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

KITTITAS COUNTY CONSERVATION,
RIDGE, FUTUREWISE,

Petitioners,

Case No. 07-1-0015

v.

FINAL DECISION ORDER

KITTITAS COUNTY,

Respondent,

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

Intervenors.

I. SYNOPSIS

A Petition for Review was timely filed by Kittitas County Conservation, RIDGE, and Futurewise (Petitioners), challenging a number of development regulations adopted by Kittitas County (County) in its Development Code Update, Ordinance 2007-22. The Petitioners raised eight issues contending the County failed to comply with the Growth Management Act (GMA) and violated the following statutes: RCW 36.70A.020, Goals 1-3, 5, 6, 8-10, 11-12; 36.70A.040; 36.70A.060; 36.70A.070; 36.70A.110; 36.70A.130;

1 36.70A.177; and 36.70A.510. In addition, the Petitioners contend the County's development
2 regulations at issue in the petition, if found non-compliant, warrant invalidity.

3 The Respondent¹ and Intervenors² argue three points: (1) the amended development
4 regulations in Ordinance 2007-22 are in compliance with the GMA, (2) the Petitioners' issues
5 are moot, misapplications of the law, and (3) the Petitioners' issues do not justify an
6 issuance of an order of invalidity. The County also contends many of the Petitioners' issues
7 will be resolved by the adoption of its new Comprehensive Plan and development code. The
8 County and Intervenors argue the County's planning decision is presumed valid and is to be
9 given greater than substantial deference; the Petitioners have a high burden to show the
10 County's decision was clearly erroneous; and the Petitioners have failed to meet this burden
11 in this matter. The Intervenors argue the County's development regulations, as amended by
12 Ordinance 2007-22, were adopted pursuant to Washington State's Growth Management Act
13 (GMA) and are presumed valid. The Intervenors contend that before the Eastern
14 Washington Growth Management Hearings Board (Board) can find an action clearly
15 erroneous, the Board must be left with the firm and definite conviction that a mistake has
16 been committed. The Intervenors also argue the proper burden of proof cannot be
17 overstated.

18 The Board studied the issues as presented and determined from the parties'
19 arguments, the record, past Hearings Boards' decisions, case law, and the requirements set
20 forth in the GMA, whether the County complied with RCW 36.70A. Rather than reiterate
21 the Board's analysis for every issue here in the Synopsis, only a summary of the conclusions
22 will be given.

23 The Board finds the Petitioners carried their burden of proof in the following issues:
24 No. 1 (rural densities), No. 2 (urban uses in rural areas), No. 3 (urban uses in agricultural
25

26 ¹ Kittitas County.

² Son Vida II; 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.

1 lands of long-term significance), No. 4 (water quality and quantity on land with common
2 ownership), No. 6 (Highway Commercial Zone), No. 7 (one-time splits), and No. 8 (Airport
3 Zone uses).

4 The Board finds the Petitioners failed to carry their burden of proof in the following
5 issue: No. 5 (urban governmental services outside of urban growth areas).

6 **II. INVALIDITY**

7 The Board further grants the Petitioners' request for a finding of invalidity and finds
8 the County's actions argued in Issue No. 1 invalid. (See section VI below).

9 **III. PROCEDURAL HISTORY**

10 On September 24, 2007, KITTITAS COUNTY CONSERVATION, RIDGE, and
11 FUTUREWISE, by and through their representative, Keith Scully, filed a Petition for Review.

12 On October 9, 2007, the Board received SON VIDA II and TEANAWAY RIDGE, LLC's,
13 Motions to Intervene in EWGMHB Case No. 07-1-0015.

14 On October 15, 2007, the Board received BIAW's, CWHBA's, and MITCHELL
15 WILLIAMS', Motion to Intervene in EWGMHB Case No. 07-1-0015. Also on October 15,
16 2007, the Board received Kittitas County Farm Bureau, Inc., Motion to Intervene in
17 EWGMHB Case No. 07-1-0015.

18 On October 22, 2007, the Board heard the Motions to Intervene filed by the
19 aforementioned parties before the Prehearing conference. The Board grants Intervenor
20 status to Son Vida, II, Teanaway Ridge, LLC, BIAW, CWHBA, Mitchell Williams, and Kittitas
21 County Farm Bureau. The parties are intervening on behalf of the Respondent. The
22 Intervenor are instructed to file one consolidated hearing on the merits brief on the due
23 date provided in the schedule below.

24 On October 22, 2007, the Board held the telephonic Prehearing conference. Present
25 were John Roskelley, Presiding Officer, and Board Members, Dennis Dellwo and Joyce
26 Mulliken. Present for the Petitioners were Keith Scully. Present for the Respondent was Neil
Caulkins. Present for Intervenor Son Vida, II, and Teanaway Ridge, LLC, was Jeff
Slothower. Present for Intervenor BIAW, Central Washington Home Builders Association,

1 and Mitchell Williams was Andrew Cook. Present for Intervenor Kittitas County Farm Bureau
2 was Gregory McElroy.

3 On October 22, 2007, the Board issued its Prehearing Order.

4 On November 13, 2007, the Board received Intervenors Son Vida II, and Teanaway
5 Ridge, LLC's Partial Motion to Dismiss/or in the Alternative Stay. The Board also received
6 Kittitas County's Motion to Consolidate or in the Alternative Stay or Dismiss.

7 On November 20, 2007, the Board received Petitioners' Response to Motions to
8 Dismiss, Consolidate, and/or Stay.

9 On November 30, 2007, the Board received Intervenors Son Vida's II Reply to
10 Petitioners' Response to Motions to Dismiss, Consolidate, and/or Stay and Declaration of
11 Jeff Slothower. The Board also received Respondent Kittitas County's Rebuttal in its Motion
12 to Consolidate, Stay, or Dismiss.

13 On December 14, 2007, the Board held a telephonic motion hearing. Present were
14 John Roskelley, Presiding Officer, and Board Members, Dennis Dellwo and Joyce Mulliken.
15 Present for the Petitioners were Keith Scully. Present for the Respondent was Neil Caulkins.
16 Present for Intervenors Son Vida, II, and Teanaway Ridge, LLC, was Jeff Slothower. Present
17 for Intervenors BIAW, Central Washington Home Builders Association, and Mitchell Williams
18 was Andrew Cook. Present for Intervenor Kittitas County Farm Bureau was Gregory
19 McElroy.

20 On December 19, 2007, the Board issued its Order on Motions.

21 On February 13, 2008, the Board held the hearing on the merits. Present were John
22 Roskelley, Presiding Officer, and Board Members, Dennis Dellwo and Joyce Mulliken.
23 Present for the Petitioners were Tim Trohimovich. Present for the Respondent was Neil
24 Caulkins and Darryl Piercy. Present for Intervenors Son Vida, II, and Teanaway Ridge, LLC,
25 was Jeff Slothower. Present for Intervenors BIAW, Central Washington Home Builders
26 Association, and Mitchell Williams was Andrew Cook. Present for Intervenor Kittitas County
Farm Bureau was Gregory McElroy.

1 12), 3.670A.040, 36.70A.070, 36.70A.110 and 36.70A.130?

2 **The Parties' Position:**

3 **Petitioners:**

4 The key issue in the Petitioners' Issue No. 1 in this case is similar in content and
5 argument to their Issue No. 1 in Case No. 07-1-0004c, primarily that the County allows rural
6 land use designations that violate the GMA by allowing urban growth in the rural area. In
7 Case No. 07-1-0004c, the Board ruled that densities of 1 du/3 acres in the rural area of
8 Kittitas County are non-compliant with the GMA. Since there have been no changes in the
9 law since Case No. 07-1-0004c was decided, and there are no differences in material fact,
10 the Petitioners believe the Board should again find the County out of compliance in this
11 issue.

12 The Petitioners cite RCW 36.70A.070(5)(b) and RCW 36.70A.110(1) to emphasize
13 their argument that the rural element shall provide appropriate rural densities and uses not
14 characterized by urban growth and urban growth is prohibited outside of urban growth
15 areas. The Petitioners argue all three Growth Boards have held the "minimum rural density
16 is 1 dwelling unit per 5 acres of land"³, and emphasize this determination is not a "bright
17 line" rule, but rather a county's discretion on rural lot sizes or density, is limited by the
18 GMA, and must be justified in the record. The Petitioners contend development regulations
19 are the tool by which counties implement their comprehensive plan and must be consistent
20 with the plan.

