lands not characterized by  
3 urban growth and primarily devoted to the growing of trees as the initial land base for  
4 forest lands of long term commercial significance. Then, the County is to consider the  
5 factors set forth in WAC 365-190-060, to classify the forest lands so as to conserve the  
6 higher grades, and to consider development related impacts as indicated by WAC 365-190-  
7 060(1)-(7). The County's designation and de-designation process does not adequately  
8 encompasses these requirements and, as was found for agricultural lands, includes factors  
9 which are not respectful of the GMA's mandate to conserve lands and maintain and  
enhance the timber industry.

10 As with agricultural lands, the Board is perplexed at the County's reluctance to simply  
11 set forth the basic definition of these natural resource lands within its CP as Petitioners  
12 request, especially since WAC 365-190-040(2)(b)(i) seeks an acceptance of the GMA's  
13 requirements as mandatory minimums with specific reference to definitions.

14 The Board finds and concludes the County's designation and de-designation process  
15 and related criteria is non-compliant with RCW 36.70A.020(8) and 36.70A.170. The criteria  
16 established does not facilitate the maintenance and enhancement of the timber industry  
17 and fails to stay within the GMA's and WAC's requirements for consideration of development  
related impacts.

18 3. Notice Provision

19 RCW 36.70A.060(1) (b) sets forth the notice requirements in regards to natural  
20 resource lands. This section of the GMA provides, emphasis added:

21 Counties and cities *shall require* that all plats, short plats, development  
22 permits, and building permits issued for development activities on, or within  
23 five hundred feet of, lands designated as agricultural lands, forest lands, or  
24 mineral resource lands, contain a notice that the subject property is within or  
25 near designated agricultural lands, forest lands, or mineral resource lands on  
26 which a variety of commercial activities may occur that are not compatible  
with residential development for certain periods of limited duration. *The notice  
for mineral resource lands shall also inform that an application might be made*

1 *for mining-related activities, including mining, extraction, washing, crushing,*  
2 *stockpiling, blasting, transporting, and recycling of minerals.*

3 The County's CP, at GPO 2.145, provides:

4 Require that all plats, short plats, development permits, and building permits  
5 issued for development activities on, or within 500 feet of, lands designated as  
6 agricultural lands, forest lands, or mineral lands, shall contain a notice that  
7 states that: "The subject property is within or near designated agricultural  
8 lands, forest lands, or mineral resource lands on which a variety of commercial  
9 activities and mineral operations may occur that are not compatible with  
10 residential development for certain periods of limited duration. Commercial  
11 natural resource activities and/or mineral operations performed in accordance  
12 with county, state, and federal laws are not subject to legal action as public  
13 nuisances. (RCW 7.48.305<sup>58</sup>)."

14 As noted by Petitioners,<sup>59</sup> the County's provision fails to include the final sentence in  
15 RCW 36.70A.060(1)(b). The County contends GPO 2.145 "plainly gives notice" and just  
16 because "every conceivable mining operation is not specifically listed does not render the  
17 notice defective."<sup>60</sup> The County misses the point. The underlying purpose of the GMA's  
18 notice provision in regards to natural resource lands is to protect the industry from  
19 encroaching incompatible uses and to adequately advise future property owners of the  
20 activities that could occur on the site. Due to the volatile nature of mineral resource  
21 extraction, the importance of the final sentence in RCW 36.70A.060(1)(b) is heightened. By  
22 not including this single sentence, GPO 2.145 fails to comply with RCW 36.70A.060(1)(b),  
23 which clearly sets forth the mandatory language to be included within the notice provisions.  
24 Therefore, the County remains in continuing non-compliance in regards to the natural  
25 resource lands notice provisions.  
26

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23 <sup>58</sup> RCW 7.48.305 pertains to agricultural activities and forest practices and notes that if such activities and  
24 practices are performed in compliance with good practices standards or inconformity with the law they are not  
25 deemed a nuisance if established prior to the non-resource use. No mention is made in RCW 7.48.305 to  
26 mineral resource lands.

<sup>59</sup> Petitioners' Response, at 18-19.

<sup>60</sup> County's Reply, at 8.

1 **CONCLUSION:**

2 The Board finds and concludes the County has failed to take corrective action to  
3 comply with the requirements of the Board's August 20, 2007, FDO and amend its CP to  
4 include all of the language set forth in RCW 36.70A.060(1)(b). Thus, the County remains  
5 non-compliant in this regard.

6 ***Legal Issue 4 and Legal Issue 13 – Agricultural Lands De-Designation***

7 These legal issues pertain to the de-designation of agricultural lands of long-term  
8 commercial significance (Ag Lands of LTCS), namely parcels identified as Application Nos.  
9 06-01, 06-03, 06-04, 06-05, 06-06, 06-13, and 06-17.<sup>61</sup> In the August 2007 FDO, the Board  
10 concluded that each of the named parcels must be re-examined to determine if they  
11 satisfied the GMA's criteria for Ag Lands of LTCS and, in order to perform this analysis, the  
12 County needed to conduct a proper area-wide or County-wide analysis of agricultural  
13 lands.<sup>62</sup> The Board issued a Determination of Invalidity in regards to Legal Issue 4;  
14 therefore, as noted *supra*, the burden is on the County to demonstrate its action no longer  
15 substantially interferes with the goals of the GMA.

16 In taking action to respond to the Board's Order, the County withdrew Application  
17 Nos. 06-01, 06-05, 06-06, and 06-13 and therefore, removed the basis for non-compliance  
18 and invalidity as to these parcels.<sup>63</sup> However, as both CTED and Petitioners note, there is  
19 no reference made to Application No. 06-17. The County acknowledges this error and states  
20 that it will "remedy the situation by rescinding de-designation 06-17 just as it did the other  
21 challenged de-designations."<sup>64</sup> Regardless of the County's intent to perform, the reality is  
22 the County failed to fully comply and remains non-compliant in regards to Application No.  
23 06-17. The Board finds invalidity is still necessary in order to prevent the vesting of

24 <sup>61</sup> Reference is made to both Parcel 06-16 and 06-17; the Board concludes the correct reference is Application  
25 06-17 as this application pertained to a proposed amendment for a change in land use designation from  
26 Commercial Agricultural to Rural.

<sup>62</sup> August 20, 2007 FDO, at 33 and 72

<sup>63</sup> County's SATC, at 7-8 (citing to Exhibit A, at 8 – withdrawals of applications).

<sup>64</sup> CTED Response, at 10; Petitioners' Reply, at 17; County's Response at 5.

1 development prior to the County taking action for the land encompassed under Application  
2 No. 06-17.

3 In addition, both Futurewise and CTED assert the Board required more of the County  
4 than just the repeal of those parcels of land that had been de-designated; the Board  
5 required the County to perform a county-wide or area-wide analysis of agricultural lands in  
6 conjunction with the challenged determination.<sup>65</sup> Futurewise takes this statement one step  
7 further in contending the County was required to revisit its designation and de-designation  
8 criteria for Ag Lands of LTCS and apply these criteria to the past de-designations.

9 Petitioners sets forth an example to demonstrate there are lands within the County which  
10 qualify for designation as commercial agriculture.<sup>66</sup> However, the analysis the Board found  
11 missing stemmed from the de-designation of the parcels which the County has now  
12 reverted, except for a few, to their original commercial agricultural designation. The county-  
13 wide or area-wide analysis sought by the Board was limited to these de-designation actions  
14 and did not, as Futurewise contends, require the County to analyze all of its lands to  
15 determine if they are suitable for designation as Ag Lands of LTCS or to revisit unchallenged  
16 land that had been previously de-designated.

17 The County is not exempt from conducting such an analysis if applications are  
18 resubmitted during the next comprehensive plan amendment process. Then, consideration  
19 shall be given to the GMA's definition of Ag Lands of LTCS, the designation criteria provided  
20 for in WAC 365-910-050, and the requisite county-wide or area-wide analysis in order to  
21 maintain the industry and conserve a quantity of resource land necessary to assure the  
22 continued existence of the agricultural support system - the suppliers, processors and  
23 industry in Kittitas County.

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24 <sup>65</sup> Futurewise Response to SATC, at 19-20; CTED Response to SATC, at 9-11. The Board notes the Response  
25 submitted by Futurewise stated that the required analysis was to be done for both agricultural and forest  
26 lands of long-term commercial significance. However, neither Issue 4 or Issue 13 asserts a violation of the  
GMA based on forest lands; thus, this reference by Futurewise is in error..

<sup>66</sup> Futurewise Response to SATC, at 20.

1 As for Application Nos. 06-03- and 06-04, Petitioners assert these applications, which  
2 de-designated Ag Lands of LTCS and included them within the City of Kittitas UGA, were not  
3 properly analyzed and therefore, the County remains non-compliant.<sup>67</sup> Whether or not the  
4 City needed to expand its UGA to accommodate projected growth was not the basis for  
5 Legal Issues 4 and 13. The basis was whether the County had properly analyzed the named  
6 parcels for de-designation as commercial agricultural and performed a county-wide analysis  
7 in this regard. The Record is devoid of this analysis, both in regards to the specific  
8 characteristics of the parcel as well as the county-wide analysis. Thus, the County has failed  
9 to achieve compliance in regards to the assertions raised by Petitioners and CTED in Legal  
10 Issues 4 and 13. As noted *supra*, the potential for vesting of development during the  
11 pendency of the compliance proceedings warrants the continuing application of a  
12 Determination of Invalidity.