21 According to the Petitioners, in *Diehl v. Mason County*, the Court of Appeals
22 determined that residential densities of one housing unit, or more, per 2.5 acres "would
23 allow for urban-like development, not consistent with primarily agricultural uses."⁴ The
24 Petitioners also point to the United States Census of Agriculture, which shows the average

25 ³ Petitioners' HOM brief at 8.

26 ⁴ *Diehl v. Mason County*, 94 Wn. App. 645, 656, 972 P.2d 543, 548 (1999).

1 size of a small farm in Kittitas County to be 5.68 acres.⁵ According to the Petitioners, this is
2 almost twice the minimum density in the Agricultural-3 and Rural-3 zones found in Kittitas
3 County. The Petitioners cite to *Tugwell v. Kittitas County* where the Court of Appeals
4 determined that parcels of less than 20 acres are too small to farm and are incompatible
5 with the primary use of land as defined in RCW 36.70A.170.⁶ Also, the Petitioners contend
6 the reports and previous cases, as to the size of farms and their viability, show that five
acres or more is needed to ensure agricultural viability and rural character.

7 The Petitioners contend water quantity and quality is impacted by small acreage lots
8 and violates the GMA, specifically Goal 10 in RCW 36.70A.020 and RCW
9 36.70A.070(5)(c)(vi). The County's development regulations, according to the Petitioners,
10 must be consistent with its Comprehensive Plan (CP) and must comply with both the GMA's
11 goals and requirements to protect surface and ground water quality and quantity.

12 In addition, the Petitioners argue urban densities of 1 du/3 acres violate RCW
13 36.70A.110(1), which requires the County to encourage urban growth in urban areas. This
14 Board found the County's rural element fails to do this in Case No. 07-1-0004c by allowing
15 "147,714 building lots in the rural area through rezones and subdivisions into three acre
lots."⁷

16 The Petitioners further argue that prior Board cases, which found 2.5 acre lots in
17 rural areas compliant, is not applicable in this case because the County has not developed
18 the required written record explaining how local circumstances are applicable and the GMA
19 is satisfied.⁸

20 The Petitioners contend several of the County's land use zones, Urban Residential
21 Zone, Historic Trailer Court (HTC) Zone, Forest and Range Zone and Performance Based

22 ⁵ U.S. Dept. of Agriculture National Agricultural Statistics Service, 2002 Census of Agriculture Washington State and
23 County Data Volume 1, Geographic Area Series Part 47 AC-02-A-47 p. 240 (June 2004).

24 ⁶ *Tugwell v. Kittitas County*, 90 Wn. App. 1, 9, 951 P.2d 272, 276 (1997).

25 ⁷ Petitioners' HOM brief at 11 citing to 07-1-0004c FDO.

26 ⁸ Petitioners' HOM brief at 12 citing to RCW 36.70A.070(5)(a).

1 Cluster Platting allow urban-like densities in the rural areas, as does KCC 17.08.022
2 Accessory Dwelling Unit, which permits a detached unit from the primary residence. The
3 Petitioners argue that all three Hearings Boards have found these urban-like zones out of
4 compliance in other cases and this Board should do so here.

5 In conclusion, the Petitioners request the Board to find the provisions of KCC
6 chapters 16.09, 17.08, 17.12, 17.22, 17.24, 17.28, 17.30, and 17.56 violate the GMA and
7 remand them to the County for action consistent with the GMA.

8 **Respondent:**

9 The Respondent, Kittitas County, contends its proposed revisions to its CP "will limit
10 where the denser zones can be."⁹ Basically, the County raises a defense that it is in the
11 process of adopting an ordinance that will rectify many of the Petitioners' concerns. The
12 County argues the Urban Residential Zone will be limited to areas within the Urban Growth
13 Areas (UGA), and the Accessory Dwelling Unit chapter will be subject to underlying zoning
14 densities and reviewed by administrative means. The Respondent points out the HTC zone
15 is simply recognition of existing trailer courts and does not allow for the creation of new
16 ones unless the trailer courts comply with the underlying zoning densities. In addition, the
17 Respondent contends the Forest and Range Zone cannot be divided more densely than 1
18 du/5 acres. The Respondent also contends bonus density will not create lots denser than 1
19 du/3 acres and a bonus will not be available for three-acre parcels.

20 **Intervenors:**

21 The Kittitas County Farm Bureau, Central Washington Home Builders Association,
22 Mitchell Williams, Building Industry of Washington and Teanaway Ridge L.L.C., collectively
23 called the Intervenors, argue the Board should dismiss the claim by the Petitioners that "the
24 GMA imposes a bright line rule of one dwelling unit per five acres."¹⁰ The Intervenors
25 contend the GMA mandates a bottom-up planning approach, and the *Viking Properties v.*
26

⁹ Respondent's HOM brief at 2.

¹⁰ Intervenors' HOM brief at 5.

1 *Holm* ruling held that Hearings Boards do not have the authority to impose a bright line, nor
2 elevate certain goals, such as reducing sprawl and encouraging urban development in the
3 urban areas, to a higher priority than other goals, such as affordable housing, economic
4 development and property rights.¹¹

5 The Intervenors contend the GMA is absent of any reference to a bright line rule
6 requiring a minimum density of 1 du/5 acres within the rural areas. Instead, the GMA allows
7 local jurisdictions to apply innovative techniques, such as clustering, which Kittitas County's
8 Rural-3 Zone allows. Contrary to the Petitioners' assertion concerning *Diehl v. Mason*
9 *County*¹², and their argument concerning *Viking*¹³ and the *Gold Star v. Futurewise*¹⁴
10 decisions, the Intervenors contend the courts have held there is no bright line of 1 du/5
11 acre rural density.

12 The Intervenors further argue the County's development regulations for
13 performance-based cluster platting is permitted under the GMA as an innovative technique,
14 and the "soon to be adopted" development regulations protect open space and restrict
15 density bonuses.¹⁵

16 **Petitioners Reply:**

17 The Petitioners contend the County's argument that pending development code
18 regulations will moot many of the Petitioners' issues is incorrect. The Petitioners argue an
19 issue is moot only if a board can no longer provide effective relief. Furthermore, the
20 Petitioners contend the proposal to enact something is very different from actually doing so,
21 and the issues are not moot until GMA-compliant development regulations have been
22 enacted. According to the Petitioners, while the Intervenors argument that a stay has been

23 ¹¹ *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112 (2005) (holding that the Growth Management Hearings Board does not
24 have the authority to establish public policy, such as bright line rules).

25 ¹² Intervenors' HOM brief at 5.

26 ¹³ *Id.*

¹⁴ *Gold Star Resorts v. Futurewise*, 140 Wn. App. 378, 166 P.3d (2007).

¹⁵ Intervenors HOM brief at 14-15.

1 issued in the County's appeal of 07-1-0004c is true, the stay does not cover this case and,
2 in fact, stay's only certain issues in the prior case. The Petitioners contend the Board still
3 has authority over this case.

4 **Board Analysis:**

5 There are several components to Issue No. 1 that need to be addressed by the
6 Board. The primary issue is whether Kittitas County failed to eliminate densities greater
7 than 1 du/5 acres in rural areas outside of the urban growth areas and limited areas of
8 more intensive rural development (LAMIRDs), and whether certain provisions of the
9 development code allow inappropriate densities. But there are also two other underlying
10 issues raised by the Respondent and Intervenors that also need to be addressed; that of
11 the challenge being moot, and the question of the impact of the court's stay in Case No. 07-
12 1-0004c. The Board will address these two issues first.

13 The County claims to be in the process of enacting an ordinance to correct many of
14 the challenged items and, as such, believes many, if not all, the Petitioners' issues are
15 moot. The Board disagrees. The mere fact the County is working on a new ordinance it
16 believes will remedy the Petitioners' concerns does not provide a basis for an issue to be
17 moot. The issue is moot only if the Board can no longer provide effective relief. In *Orwick v.*
18 *Seattle*,¹⁶ the court provided a definition of moot and this was later cited by the Central
19 Board in *McVittie v. Snohomish County*.¹⁷ This Board adheres to the same definition:

20 In *Orwick v. Seattle*, 103 Wn 2d 249 (1984), the court stated, "A case is moot
21 if a court can no longer provide effective relief." The *Orwick* court also
22 recognized an exception to moot cases involving "matters of continuing and
23 substantial public interest."