12 **CONCLUSION:**

13 The Board finds and concludes the County has repealed Application Nos. 06-01, 06-  
14 05, 06-06, and 06-13, thereby removing the basis for non-compliance raised by Legal  
15 Issues 4 and 13 in regards to the de-designation of agricultural lands of long-term  
16 commercial significance. However, the Board finds and concludes the County has not taken  
17 such an action in regards to Application Nos. 06-03, 06-04, and 06-17. Kittitas County states  
18 the omission of Application No. 06-17 was inadvertent, however until such time as the  
19 County takes legislative action to cure the non-compliant nature of this action, the County  
20 remains non-complaint. As to Application Nos. 06-03 and 06-04, the County has failed to  
21 provide the necessary analysis to support de-designation of these parcels, both in regards  
22 to the application of the agricultural lands definitions contained within the GMA at RCW  
23 36.70A.030 and the criteria set forth in WAC 365-190-050.

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<sup>67</sup> Petitioners' Response, at 20

1 Due to the potential for vesting of development to occur during the pendency of  
2 compliance proceedings, the Board concludes invalidity shall remain in regards to those  
3 lands impacted by Application Nos. 06-03, 06-04, and 06-17.

4 ***Legal Issue 6 and Legal Issue 14 – Expansion of the Cities of Kittitas and***  
5 ***Ellensburg UGAs***

6 In the August 2007 FDO, the Board found Kittitas County had failed to conduct a  
7 proper land capacity analysis (LCA) and updated Capital Facilities Plan (CFP) to support the  
8 UGA expansions for the City of Kittitas and the City of Ellensburg.<sup>68</sup> The Board found the  
9 County's action was non-compliant with the GMA and warranted a Determination of  
10 Invalidation in regards to these UGA expansions. In response to the Board's Order, the County  
11 states it has rescinded the expansion of the Ellensburg UGA and cites to Page 8 of SATC  
12 Exhibit A – Ordinance 2008-13 – to support its action. This section of the Ordinance  
13 provides, emphasis added:

14 BE IT FURTHER ORDAINED that the Board of Kittitas County Commissions,  
15 after due deliberation, *withdraws the approval of land application 06-13 as*  
16 *previously adopted* by the Board of County Commissioners with the properties  
17 shown on attachment 1 and *further orders no expansion of the Urban Growth*  
18 *Area boundary for the City of Ellensburg.*

19 As for the City of Kittitas UGA expansion, the County asserts the necessary studies  
20 and analysis needed to justify the UGA expansion have been supplied by the City and that  
21 CTED has reviewed and affirmed the expansion. The County cites to SATC Exhibit A –  
22 Ordinance 2008-13 – to support its action, which provides, emphasis added:

23 BE IT ORDAINED that the Board of Kittitas County Commissioners, after due  
24 deliberation hereby *adopts by reference the City of Kittitas Comprehensive*  
25 *Plan and utilizes the analysis and justification contained within that document*  
26 to approve land applications 06-03 and 06-04 with the properties shown on  
attachment 1 and *approves the expansion of the City of Kittitas Urban Growth*  
*Area* as provided for in these applications.

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<sup>68</sup> FDO, at 39, 78.

1 City of Ellensburg UGA: Petitioners and CTED agree that by rescinding the expansion  
2 areas, the County has complied with the Board's FDO.<sup>69</sup> The Board concurs; by repealing  
3 the expansion of the Ellensburg UGA, through the withdrawal of Application Nos. 06-13, the  
4 County has removed the basis for non-compliance in that regard.

5 City of Kittitas UGA: The County contends the needed analysis and justification for approval  
6 of these applications is contained with the City of Kittitas Comprehensive Plan.<sup>70,71</sup> CTED,  
7 although no longer contesting the compliance of the City's UGA, notes the studies and  
8 analysis prepared by the City to support the expansion are not contained in the Record  
9 before the Board nor does the record contain "any assessment by the County of the  
10 information presented by the City."<sup>72</sup> Petitioners make a similar observation – they "cannot  
11 find any [land capacity] analysis prepared by the County or adopted or verified nor any  
12 capital facility plan for the land included in the expansion adopted by the county."<sup>73</sup> In  
13 reply, the County points to Ordinance 2008-13 and that it has adopted by reference "any  
analysis" showing the propriety of the expansion of the Kittitas UGA.<sup>74</sup>

14 The problem for the Board is the County fails to provide the Board the location for  
15 where in the City's CP, a 92 page document, the "needed analysis and justification" is  
16 contained. Nor, as both Petitioners and CTED point out, has the County presented any  
17 evidence that it has evaluated the City's assessment. Without this supporting analytical

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18 <sup>69</sup> CTED Response, at 12; Petitioners' Response, at 22.

19 <sup>70</sup> County SATC, at 6-7 (Citing Compliance Exhibit A, at 7- 8 which adopts, by reference, the City of Kittitas CP)

20 <sup>71</sup> The Board notes Kittitas County relies on e-mail correspondence within which the County asserts CTED  
21 "affirmed" the UGA expansion; however, at the compliance hearing counsel for CTED stated CTED did not  
22 concur in the "affirmation" of the UGA. The Board does not read CTED's e-mail so liberally, the e-mail simply  
23 noted the City had completed its CP update and provided a LCA and CFP covering the expanded UGA. CTED  
24 is not the agency with authority to determine compliance or non-compliance with the GMA; that is for the  
Board to decide. Although CTED's conclusion that a local jurisdiction's planning efforts appear to conform to  
the goals and requirements of the GMA are given due deference by this Board, the Board must review the  
documents to ensure compliance and it is the County's responsibility, especially given the application of  
invalidity, to provide such documentation to the Board. As noted above, without the documentation the  
Board is unable to perform the needed review.

25 <sup>72</sup> CTED Response, at 13

26 <sup>73</sup> Petitioners' Response, at 22-23.

<sup>74</sup> County Reply, at 8.

1 evidence for the Board to review, the Board has no way of determining whether the County  
2 has achieved compliance in regards to the City of Kittitas UGA.

3 In the original briefing on this matter, the County asserted the UGA expansion was  
4 based on the need for both residential and industrial lands.<sup>75</sup> As for residential needs, the  
5 Board's review of the City's CP, finds the County has allocated a percentage of the project  
6 county population growth to each community based on the Office of Financial Management  
7 (OFM) high-end projections, with the City assuming an annual growth rate of 1.68 percent  
8 or, a need for 202 housing units, but notes an expectation for a more "historical population  
9 growth of 1.3 percent annually."<sup>76</sup> The City's analysis goes on to state several subdivisions  
10 currently under development – Coles Crossing I, Coles Crossing II, Farmview, Brown, and  
11 Morfield/Flood - are expected to provide a combined 244 homes, which is 42 units more  
12 than the 202 housing units necessary for population projects established by the Conference  
13 of Government (COG) for the 2027 population allocation. The analysis further concludes,  
14 based on a continued growth rate of 1.3 percent, a total of 379 homes would be built in the  
15 City by the end of the 20-year planning period.<sup>77</sup> The CP concludes, emphasis added:<sup>78</sup>

15 The land analysis shows a possible 417 homes within the UGA. *The Kittitas*  
16 *UGA has land available to meet these residential needs* while preserving  
17 critical areas, providing parks and right-of-ways and keeping market values  
18 affordable.

18 Therefore, the City's own land analysis demonstrates Application Nos. 06-03 and 06-  
19 04 are not needed to accommodate expected residential growth within the UGA.<sup>79</sup> The  
20 Board notes the two applications still at issue for the City of Kittitas were not designated as  
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22 <sup>75</sup> County Hearing on the Merits Brief, at 16; Ordinance 2006-63 (*see* Findings pertaining to applications)

23 <sup>76</sup> City of Kittitas Comprehensive Plan, Page 8-9.

24 <sup>77</sup> The Board notes a problem with the City's analysis, in that RCW 36.70A.110(2) requires an UGA to be sized  
25 to permit the urban growth projected to occur over the 20-year planning horizon *based upon the population*  
26 *projections made by OFM*, not on expected subdivision homes to be constructed. However, the City's  
methodology has not been challenged and the Board addresses it no further.

<sup>78</sup> City of Kittitas Comprehensive Plan, at 12.

<sup>79</sup> *Id.* Land Use Designations Map, at 88; *See also*, Petitioners' Response, at 22-24.

1 residential, but as Mixed Commercial Industrial, therefore any reliance on residential needs  
2 for the City is not supported.

3 In regards to commercial and industrial lands, all that is noted in the City's CP is that  
4 the City wants to provide stronger tax base, reduce commute time, improve the quality of  
5 life and job opportunities, and fill a regional need for larger retail and industrial land. To  
6 achieve these goals, the City has designated a Mixed Commercial Industrial Area, covering  
7 most of the "recent lands brought into the UGA" – the pending applications - which it  
8 believes are ideal for large retail and industrial uses due to their proximity to the highway,  
9 public facilities, single ownership, and topography.<sup>80</sup> However, the City's CP contains no  
10 analysis, other than a conclusory statement, about commercial and industrial land needs.  
11 Without a more persuasive and complete analysis as to the commercial and industrial needs  
12 of the City, the Board continues to find the County has failed to provide, either through its  
13 own preparation or submittal of supporting documentation drafted by the City, the required  
land capacity analysis to support an expansion of the City of Kittitas's UGA.