24 A proposal by the County to enact future legislation is irrelevant to the Petitioners'
25 issues, which are not moot until compliant development regulations have been put in place.
26 In this case, the Board can still provide effective relief to the Petitioners.

¹⁶ *Orwick v. Seattle*, 103 Wn 2d 249 (1984).

¹⁷ Jody McVittie et al., v. Snohomish County et al., CPSGMHB Case No. 99-3-0016c, FDO (Feb. 9, 2000).

1 In the matter of the Court's stay of Case No. 07-1-0004c and its effect on this case,
2 the stay does not cover this appeal. The court-issued stay does not change the non-
3 compliant nature of the County's CP provisions; it only stays the County's duty to comply
4 with the Board's schedule for compliance.

5 As to the primary issue of three-acre zoning, in Case No. 07-1-0004c, the Board
6 found the County out of compliance for allowing urban-like densities in the rural areas, in
7 particular, the County's Agriculture-3 and Rural-3 zoning. As such, the Board concluded:

8 The Board finds that the densities allowed by regulations Agriculture-3 and
9 Rural-3 are urban in the rural element and not in compliance with the Growth
10 Management Act and the County has not developed a written record
11 explaining how the rural element harmonizes the planning goals in the GMA
12 and meets the requirements of the Act.¹⁸

13 The critical statement in the Board's conclusion is "...the County has not developed a
14 written record explaining how the rural element harmonizes the planning goals in the GMA
15 and meets the requirements of the Act". The preparation of this written record is a GMA
16 requirement found in RCW 36.70A.070(5)(a).

17 The Petitioners in this case have shown through definitions, expert opinion, statutes,
18 and past court and board decisions that 1 du/3 acre zoning allowed in the County is more
19 urban-like in nature and violates the GMA. This is not a "bright line" definition as the
20 Respondent and Intervenors would like us to find, rather it is the end-result of an
21 accumulation of quantitative data which points to an appropriate lot size for rural
22 development. As the GMA requires, the County may apply local circumstances to its rural
23 element in deciding density, but it also must develop a written record explaining how the
24 rural element meets the requirements of the GMA. The County has failed to do this.

25 The Petitioners have shown the following: (1) that GMA requirements, such as RCW
26 36.70A.070(5)(a), control over goals, as the Supreme Court wrote in *Lewis County*¹⁹; (2)

¹⁸ KCC et. al., v. Kittitas County, EWGMHB Case No. 07-1-0004c, FDO (Aug. 20, 2007).

¹⁹ *Lewis County v. WWGMHB*, 157 Wn.2d 488, 504, 139 P.3d 1096, 1104 (2006).

1 that small urban-like lots affect water quality and quantity²⁰; (3) that urban growth refers to
2 growth which makes intensive use of land to such a degree as to be incompatible with the
3 primary use of land for agriculture²¹; (4) that the rural element shall provide densities
4 consistent with rural character²²; (5) that development regulations shall be consistent with
5 a county's comprehensive plan²³; (6) that *Tugwell v. Kittitas County* suggests the size of a
6 lot to produce food or other agricultural products is greater than five acres²⁴; (7) that three-
7 acre zoning throughout Kittitas County fails to provide for a variety of rural densities²⁵; and
8 (8) that in the *Gold Star Resorts v. Futurewise*²⁶ the court held that the Growth Boards
9 retain some discretion as to what is urban and what is rural based on local circumstances
and the written record, as long as *Viking* is taken into consideration.

10 The Board stands by its decision in Case No. 07-1-0004c, which concerns three-acre
11 zoning in Kittitas County. Rather than reiterate the same analysis for this case, the Board
12 incorporates by reference in its entirety the Board Analysis set forth in Legal Issue No. 1 for
13 the prior case, *Kittitas Conservation, et al.*, EWGMHB Case No. 07-1-0004, FDO at 15-17.

14 As for the other provisions of the County's development code, including KCC 17.22,
15 Urban Residential Zone; KCC 17.24, Historic Trailer Court Zone,; KCC 17.56, Forest and
16 Range Zone; KCC 16.09, Performance Based Cluster Platting; and KCC 17.08.022, Accessory
17 Dwelling Unit, which the Petitioners contend allow urban-like densities in the rural areas,
the Board will address each one separately.

18 In their HOM brief, the Respondent indicates that the amendment currently under
19 consideration by the County, KCC 17.22 Urban Residential Zone, "will be limited to areas

20 _____
21 ²⁰ Petitioners HOM brief at 9-11.

22 ²¹ RCW 36.70A.030(18).

23 ²² RCW 36.70A.070(5)(b).

24 ²³ RCW 36.70A.040.

25 ²⁴ *Tugwell v. Kittitas County*, 90 Wn. App.1, 9, 951 P.2d 272, 276 (1997).

26 ²⁵ Petitioners HOM brief at 11.

²⁶ *Gold Star Resorts v. Futurewise*, 140 Wn. App. 378, 166 P.3d 748 (2007).

1 within the Urban Growth Areas (UGA's) and those areas formerly designated Urban
2 Residential that are outside a UGA will immediately become Rural and subject to those
3 densities."²⁷ This statement indicates to the Board that the County recognizes its Urban
4 Residential Zone is out of compliance and it will amend KCC 17.22 in its upcoming code
5 revision. But until such a code revision, the Board finds the County out of compliance in this
6 issue.

7 According to the Petitioners, KCC 17.24 Historic Trailer Court Zone is allowed outside
8 of urban growth areas and allows for urban density. The County argues KCC 17.24 is just
9 recognition of existing trailer courts and the creation of new ones is not allowed unless they
10 comply with the underlying zoning. The Board agrees with the Respondent. KCC 17.24
11 recognizes an existing use and specifically states, "The purpose and intent of the trailer
12 court zone is to recognize established mobile home developments located in Kittitas County.
13 No further expansion of these developments is allowed."²⁸

14 KCC 17.56 Forest and Range Zone has a minimum lot size of twenty acres, but also
15 allows one-half acre minimum lot sizes for any lot within an approved platted cluster
16 subdivision served by public water and sewer, and six-thousand square feet for lots on
17 existing municipal sewer and water systems. There is no maximum density. In their brief,
18 the Respondent acknowledges, "[T]here will be no bonus density that will create lots denser
19 than one unit per three acres" and "[T]here will be no bonus density available for three-acre
20 parcels and the bonus density available for five-acre parcels cannot create anything smaller
21 than three acres in size."²⁹ The Board agrees with the Petitioners that allowing for the
22 creation of three acre lots within the rural area effectively permits urban density in the rural
23 area and finds KCC 17.56 out of compliance with the GMA.

24 As with the Urban Residential Zone, the County recognizes KCC 17.08.022 Accessory

25 ²⁷ Respondent's HOM brief at 3.

26 ²⁸ KCC 17.24.010 (emphasis added).

²⁹ Respondent's HOM brief at 3.

1 Dwelling Unit is out of compliance and "will be remedied".³⁰ KCC 17.08.022 fails to provide
2 that an accessory dwelling unit must comply with any density limits for the few zones that
3 have them. The Board agrees with the Petitioners and finds KCC 17.08.022 is out of
4 compliance for allowing urban-like growth in the rural areas.

5 The Board found the County's KCC 16.09 Performance Based Cluster Platting, out of
6 compliance in Case No. 07-1-0004c and reaches the same conclusion here. KCC 16.09
7 allows densities of 1 du/1.5 acres for the Agriculture-3 and Rural-3 zones and densities of 1
8 du/2.5 acres in the Agriculture-5 and Rural-5 zones. These densities are urban densities,
9 violate the GMA, and are out of compliance.

10 KCC 17.12 Zones Designated –Map divides the County into 22 zones, two of which
11 are KCC 17.28 Agriculture-3 and KCC 17.30 Rural-3, which have been found by this Board
12 to be non-compliant. The Official Zoning Map of Kittitas County is referenced through KCC
13 17.12. The zones are established and shown on the Official Zoning Map and are "...as much
14 a part of this title as if the matters and information set forth by said maps were all fully
15 described herein."³¹ As such, the Board finds KCC 17.12 out of compliance in regards to
16 KCC 17.28 and KCC 17.30.

17 **Conclusion:**

18 The Petitioners have carried their burden of proof and shown by clear and convincing
19 evidence that the actions of the County, complained of herein, are clearly erroneous in view
20 of the entire record before the Board and in light of the goals and requirements of the
21 Growth Management Act. The Board finds that the densities allowed by Agriculture-3 (KCC
22 17.28) and Rural-3 (KCC 17.30) are urban in the rural element and not in compliance with
23 the Growth Management Act and the County has not developed a written record explaining
24 how the rural element harmonizes the planning goals in the GMA and meets the
25 requirements of the Act. The Board also finds that Kittitas County Code Chapters 16.09,
26

³⁰ Id.

³¹ Kittitas County Code, Title 17, Zoning, KCC 17.12.020, p. 21

1 17.08, 17.12 (zoning map), 17.22, and 17.56 allow urban-like densities in the rural areas
2 and are not in compliance with the GMA.

3 The Board finds the Petitioners have failed to carry their burden of proof in regards
4 to KCC 17.24, the Historic Trailer Court Zone. This provision of the KCC is in compliance.

5 **Issue No. 2:**

6 Does Kittitas County's failure to prohibit urban uses and urban development in rural
7 areas in chapters 16.09, 17.12, 17.29, and 17.36 KCC and the failure to include standards
8 to protect the rural area violate RCW 36.70A.020 (1-2, 8-10, 12), 36.70A.040, 36.70A.070,
9 36.70A.110, and 36.70A.130?

10 **The Parties' Position:**

11 **Petitioners:**

12 The Petitioners contend the County impermissibly allows urban uses in its rural area
13 and fails to include standards to protect the rural character as required by RCW
14 36.70A.070(5)(b) and RCW 36.70A.110(1). The Petitioners also argue rural character has
15 both a "functional and a visual component" as determined in *Vashon-Maury v. King County*.
16 The functional component refers to a dependency on a "rural setting" and the visual
17 component refers to the "visual character of the traditional rural landscape."³² The
18 Petitioners contend there are two exceptions to the prohibition on urban growth in rural
19 areas: (1) uses dependent on location in a rural area, such as saw mills and campgrounds,
20 and (2) essential public facilities as described in RCW 36.70A.200(1).

21 The County recognizes RCW 36.70A.070(5)(c) and its requirement to contain and
22 control rural development, but permits uses in the Agricultural-20 Zone inconsistent with its
23 own definition of rural character in the KCC. The Petitioners argue the County's
24 development regulations must be "consistent with and implement the comprehensive
25 plan..."³³ According to the Petitioners, KCC 17.29 A-20 Agricultural Zone allows urban uses
26 in the rural area, such as kennels, auctions, hospitals, museums and convalescent homes.

³² *Vashon-Maury v. King County*, CPSGMHB Case No. 95-3-0008, FDO at 48, 1995 WL 903209 (Oct. 23, 1995).

³³ RCW 36.70.040(4)(d).

1 The Petitioners point out the Western Board cited kennels and auction houses in rural areas
2 as examples of non-resource based uses prohibited outside UGAs when it invalidated similar
3 provisions in Mason County.³⁴

4 The Petitioners agree some types of hospitals, museums, and convalescent homes
5 "might be permissible in the rural area, if Kittitas County had standards in place to keep
6 intact rural character and limit the size of development", but the KCC fails to have
7 development standards or size limitations to preserve rural character visually, or protections
8 for natural resources, such as water, from over-sized institutions.³⁵

9 Additionally, the Petitioners argue that KCC 17.29 A-20 also allows in the
10 Agricultural-20 Zone "any use not listed which is nearly identical to a listed use, as judged
11 by the administrative official..."³⁶ The Petitioners contend this violates the GMA in that it
12 does not limit the allowed uses to those that are not urban development, thus lacking
13 adequate standards for staff.

14 The Petitioners contend KCC 17.36, the Planned Unit Development (PUD) Zone,
15 allows a variety of urban uses in the rural area, such as multi-family structures,
16 manufactured home parks, hotels, motels, condominiums, retail businesses, commercial-
17 recreation businesses, restaurants, cafes, taverns, cocktail bars and any other similar uses.
18 The Petitioners argue these uses are not limited to those that serve the rural areas, do not
19 include standards to protect rural character, and do not comply with RCW 36.70A.070(5)(c).
20 In addition, the Petitioners claim the PUD Zone does not include any maximum density for
21 the residential uses it allows in the rural areas, and lacks the standards this Board held were
22 necessary to comply with the GMA in Case No. 07-1-0004c.³⁷

23 **Respondent:**

24 _____
25 ³⁴ Dawes v. Mason County, WWGMHB Case No. 96-2-0023, Order Finding Invalidity (Jan. 14, 1999).

26 ³⁵ Petitioner's HOM brief at 19.

³⁶ KCC 17.29.020(18).

³⁷ Kittitas County Conservation et al., v. Kittitas County et al., EWGMHB Case No. 07-1-0004c, FDO at 47-54 (August 20, 2007).

1 The Respondent contends PUD's are allowed under the GMA and all developments in
2 PUD's permitted in Kittitas County must comply with rural zoning densities. In addition,
3 PUD's must go through an extensive public process to ensure compatibility with the rural
4 character.

4 **Intervenors:**

5 The Intervenors point out the Petitioners failed to brief KCC 16.09 and KCC 17.12
6 under this issue. Therefore, they believe these two arguments are abandoned.

7 The Intervenors contend local governments can achieve a variety of rural densities
8 and uses through "clustering, density transfer, design guidelines, conservation easements,
9 and other innovative techniques..."³⁸ They argue this portion of the GMA "expressly grants
10 local governments discretion in establishing the pattern of rural densities and uses."³⁹

11 The Intervenors discuss each use allowed in the Agricultural-20 Zone that is
12 addressed by the Petitioners in their brief, such as kennels, auctions, hospitals, museums
13 and convalescent homes. According to the Intervenors, the Petitioners fail to understand
14 rural and agricultural uses in the County. For instance, kennels are numerous in the
15 agricultural zones because dogs are kept, raised and sold specifically to work with livestock;
16 and museums, hospitals and larger buildings would be under the County's development
17 regulations, which limit their size, and state regulations, which require permitting and new
18 water rights. The Intervenors contend that KCC 17.29 A-20 Agricultural Zone is
19 implemented in conjunction with the County's CP, development regulations, and other state
20 regulations and, when taken together, do not allow urban uses in rural areas.

21 The Intervenors contend KCC 17.36, Planned Unit Developments, allows for local
22 planning based on local circumstances and is intended by the County to be one of the tools
23 it needs to meet the goals in the GMA. KCC 17.36 provides for a detailed preliminary
24 development plan prior to approval of a PUD, and a final development plan. The

24 ³⁸ RCW 36.70A.070(5)(b).

25 ³⁹ Intervenors' HOM brief at 16.

1 Intervenor's argue there is no mandatory minimum density required in lands designated for
2 rural uses, but instead the GMA requires innovative land use management techniques,
3 including PUD's.⁴⁰

4 According to the Intervenor's, the PUD ordinance must be read in conjunction with
5 other state laws, including availability of water rights from the Department of Ecology
(DOE).

6 **Petitioners Reply:**

7 The Petitioners did not respond to the Respondent's and Intervenor's' briefs.

8 **Board Analysis:**

9 The Board agrees with the Intervenor's concerning KCC 16.09 and KCC 17.12. It is
10 not enough to just list the provisions in the issue statement. The Petitioners must address
11 the provision(s) in their argument and, if they fail to do so, the provisions or issue is
12 considered abandoned. The Petitioners failed to brief these two provisions in this issue and
are therefore deemed abandoned.

13 The Board will examine KCC 17.29 A-20 Agriculture Zone and KCC 17.36 Planned
14 Unit Development separately.

15 KCC 17.29 sets forth certain permitted and conditional uses in the A-20 or
16 Agricultural Zone. The purpose stated in KCC 17.29 is to "...preserve fertile farmland from
17 encroachment by nonagricultural land uses; and protect the rights and traditions of those
18 engaged in agriculture."⁴¹ According to KCC 17.29, a variety of agricultural-related uses are
19 permitted outright and many other uses are allowed by conditional use, including those the
20 Petitioners argue are not allowed in the rural zone. There is also the open-ended provision
21 which allows "any use not listed which is nearly identical to a listed use, as judged by the
22 administrative official..."⁴²

23
24 ⁴⁰ RCW 36.70A.090.