14 In addition, the County was also required to develop a CFP addressing the expanded  
15 UGA. The Board cannot reiterate enough the importance of capital facility planning, by all  
16 entities, *when a County is setting UGA boundaries*. Kittitas County must ensure the areas  
17 within the entire UGAs, both existing and expansion areas, will have adequate and available  
18 urban facilities provided over the 20-year planning period. The area impacted by the  
19 proposed applications, Nos. 06-03 and 06-04, is not within the jurisdictional limits of the  
20 City of Kittitas, but is located in what would be deemed the unincorporated portion of the  
21 UGA. It is the County, not the City, that is responsible for ensuring capital facilities within  
22 this area. With its SATC, the County directs the Board's attention to a lack of documentation

23 <sup>80</sup> *Id.* at 12-13. The Board can not help but notice that the City adopted its current Comprehensive Plan on  
24 July 24, 2007, some six months after the PFRs in the instant matter were filed and less than one month before  
25 the Board's issuance of the FDO which found the County's action in permitting the expansion of the UGA both  
26 non-compliant and invalid. Why the City would adopt a version of a Comprehensive Plan during the  
pendency of a Board appeal challenging the very validity of the action is both perplexing and confusing to the  
Board.

1 to denote this fundamental aspect of GMA planning has been accomplished. If the County  
2 wishes to rely on the City to satisfy this responsibility, it is still required to demonstrate to  
3 the Board that the necessary infrastructure to serve the UGA expansion area will be  
4 available during the 20-year planning horizon. As with the LCA, simply citing to the City's  
5 CP, without more, fails to demonstrate compliance.

6 The County failed to provide the Board with adequate documentation to support the  
7 UGA expansion. Without this supporting analytical evidence for the Board to review, the  
8 County continues to be out of compliance with the GMA both in regards to a LCA, as  
9 required by RCW 36.70A.110, and a CFP that addresses the expansion area, as required by  
10 RCW 36.70A.070(3).

11 With its SATC, the County requested the Board lift its Order of Invalidity as to both  
12 the Ellensburg UGA and the City of Kittitas UGA.<sup>81</sup> Because the County has repealed the  
13 expansion of the Ellensburg UGA, the Board grants the County's request in regards only to  
14 the Ellensburg UGA. As for the City of Kittitas UGA, as noted *supra*, the County has failed to  
15 support the continued expansion of this UGA by Application Nos. 06-03 and 06-04 with  
16 either an adequate LCA or a CFP. Therefore, the County's action, which permits the  
17 expansion, continues to substantially interfere with the goals of the GMA and the County's  
18 request for lifting of invalidity is denied in regards to the City of Kittitas UGA.

19 **CONCLUSION:**

20 The Board finds and concludes Kittitas County, by repealing Application No. 06-13,  
21 has removed the basis for non-compliance in regards to the City of Ellensburg UGA as  
22 raised by the parties in Legal Issues 6 and 14. The County's action also warrants the  
23 removal of the Board's Determination of Invalidity in regards to the Ellensburg UGA.

24 The Board finds and concludes Kittitas County has failed to justify the expansion of  
25 the City of Kittitas Urban Growth Area, based on Application Nos. 06-03 and 06-04. The  
26 County has failed to provide the Board with an LCA that demonstrates this additional

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<sup>81</sup> County's SATC, at 8

1 acreage is needed by the City to accommodate residential, commercial, or industrial  
2 development needs based on OFM projected population growth. In addition, the County has  
3 failed to provide the Board with a CFP which addresses the provision of capital facilities  
4 within the UGA expansion area.

5 Therefore, Kittitas County is found to be in continuing non-compliance in regards to  
6 Legal Issues 6 and 14, as these issues relate to the City of Kittitas UGA, because its actions  
7 do not comply with RCW 36.70A.110 or 36.70A.070(3). At this time, the County's actions  
8 continue to substantially interfere with the goals of the GMA and invalidity shall not be lifted  
9 in regards to the City of Kittitas UGA, specifically those lands identified by Application Nos.  
10 06-03 and 06-04, and in relationship to the County's failure to prepare an adequate LCA  
11 and CFP.

#### 11 **IV. FINDINGS AND CONCLUSIONS**

- 12 1. The Board issued its FDO in this matter on August 20, 2007. In the  
13 FDO, the Board found the County non-compliant in regards to Legal  
14 Issues 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, and 14 and ordered the  
15 County to take legislative action to achieve compliance with the goals  
16 and requirements of the GMA as noted by the Board.
- 17 2. The Board finds and concludes Kittitas County and the Intervenors have  
18 filed appeals in Kittitas County Superior Court - Cause Nos. 07-2-00549-  
19 1 and 07-2-00552-1, consolidated under Cause No. 07-2-00552-1, and  
20 a Stay was filed on November 13, 2007, in regards to these appeals  
21 pertaining to Case No. 07-1-0004c and in relationship to Legal Issues 1,  
22 10, and 11. Abeyance for the County in regards to compliance as to  
23 those issues on appeal is warranted.
- 24 3. The Board finds and concludes Kittitas County failed to take legislative  
25 action to comply with the goals and requirements of the GMA, as noted  
26 by the Board's August 2007 FDO, as to Legal Issues 2, 5, 7, and 12.  
The Board further finds and concludes these Legal Issues were not

1 subject to the County's or the Intervenors' appeal in regards to Case  
2 No. 07-1-0004c and, therefore, the County is in continuing non-  
3 compliance as to these issues.

- 4 4. The Board finds and concludes that in regards to Legal Issue 3 and the  
5 criteria for the designation and de-designation of Agricultural Lands of  
6 Long-Term Commercial Significance, the County failed to take  
7 legislative action to comply with the goals and requirements of the GMA  
8 as noted by the Board in its August 2007 FDO and this Order on  
9 Compliance. Thus, the County is in continuing non-compliance as to  
10 this issue.
- 11 5. The Board finds and concludes that in regards to Legal Issue 3 and the  
12 criteria for the designation and de-designation of Forest Lands of Long-  
13 Term Commercial Significance, the County failed to take legislative  
14 action to comply with the goals and requirements of the GMA, as noted  
15 by the Board in its August 2007 FDO and this Order on Compliance.  
16 Thus, the County is in continuing non-compliance as to this issue.
- 17 6. The Board finds and concludes that in regards to Legal Issue 3 and the  
18 notice requirements for Natural Resource Lands, the County failed to  
19 take corrective action to comply with the requirements of GMA and  
20 amend its Comprehensive Plan to include all of the language set forth  
21 in RCW 36.70A.060(1)(b), thus, the County remains non-compliant in  
22 this regard.
- 23 7. The Board finds and concludes that in regards to Legal Issues 6 and  
24 14, Kittitas County has, by repealing Application No. 06-13, complied  
25 with the GMA as required by the Board's August 2007 FDO as it  
26 pertains to the Ellensburg UGA. The Board finds the County in  
compliance and rescinds the Determination of Invalidity in regards to  
the City of Ellensburg UGA.

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8. The Board finds and concludes that in regards to Legal Issues 6 and 14, Kittitas County failed to take legislative action to achieve compliance in regards to the City of Kittitas UGA. The County retained the expansion of the UGA with Application Nos. 06-03 and 06-04, but has failed to provide the Board with a LCA, as required by RCW 36.70A.110, that supports a need for the expansion, and has failed to provide the Board with a CFP, as required by RCW 36.70A.070(3), which addresses the expansion areas and demonstrates the required facilities will be made available during the 20-year planning horizon. Thus, the Board finds the County in continuing non-compliance. The Board further finds the County's action in regards to the City of Kittitas UGA continues to substantially interfere with the goals of the GMA and warrants the continued application of a Determination of Invalidity.

9. The Board finds and concludes that in regards to Legal Issues 4 and 13, Kittitas County has taken legislative action to achieve compliance. However, the County failed to perform all of the actions required by the GMA as noted in the Board's August 2007 for which non-compliance with the GMA was based. The County has repealed Application Nos. 06-01, 06-05, 06-06, and 06-13, thereby reinstating the commercial agricultural designation on these parcels of land which gave rise to the alleged GMA violation. Thus, the Board finds the County in compliance in regards to these cited applications and rescinds the Determination of Invalidity in regards to these cited applications. The Board finds and concludes Kittitas County failed to repeal Application No. 06-17 and, therefore, remains non-compliant in this regard. In addition, the Board finds the County's action continues to substantially interfere with the goals of the GMA and warrants the continued application of a

1 Determination of Invalidity in regards to the lands covered by  
2 Application No. 06-17.

- 3 10. The Board finds and concludes that in regards to Legal Issues 4 and 13  
4 Kittitas County failed to adequately demonstrate Application Nos. 06-03  
5 and 06-04 no longer warrant designation as agricultural lands of long-  
6 term commercial significance as set forth in the GMA. The Board further  
7 finds and concludes the County failed to conduct a county-wide or  
8 area-wide assessment of its agricultural lands as required by RCW  
9 36.70A.060 and 36.70A.170. Therefore, since Kittitas County failed to  
10 take the requisite legislative action required by the GMA, as noted in  
11 the Board's August 20, 2007 FDO; the Board finds the County in  
12 continuing non-compliance in regards to Legal Issues 4 and 13, as to  
13 those issues related to Application Nos. 06-03 and 06-04. The Board  
14 further finds the County's failure to perform a proper evaluation of  
15 these lands for continuing conservation as agricultural lands of long-  
16 term commercial significance substantially interferes with the GMA's  
17 mandate to conserve such land and to maintain the agricultural  
18 industry; thus, warranting the continued application of a Determination  
19 of Invalidity in regards to the lands covered by Application Nos. 06-03  
20 and 06-04.