25 ⁴¹ KCC 17.29.010

26 ⁴² KCC 17.29.020

1 KCC 17.29 requires a lot size of 20 acres, but other than that restriction, KCC 17.29
2 fails to contain development standards or size-limitations for the conditional uses allowed,
3 and fails to control an unlimited number of unknown uses that can be permitted through
4 administrative decision. In *Vashon-Maury*⁴³, the CPSGMHB held that, although some uses
5 may fall within the definition of urban growth, many uses may be permitted in the rural
6 area, if they satisfy the test ⁴⁴and the county has adopted policies and regulations
7 necessary to keep the use in the rural area from being incompatible with the character of
8 the rural land use pattern.

9 The Board concludes, if the County has standards in place to keep intact rural
10 character and limit the size of development, some of the uses might be permissible in the
11 rural area, such as kennels and agricultural-related auctions and museums. However, that's
12 not the case here. In this case, the County failed to provide the necessary standards and
13 limitations in its regulations to ensure urban-type uses will not be conditionally permitted or
14 administratively decided in the rural area. The County also failed to fulfill either of the
15 criteria in the two-part test in *Vashon-Maury*, which this Board believes is a reasonable
16 standard that can be used to help the Board make a decision in this matter.

17 KCC 17.36 is the County's Planned Unit Development Zone chapter. The Board
18 agrees with the Petitioners this zone: (1) allows a variety of urban uses in the rural area;
19 (2) fails to limit uses to those that serve the rural areas; (3) fails to include standards to
20 protect rural character; (4) fails to comply with RCW 36.70A.070(5)(c); (5) fails to include
21 any maximum density for the residential uses it allows in the rural areas; and (6) basically
22 lacks appropriate standards to comply with the GMA.⁴⁵ KCC 17.36 does not specify which
23 zones PUD's are allowed or under what specific criteria they will be permitted. In fact, it
24 looks as though the PUD Zone is set up as its own independent zone, rather than a

25 ⁴³ *Vashon-Maury v. King County*, CPSGMHB Case No. 95-3-0008, FDO at 48, 1995 WL 903209 (Oct. 23, 1995).

26 ⁴⁴ The test's two components that determine whether something is urban in nature and can be located in the rural area are
(1) it is dependent on a rural location and it is compatible with the rural character OR (2) it is an EPF.

⁴⁵ Petitioners' HOM brief at 18-21.

1 development option, as most other counties choose to do. The Kittitas Draft Proposed
2 Zoning Map shows the PUD Zone located at Snoqualmie Pass and Vantage surrounded by
3 the Forest and Range Zone, and possibly in some areas of the Commercial Agriculture Zone.
4 The clarity of the map makes this determination inconclusive.

5 The Intervenor's contend the use of PUDs is authorized by the GMA. The Board
6 agrees. PUDs are one of the acceptable tools counties and cities can adopt in their
7 development regulations, provided that standards and limitations are in place to ensure
8 compliance with the GMA. The only restriction imposed by the County in this chapter is
9 under KCC 17.36.025, Density, which provides, "[T]he overall density of any PUD residential
10 development shall not exceed the density as allowed for in the underlying zone." Density is
11 defined in the KCC as, "Expressed in dwelling units per acre." ⁴⁶

12 KCC 17.36 allows commercial uses, such as hotels, motels, restaurants, cafes,
13 taverns and other businesses in the rural area. These uses are typically located in the urban
14 growth areas or in LAMIRDs, not in rural areas. Permitting of the above mentioned
15 commercial uses can't be determined in terms of "dwelling units per acre". These uses must
16 have specific standards and limitations in order to prevent urban development in the rural
17 area or not be allowed outside of established UGA's or LAMIRD's.

18 The Intervenor's argue the PUD ordinance must be read in conjunction with other
19 state laws. This is true, but the Board also believes a jurisdiction's development regulations
20 should be clear, detailed and concise. Pertinent state laws should be mentioned in the
21 chapter, if applicable.

22 **Conclusion:**

23 The Petitioners have carried their burden of proof and shown by clear and convincing
24 evidence the action of the County, complained of herein, is clearly erroneous in view of the
25 entire record before the Board and in light of the goals and requirements of the Growth
26 Management Act. The Board finds Kittitas County impermissibly allows urban uses in its

⁴⁶ KCC 17.36.025.

1 rural areas, and fails to include standards to protect the rural character as required by RCW
2 36.70A.020(1-2, 8-10), RCW 36.70A.070(5)(b) and RCW 36.70A.110(1). The Board finds
3 Kittitas County Code Chapters 17.29 and 17.36 allow urban uses in the rural areas and fail
4 to protect rural character and are not in compliance with the GMA.

5 The Board also finds the Petitioners failed to brief KCC 16.09 and KCC 17.12 and,
6 therefore, these two provisions mentioned in this issue are deemed abandoned.

7 **Issue No. 3:**

8 Does Kittitas County's failure to prohibit urban uses in designated agricultural lands
9 of long-term commercial significance in chapter 17.3 KCC violate RCW 36.70A.020 (1-2, 8-
10 10, 12), 36.70A.040, 36.70A.060, 36.70A.070, 36.70A.110, 36.70A.130, and 36.70A.177?

11 **The Parties' Position:**

12 **Petitioners:**

13 The Petitioners contend Kittitas County violates the GMA by allowing non-farm uses
14 in designated agricultural lands of long-term commercial significance (ALOLTCS).
15 Specifically, the County allows non-livestock auctions, quarries, sand and gravel excavation,
16 kennels, day care centers, community clubhouses, governmental uses essential to
17 residential neighborhoods, and schools with no limiting criteria or standards. The Petitioners
18 agree the GMA provides counties with some discretion in the zoning of agricultural lands,
19 but zoning techniques "should be designed to conserve agricultural lands and encourage
20 the agricultural economy."⁴⁷

21 The Petitioners contend the EWGMHB in *Ellensburg v. Kittitas County*, explicitly listed
22 schools, hospitals, convalescent homes and day care facilities as examples of development
23 incompatible with ALOLTCS.⁴⁸ In that case, the Board found that Kittitas County's ordinance
24 failed to meet the minimum requirement of discouraging incompatible uses, similar to those
25 at issue in this case. The Petitioners cite the *Lewis County* decision as an example where
26

⁴⁷ RCW 36.70A.177(1).

⁴⁸ City of Ellensburg v. Kittitas County, EWGMHB Case No. 95-1-0009 at 6, 1996 (May 7, 1996).

1 the Supreme Court determined that certain non-farm uses, such as mining and public
2 facilities, could negatively impact resource lands and activities and substantially interfere
3 with the GMA goal of maintaining and enhancing the agricultural industry. The Supreme
4 Court found the Western Washington Growth Management Hearings Board's (Western
5 Board) holding made sure the county's zoning methods actually were "designed to conserve
6 agricultural lands and encourage the agricultural economy" as required by RCW
7 36.70A.177(1).⁴⁹ Other illegal uses disapproved of by the Supreme Court included utility
8 facilities, schools, shops, prisons and airports.⁵⁰

9 As for auction houses and mining activities, in *Dawes v. Mason County*,⁵¹ the
10 Western Board listed auction houses in rural areas as a prohibited use in rural areas, which,
11 according to the Petitioners, clearly means agricultural land as well.⁵² And, according to the
12 Petitioners, mineral excavation is also an inappropriate activity in agricultural lands.⁵³ Lands
13 desired for use for mineral excavation should first be designated by the County as mineral
14 resource lands.

15 **Respondent:**

16 The Respondent argues this issue was already litigated in *Ellensburg v. Kittitas*
17 *County*, and the County's list of permitted and conditional uses was what survived. The
18 Respondent disagrees with the Petitioners' analysis of *Lewis County*. The Respondent
19 contends the question under *Lewis County* was whether the non-agricultural uses in
20 designated commercial agricultural lands "undermine the GMA mandate to conserve
21 agricultural lands for the maintenance and enhancement of the farm industry."⁵⁴ The
22 Respondent asks how a grange hall, a rural school, a rural volunteer fire department, or day

23 ⁴⁹ Lewis County, 157 Wn.2d at 507-508, 139 P.3d at 1105 footnote omitted.

24 ⁵⁰ Id.

25 ⁵¹ *Dawes v. Mason County*, WWGMHB Case No. 96-2-0023, Order Finding Invalidity (Jan. 14, 1999).

26 ⁵² Petitioners' HOM brief at 23.

⁵³ Lewis County, Id.

⁵⁴ Lewis County, Id..

1 care undermines the farm industry. According to the Respondent, most of these uses are
2 conditional uses and, as such, subject to an intensive public hearing process to ensure
3 compatibility with the rural area.

4 The Respondent also argues the Petitioners misstate the holding in *Dawes v. Mason*
5 *County*. The Western Board said “[t]he matrix of permitted uses within rural lands...goes far
6 beyond resource based uses”, not that all uses in the matrix of uses were prohibited as the
7 Petitioners suggest, but rather the list went beyond what would be permitted, or includes
8 many that would not be permitted.⁵⁵ The Respondent contends auctions convenient for
9 farmers are indeed resource-based uses which form an important part of the agricultural
10 community.

11 In regards to sand and gravel excavation and stone quarries, the Respondent
12 contends the KCC is being revised and will no longer allow these uses in the commercial
13 agricultural lands. In the future, these uses will be designated as mineral lands of long-term
14 significance.

15 **Intervenors:**

16 The Intervenors contend the Petitioners blur the distinction between urban uses,
17 natural resource uses, and agricultural use, which the Intervenors say is not just farming.

18 The Intervenors argue there is no evidence mining permanently removes farm land
19 from production, contending mining is a transitory use and the land can later be reclaimed.
20 According to the Intervenors, the purpose of the agricultural lands designation is to protect
21 and preserve rural character and the farm economy, not to limit agricultural uses.

22 The Intervenors contend the Petitioners fail to understand the assertion in *Lewis*
23 *County* and argue that agriculture is more than just cropland. According to the Intervenors,
24 the Petitioners also fail to brief the issues it identified and fails to identify specific
25 incompatible urban uses allowed by the County on agricultural lands. The Intervenors also
26 contend as evidence that the Petitioners fail to even attempt to review any of the criteria for

⁵⁵ Dawes, Id.

1 siting mineral facilities in the County and the County fails to consider impacts on agricultural
2 lands.

3 **Petitioners Reply:**

4 The Petitioners argue they are correct in their analysis of *Lewis County*. In *Lewis*
5 *County*, the Supreme Court invalidated the exclusion of farm homes and farm centers from
6 the GMA requirement and approved of a prohibition on mining, and a variety of other uses,
7 noting that “[s]erving the farmer’s ‘non-farm’ economic needs is not a logical or permissible
8 consideration in designating agricultural lands under the GMA.”⁵⁶ The Supreme Court also
9 “affirmed the (Western) Board’s invalidation of non-farm uses within the agricultural lands,”
10 noting that all uses on agricultural lands must be in keeping with the GMA’s mandate to
11 conserve designated agricultural lands.⁵⁷

12 The Petitioners argue certain uses are not farm uses, such as clubhouses,
13 government buildings, and certain day care centers. They agree grange halls, some schools
14 and maybe day care centers may be permissible, but the County failed to place provisions
15 to limit the scope of these uses, allowing such non-agricultural activities as boarding schools
16 of any size, community center complexes and athletic facilities, and any type of auction
17 facility. Without criteria limiting these to agricultural-related uses, many inappropriate uses
18 can be permitted in the County.

19 **Board Analysis:**

20 RCW 36.70A.170 requires counties and cities to designate and preserve agricultural
21 land of long-term commercial significance.⁵⁸ Kittitas County has designated these lands.
22 The Petitioners contend the County, in its development regulations, has authorized urban
23 uses in these lands without the essential provisions in place to limit the scope of these uses
24 so as to protect the agricultural lands. The County argues that RCW 36.70A.177, which

25 ⁵⁶ Lewis County, Id.

26 ⁵⁷ Id.. at 509.

⁵⁸ RCW 36.70A.170.

1 allows a variety of innovative zoning techniques in areas designated as ALOLTCS, permits
2 the uses authorized in its development regulations either outright or by conditional use, and
3 the authorized uses can be rural.

4 Under KCC 17.31.010, Purpose and Intent, the County recognizes the importance of
5 the Commercial Agricultural Zone by stating “[T]he intent of this zoning classification is to
6 preserve fertile farmland from encroachment by non-agricultural land uses and protect the
7 rights and traditions of those engaged in agriculture.”⁵⁹ Then the County, in KCC 17.31.020,
8 Uses Permitted, and KCC 17.31.0030, Conditional Uses, allows a variety of uses which can
9 be urban or rural, without limitations placed on these uses. Unfortunately, KCC 17.31 is void
10 as to the scope and limitations of these uses, thus allowing unlimited discretion in
11 permitting them. KCC 17.31 also allows quarries and sand and gravel mining operations.
12 These activities remove the land from agricultural production for many years, if not forever.

13 The Board agrees with the Petitioners that the County needs to have written
14 limitations on uses authorized by its development regulations in ALOLTCS, which is the
15 County's Commercial Agricultural Zone. There are uses presently allowed by the County that
16 may be appropriate for the ALOLTCS, if their scope and/or function are limited. Without
17 specific criteria to limit inappropriate non-agricultural uses, the County's actions will
18 substantially interfere with the GMA's mandate for conservation of ALOLTCS and have a
19 negative impact on designated agricultural lands.

20 In *Lewis County*, the Court approved of the Western Board's holding that when
21 looking at non-agricultural uses on agricultural lands the uses should be reviewed so as to
22 show they are: (a) limited in ways to ensure no negative impact to resource lands and
23 activities; and (b) do not substantially interfere with achieving the GMA goal of maintaining
24 and enhancing the agricultural industry.⁶⁰ This Board subscribes to the Court's
25 determination in *Lewis County* and encourages counties and cities to be specific in their
26

⁵⁹ KCC Chapter 17.31.010.

⁶⁰ Lewis County, Id.

1 development regulations to ensure compliance with the GMA.

2 The County should include standards and criteria for use on a case-by-case basis to
3 determine whether permitting a use will result in a negative impact to resource lands and
4 activities, and whether the use will maintain and enhance the agricultural industry. The
5 methodology to determine these two criteria should be in the County's development
6 regulations. Under the current regulations, a wide variety of non-agricultural uses can be
permitted with no such analysis.

7 **Conclusion:**

8 The Petitioners have carried their burden of proof and shown by clear and convincing
9 evidence the action of the County, complained of herein, is clearly erroneous in view of the
10 entire record before the Board and in light of the goals and requirements of the Growth
11 Management Act. The Board finds Kittitas County impermissibly allows urban uses on its
12 agricultural lands of long-term significance, and fails to include standards within its
13 development regulations to limit such uses and protect the commercial agricultural zone as
14 encouraged and required by RCW's 36.70A.020(1, 8), 36.70A.060, 36.70A.070, and
15 36.70A.177. The Board also finds Kittitas County Code Chapter 17.31 allows urban uses in
the rural areas, fails to protect rural character, and is not in compliance with the GMA.

16 **Issue No. 4:**

17 Does Kittitas County's failure to require that all land within a common ownership or
18 scheme of development be included within one application for a division of land (KCC
19 16.04) violate RCW 36.70A.020 (6, 8, 10, 12), 36.70A.040, 36.70A.060, 36.70A.070,
36.70A.130, and 36.70A.177?

20 **The Parties' Position:**

21 **Petitioners:**

22 The Petitioners contend Kittitas County's subdivision code allows property owners to
23 divide applications for short subdivisions and short plats, and long subdivisions and long
24 plats, amongst numerous applications, even if all the property is part of one development.
25 The Board addressed this issue in Case No. 07-1-0004c and concluded the "Kittitas County
26

1 Code Title 16 needs review to ensure water quality and quantity is protected as required by
2 the GMA."⁶¹ The Petitioners believe this ruling was well-founded and should be applied to
3 the County's new development regulations as well. New evidence from the DOE detailing
4 the problems with the County's water supply and exempt wells has been submitted by the
5 Petitioners.⁶²

6 The Petitioners contend KCC 16.04 applies to all subdivisions of land, but there are
7 no requirements for an entire development to be submitted at one time. Instead, a property
8 may be subdivided, and then re-divided again with separate applications. The effect,
9 according to the Petitioners, is to allow developers to skirt the GMA's mandate to preserve
10 water quality by allowing multiple exempt wells for one residential subdivision and cite to
11 *Kathy Moitke and Neighborhood Alliance of Spokane v. Spokane County*,⁶³ which requires
12 the County to protect water quality, and *Dept. of Ecology v. Campbell & Gwinn LLC*⁶⁴,
13 where the court determined that a developer may not draw more than 5,000 gallons of well
14 water per day per subdivision without a permit.