## 21 **V. ORDER**

22 Based upon a review of the County's Statement of Actions Taken to Comply, the  
23 briefs and exhibits submitted by all parties, the requirements set forth in the Board's August  
24 20, 2007 FDO, the GMA, prior Board orders, case law, and having considered the argument  
25 of the parties and deliberated on the matter, the Board ORDERS:

- 26 1. The Board recognizes and acknowledge Kittitas County and Intervenors'  
Appeals in regards to this matter, Case No. 07-1-0004c, and referenced

1 as consolidated Cause No. 07-2-00552-1. The Board further recognizes  
2 and acknowledges the November 13, 2007 Stay issued by the Kittitas  
3 Superior Court in regard to these appeals. **The Board hereby issues**  
4 **an Order of Abeyance in regards to compliance as to Legal**  
5 **Issues 1, 10, and 11** based on the appeals and stay pending in  
6 Kittitas County Superior Court. Kittitas County remains non-compliant  
7 as to these issues; however, the County is not required to take  
8 legislative action to achieve compliance with the GMA, as noted in the  
9 Board's August 20, 2007, Final Decision and Order until the Court has  
10 rendered its final decision in the matter.

11 2. Kittitas County has taken legislative action which has brought it into  
12 compliance with the GMA in the following regards for which **the Board**  
13 **issues an Order Finding Compliance and Rescinding Invalidity:**

14 A. Legal Issues 6 and 14, as those issues pertain to the expansion  
15 of the City of Ellensburg UGA. The County has rescinded Application  
16 No. 06-13 and has therefore removed the basis of non-compliance.

17 The Board finds the County in compliance and removes the  
18 Determination of Invalidity as to Application No. 06-13's application to  
19 the Ellensburg UGA expansion.

20 B. Legal Issues 4 and 13, as those issues pertain to the de-  
21 designation of agricultural lands of long-term commercial significance.

22 The County has rescinded Application Nos. 06-01, 06-05, 06-06, and  
23 06-13 and has, therefore, removed the basis for non-compliance. The  
24 Board finds the County's actions in compliance with the GMA and  
25 removes the Determination of Invalidity as it applied to these  
26 comprehensive plan amendment applications.

1           3.       Kittitas County has failed to take any legislative action to bring itself  
2                   into compliance with the GMA as required by the Board's August 20,  
3                   2007, FDO in the following regards and for which **the Board issues**  
4                   **an Order of Continuing Non-Compliance and, where relevant, a**  
5                   **Continuing Determination of Invalidity:**

6           A.       As for Legal Issue 2, in regards to the Gold Creek resort  
7                   designation and the Snoqualmie Pass Sub-Area Plan, the County has  
8                   taken no action. Therefore, the County remains non-compliant with the  
9                   GMA.

10          B.       As for Legal Issue 5, in regards to the County's Urban Growth  
11               Areas and Urban Growth Nodes, the County has taken no action.  
12               Therefore, the County remains non-compliant with the GMA.

13          C.       As for Legal Issue 7, in regards to the County's Future Land Use  
14               and Zoning Maps, the County took no action. Therefore, the County  
15               remains non-compliant with the GMA.

16          D.       As for Legal Issue 12, in regards to the County's Urban Growth  
17               Nodes, the County has taken no action. Therefore, the County remains  
18               non-compliant with the GMA.

19          E.       As for Legal Issue 3, the County failed to adopt mandatory  
20               language set forth in RCW 36.70A.060(1)(b) as it relates to mineral  
21               resource lands. Therefore, the County remains non-compliant with the  
22               GMA.

23          F.       As for Legal Issue 3, in regards to criteria for the designation  
24               and de-designation of agricultural lands of long-term commercial  
25               significance, the County failed to adopt criteria which conforms to the  
26               requirements of the GMA as set forth in RCW 36.70A.020(8),  
              36.70A.170, and the guidelines established by WAC 365-190-050.  
              Therefore, the County remains non-compliant with the GMA.

1 G. As for Legal Issue 3, in regards to criteria for the designation  
2 and de-designation of forest lands of long-term commercial  
3 significance, the County failed to adopt criteria which conforms to the  
4 requirements of the GMA as set forth in RCW 36.70A.020(8),  
5 36.70A.170, and the guidelines established by WAC 365-190-060.  
6 Therefore, the County remains non-compliant with the GMA.

7 H. As for Legal Issues 4 and 13, as these issues related to  
8 Application Nos. 06-03 and 06-04, the County has failed to properly  
9 analyze these lands for de-designation from these parcels' current  
10 designation of agricultural lands and has failed to conduct a proper  
11 county-wide or area-wide analysis of agricultural land in conjunction  
12 with this review. Therefore, the County remains non-compliant with  
13 the GMA. The County's failure in regard to these Legal Issues continues  
14 to substantially interfere with the GMA, thereby warranting continuing  
15 invalidity.

16 I. As for Legal Issues 6 and 14, as those issues related to  
17 Applications Nos. 06-03 and 06-04 and the City of Kittitas UGA, the  
18 County has failed to provide the Board with a Land Capacity Analysis,  
19 which supports the need for additional lands, and has failed to provide  
20 the Board with a Capital Facilities Plan which addresses the expansion  
21 areas. Therefore, the County remains non-compliant with the GMA.  
22 The County's failure in regard to these Legal Issues continues to  
23 substantially interfere with the GMA, thereby warranting continuing  
24 invalidity.

25 4. Therefore, the Board directs Kittitas County to take legislative action to  
26 achieve compliance with the Growth Management Act pursuant to both  
the Board's August 20, 2007, FDO and this Order on Compliance for all  
issues for which non-compliance has been found. Such action shall be

1 taken by not later than **November 6, 2008, 90 days** from the date  
2 issued. The following schedule for compliance, briefing, and hearing  
3 shall apply:

- 4 • Respondent's Statement of Action Taken to Comply is due **November 20,**  
5 **2008.**
- 6 • Petitioners' compliance brief is due **December 4, 2008.**
- 7 • Respondent's and Intervenors' brief is due **December 18, 2008.**
- 8 • Petitioners' option compliance reply brief is due **December 29, 2008.**
- 9 • The Board will hold a telephonic compliance hearing on **January 5, 2009, at**  
10 **10:00 a.m. to 2:00 p.m.** The parties will call **360-407-3780 followed by**  
11 **580056 and the # sign.** Ports are reserved for Mr. Howell, Mr. Copsey, Mr.  
12 Caulkins, Mr. Cook, Mr. Merryfield, and Mr. Ryan. **The compliance hearing**  
13 **shall be limited to consideration of the Legal Issues found**  
14 **noncompliant and remanded in this Order. The parties shall file their**  
15 **briefing electronically to: [aandreas@ew.gmhb.wa.gov](mailto:aandreas@ew.gmhb.wa.gov). The parties**  
16 **shall file the original and four copies. Board originals, Board Member**  
17 **copies and exhibits must be single sided, two hole, top center**  
18 **punched, clearly tabbed, and accompanied by a table of attached**  
19 **exhibits naming and describing each document. NO EXCEPTIONS.**

19 If the County takes legislative compliance actions prior to the date set forth in this  
20 Order, it may file a motion with the Board requesting an adjustment to this compliance  
21 schedule.

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

23 **Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the**  
24 **mailing of this Order to file a petition for reconsideration. The original and four**  
25 **copies of a motion for reconsideration, together with any argument in support**  
26 **thereof, should be filed with the Board by mailing, faxing, or otherwise**  
**delivering the original and four copies of the motion for reconsideration directly**

1 to the Board, with a copy served on all other parties of record. Filing means  
2 actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-  
3 02-240, WAC 242-02-330. The filing of a motion for reconsideration is not a  
prerequisite for filing a petition for judicial review.

4 Judicial Review. Any party aggrieved by a final decision of the Board may appeal  
5 the decision to superior court as provided by RCW 36.70A.300(5). Proceedings  
6 for judicial review may be instituted by filing a petition in superior court  
7 according to the procedures specified in chapter 34.05 RCW, Part V, Judicial  
8 Review and Civil. The petition for judicial review of this Order shall be filed with  
9 the appropriate court and served on the Board, the Office of the Attorney  
10 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. Service of the Board means actual receipt of the document at the  
Board office within thirty (30) days after service of the final order. A petition for  
judicial review may not be served on the Board by fax or electronic mail.

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

13 SO ORDERED this 7<sup>th</sup> day of August, 2008.

14 EASTERN WASHINGTON GROWTH MANAGEMENT  
15 HEARINGS BOARD

16 \_\_\_\_\_  
17 Joyce Mulliken, Board Member

18 \_\_\_\_\_  
19 John Roskelley, Board Member