15 The Petitioners contend the County is facing a water shortage and base this on a
16 DOE study.⁶⁵ Furthermore, excessive withdrawal of ground water can adversely affect
17 surface and ground water quality. One study shows the Yakima River Basin appears to
18 already have surface water contamination by ground water contaminant flow.

19 The Petitioners argue the water problems in Kittitas County are significant. The DOE
20 reviewed the County's SEPA documents and found that 75% of the 10 to 14 lot
21 developments in the County were from developers and land owners with multiple

22 ⁶¹ Kittitas County Conservation et al., v. Kittitas County, EWGMHB Case No. 07-1-0004c, FDO (Aug. 20, 2007).

23 ⁶² Letter from Department of Ecology, Kittitas Development Draft pp. 2-3 (Nov. 2006).

24 ⁶³ *Kathy Moitke and Neighborhood Alliance of Spokane v. Spokane County*, EWGMHB Case No. 05-1-0007, FDO
(Feb. 14, 2006).

25 ⁶⁴ *Dept. of Ecology v. Campbell & Gwinn LLC*, 146 Wn.2d 1, 43.P.3d 4 (2002).

26 ⁶⁵ Letter from Dept. of Ecology, Kittitas County Development Draft pp. 2-3 (Nov. 2006).

1 developments.⁶⁶ According to the Petitioners, over two days, 56 residences divided into four
2 applications were proposed by a single developer, with at least four exempt wells.⁶⁷ The
3 Petitioners contend the County is allowing developers to structure subdivision applications in
4 an attempt to skirt the holding of *Department of Ecology v. Campbell & Gwinn* and the
5 GMA's mandate to conserve water quality.

6 **Respondent:**

7 The Respondent contends the County has worked cooperatively with the DOE and a
8 cumulative SEPA analysis is done where appropriate. The Respondent argues the well and
9 water issues brought forth by the Petitioners are within the jurisdiction of the DOE, not the
10 County. The Respondent then proceeds to present the County's actions concerning Pine
11 View Estates to counter the Petitioners argument that the County fails to engage in
12 cumulative review of projects. The Respondent argues that Exhibits "E", "F" and "G" show
13 the County's efforts to review related projects.

14 **Intervenors:**

15 The Intervenors contend there is not a "scintilla of analysis" as to how KCC 16.04
16 violates any of the GMA provisions produced by the Petitioners.⁶⁸ Instead, the Intervenors
17 claim the Petitioners are really arguing that KCC 16.04 violates the Supreme Court's
18 decision in *Department of Ecology v. Campbell & Gwinn*.

19 According to the Intervenors, the Hearings Boards do not have subject matter
20 jurisdiction to determine whether KCC 16.04 is inconsistent with the Court's holding in
21 *Campbell & Gwinn*, and there is no provision in the GMA which requires all land within a
22 common ownership or scheme of development to be included within an application for a
23 division of land. If the Petitioners choose to challenge individual developments for failing to
24 comply with RCW 90.44 or *Campbell & Gwinn*, then they must do so in Superior Court, not

25 ⁶⁶ Id.

26 ⁶⁷ Petitioners' HOM brief at 26 citing to Id.

⁶⁸ Intervenors' HOM brief at 22.

1 before the Hearings Boards.

2 With regards to the Petitioners' claim that KCC 16.04 violates the GMA, the
3 Intervenors argue the Petitioners provide no analysis how this actually violates the GMA
4 provisions, except the GMA "commands that Kittitas County adequately protect water
5 quality, and consider the impact of developments on capital facilities."⁶⁹

6 **Petitioners Reply:**

7 The Petitioners contend KCC 16.04 is deficient because it does not require all
8 development applications to identify land in common ownership, nor does it require staff to
9 handle proposals cumulatively. According to the Petitioners, their example where 56
10 residences divided into four applications were proposed by a single developer over two days
11 clearly shows a County regulation is needed. The Petitioners contend by requiring project
12 applicants to identify all related projects and requiring County staff to review related
13 projects for cumulative impacts, the County will prevent application problems in the future.

14 The Petitioners argue the GMA commands the County to protect water quality and
15 ground water resources,⁷⁰ yet the County's procedure of allowing developments to be
16 submitted separately creates the problem addressed in this issue, not the DOE's permitting
17 process. According to the Petitioners, the wells are exempt from DOE's regulation because
18 these are exempt wells.

19 **Board Analysis:**

20 The Board has jurisdiction on this issue based on RCW 36.70A.020(10) and RCW
21 36.70A.070(5)(c)(iv), which direct the County to protect the environment and enhance the
22 state's high quality of life, including water quality and quantity, whether found as a surface
23 or ground water resource. The question is whether KCC 16.04 adequately protects water
24 quality and quantity as required by the GMA when this chapter provision allows multiple
25 divisions of commonly owned property which will permit multiple new wells exempt from
26

⁶⁹ Petitioners' HOM brief at 25.

⁷⁰ RCW 36.70A.020(10) and RCW 36.70A.070(5)(c)(iv).

1 the DOE's regulations.

2 The Board agrees with the Petitioners that the County's subdivision regulations allow
3 multiple subdivisions side-by-side, in common ownership, which then can use multiple
4 exempt wells. This is contrary to the GMA's requirements to protect water quality and
5 quantity. The County's exhibits "E", "F" and "G" indicate it is catching some of the
6 applications in common ownership and requiring SEPA review of the cumulative impacts,
7 but this is ineffective and will lead to errors. A mandatory cumulative evaluation
8 requirement in the code is the first step to ensuring the County would reduce permitting
9 errors and include all applications with common ownership.

10 The DOE has authority over exempt wells, but the County has authority over land
11 use decisions and planning, which serves to support and supplement DOE's regulations.
12 Although DOE is the ultimate authority on just how a permit for an exempt well is obtained,
13 the County still controls its own ground/surface water and the GMA requires protection of
14 these resources. Given these roles within water resource management, the County's
15 development regulations are important in that they can limit the impact on water resources
16 by requiring a developer seeking application approval to demonstrate that the proposed
17 development will not adversely impact ground/surface waters. Simply stating the DOE
18 exempts the well does not remove the responsibility of the County to protect water quality
19 and quantity as required by the GMA.

20 Also, as correctly stated by the Petitioners, SEPA can supplement, but it cannot
21 substitute for GMA regulations, which require measures to control rural development to
22 protect water resources.⁷¹ The DOE's strongly worded letter on the Kittitas Development
23 Draft expresses deep concern over "the adequate long term water supply for municipal use
24 by developments and protecting senior water rights in an adjudicated basin."⁷² Even though
25 this statement pertains to the Cle Elum vicinity in particular, the DOE indicated additional
26

⁷¹ RCW 36.70A.070(5)(c)(iv).

⁷² Letter from Dept. of Ecology, Kittitas County Development Draft (Nov. 2006).

1 concerns over a number of subdivisions which did not use groundwater exemptions
2 according to the Court's determination in *Campbell & Gwinn*. The DOE's letter went on to
3 say, "...Kittitas County continues to make land use decisions contrary to Ecology's concerns
4 and SEPA recommendations."⁷³ Furthermore, Ecology felt strongly enough about the
5 County's "consistent disregard of Ecology's commitment to meet current water needs,
6 ensure water availability for people, fish and natural environment" that the DOE pointed out
7 the County's action "diminishes Ecology's goals and objectives to work with communities
8 and citizens to provide effective water management."⁷⁴

8 As stated by the Board earlier in this order, the County needs to have regulations in
9 its code that are clear, detailed and concise, to ensure public understanding and
10 compliance. The County continues to be aware of the problems with its subdivision laws,
11 but fails to have adequate protections in place for water quality and quantity as required by
12 the GMA and recommended by the DOE.

12 **Conclusion:**

13 The Petitioners have carried their burden of proof and shown by clear and convincing
14 evidence the action of the County, complained of herein, is clearly erroneous in view of the
15 entire record before the Board and in light of the goals and requirements of the Growth
16 Management Act. The Board finds Kittitas County's KCC 16.04 fails to protect water quality
17 and quantity as required by RCW's 36.70A.020(10) and 36.70A.070(5)(c)(iv).

18 **Issue No. 5:**

19 Does Kittitas County's failure to prohibit urban governmental services outside of
20 urban growth areas or LAMIRDs violate RCW 36.70A.020 (1-2, 8-10, 12), 36.70A.040,
36.70A.060, 36.70A.070, 36.70A.110, and 36.70A.130?

21 **Conclusion:**

22 The Petitioners have failed to brief this issue and the Board has determined this issue
23

24 ⁷³ Id.

25 ⁷⁴ Id.

1 is abandoned.

2
3 **Issue No. 6:**

4 Does Kittitas County's failure in chapter 17.32, 17.40, and 17.44 KCC to have any
5 guidelines for location of the Highway Commercial Zone and standards to protect the rural
6 area violate RCW 36.70A.020 (1-2, 5, 8-10, 12), 36.70A.040, 36.70A.060, 36.70A.070,
7 36.70A.110, 36.70A.130, and 36.70A.177?

8 **The Parties' Position:**

9 **Petitioners:**

10 The Petitioners contend the County's Highway Commercial Zone fails to have
11 restrictions in the County's development regulations or CP as to where these zones may be
12 placed. As discussed in Issue No. 2, the Petitioners argue the County must protect rural
13 character and restrict urban growth and urban uses to urban growth areas. Currently, the
14 Highway Commercial Zone is allowed anywhere in the County provided the zone abuts a
15 public street.⁷⁵ According to the Petitioners, the County must enact restrictions on
16 placement, uses, size, scale and appearance which protect rural character and serve rural
17 residents, and cites the Court of Appeals decision in *Timberlake Christian Fellowship v. King*
18 *County*, as authority.⁷⁶

19 The Petitioners contend the County's Highway Commercial Zone fails to contain any
20 of the criteria or limitations required by RCW 36.70A.070(5) and it allows urban
21 development contrary to RCW 36.70A.070(5) and RCW 36.70A.110(1). The Petitioners also
22 argue the County's Limited Commercial Zone, KCC 17.32, and General Commercial Zone,
23 KCC 17.40, both suffer from the same defects.

24 **Respondent:**

25 The Respondent argues the County's Highway Commercial Zone has restrictions on
26 size and location. According to the Respondent, the maximum size and height of an allowed

⁷⁵ KCC 17.44.080.

⁷⁶ *Timberlake Christian Fellowship v. King County*, 114 Wn. App. 174, 184-85, 61 P.3d 332, 337-38 (2002).

1 structure is 4,000 square feet and not more than 35 feet in height.⁷⁷ The Respondent also
2 contends there is also a requirement the commercial nature be geared toward local uses or
3 uses within the vicinity.

4 **Intervenors:**

5 Intervenors adopt the Respondent's briefing on this issue.

6 **Petitioners Reply:**

7 The Petitioners argue KCC 17.44 must limit future applications of the Highway
8 Commercial Zone to appropriate locations and limit uses to those which serve the rural
9 areas.

10 **Board Analysis:**

11 The Board agrees with the Petitioners that KCC 17.44 Highway Commercial Zone,
12 fails to prohibit urban commercial uses from being located almost anywhere in the County
13 where the proposed businesses "abut a public street, or shall have such other access as
14 deemed suitable by the board."⁷⁸ In other words, the Highway Commercial Zone is not
15 limited in any reasonable way to comply with RCW 36.70A.070(5) and RCW 36.70A.110(1).

16 The County's purpose and intent of the Highway Commercial Zone is to "provide for
17 motorist-tourist dependent businesses having little interdependence and requiring
18 convenient access to passing traffic."⁷⁹ The County limits the height of the buildings to 35
19 feet, but contrary to the County's assertion that "[G]uidelines exist to limit the size of the
20 structure to under 4,000 sq. ft.", only grocery stores are limited in size to 4,000 square feet
21 in KCC 17.44.⁸⁰ All other commercial uses are not limited in size and the County allows
22 "[A]ny use not listed which is nearly identical to a permitted use, as judged by the
23 administrative official" to be permitted. There is also no requirement in the chapter that the

23 ⁷⁷ KCC 17.44.020; KCC 17.44.060.

24 ⁷⁸ Id.

25 ⁷⁹ Id.

26 ⁸⁰ Respondent HOM at 8.

1 "commercial nature be geared toward local uses or uses within the vicinity," as argued by
2 the Respondent.⁸¹

3 The Highway Commercial Zone is primarily intended by the County to be placed in
4 the rural areas where uses are required by the GMA to be "not characterized by urban
5 growth and that are consistent with rural character."⁸² RCW 36.70A.070(5) requires
6 counties and cities to "include a rural element including lands that are not designated for
7 urban growth..."⁸³ The KCC 17.44 fails to prevent this requirement and the requirements
8 found in RCW 36.70A.070(5)(c)(i), (ii), and (iii). For all intents and purposes, the County's
9 Highway Commercial Zone has characteristics similar to a LAMIRD [RCW 36.70A.070(5)(d)]
and should be designated as such.

10 The Limited Commercial Zone, KCC 17.32, and the General Commercial zone, KCC
11 17.40, are found on the Official County Map, which defines their location in the County.⁸⁴ It
12 appears the Limited Commercial Zone is found within the Ellensburg and Cle Elum proposed
13 UGA expansions and the Thorp Urban Growth Node (UGN). KCC 17.40 General Commercial
14 Zone is located in the Easton, Ronald, Vantage and Thorp UGNs.

15 The Board in Case No. 07-1-0004c found the expanded UGAs around Ellensburg and
16 Kittitas, and the designation of UGNs out of compliance. In its Conclusion, the Board stated:

17 The Petitioners have carried their burden of proof and shown the County's
18 actions are clearly erroneous. This issue is remanded with directions for the
19 County to designate the communities of Easton, Ronald, Snoqualmie Pass,
20 Thorp, and Vantage consistent with the GMA. Further the County is out of
21 compliance with the GMA by failing to conduct a proper land quantity analysis
22 to determine the appropriate size of the UGA, and the County did not provide
an updated Capital Facilities Plan to accommodate the UGA expansions for the
City of Kittitas and for the City of Ellensburg. Such expansions are out of
compliance. This issue is remanded with directions for the County to conduct
a proper land quantity analysis and an updated CFP in compliance with the

23 ⁸¹ Ibid.

24 ⁸² RCW 36.70A.070(5)(b).

25 ⁸³ RCW 36.70A.070(5).

26 ⁸⁴ KCC 17.12.020

1 GMA and to show the work done.⁸⁵

2 The County is working on changing its UGN designation to comply with the GMA and
 3 is no longer planning to expand the Ellensburg UGA, but has not yet completed that work.
 4 In its proposal, the County states:

5 **Elimination of Urban Growth Nodes**

6 Remove the UGN designation and revert to Rural Land Use Designation and
 7 rural zones. Intend to continue subarea plans for each UGN area, which could
 8 result in either rural or Limited Areas of More Intense Rural Development
 9 (LAMIRD) in the future.⁸⁶

10 The following chart indicates where the Highway, Limited and General
 11 Commercial zones are located in the County and the zones past, present and
 12 future land use.⁸⁷

Name	Ltd Com	Gen Com	Hwy Com	CZ	CLU	PZ	PLU	UGN
Ellensburg UGA	Outside UGA			Ltd Com	Ltd Com	Com	?	No
Kittitas UGA								No
Cle Elum UGA	Outside UGA			R-10; R-Res	Ltd Com	Com	Rural	No
Thorp	Yes	Yes	Yes	Gen Com	Com	All	Com	Yes
Ronald		Yes		Gen Com	Urban Res	Gen Com	Rural	Yes
Snoqualmie			Yes	Hwy Com	Hwy Com	Hwy Com	Hwy Com	Yes
Easton		Yes		Gen Com	Com	Gen Com	Com	Yes
Vantage		Yes		Gen Com	Rural	Gen Com	Com	?

22 Ltd Com - Limited Commercial zone

23 _____
 24 ⁸⁵ Kittitas Co. Conservation et al., v. Kittitas County, EWGMHB Case No. 07-1-0004c, FDO p. 37 (Aug. 20, 2007).

25 ⁸⁶ Kittitas County Planning Dept. UGN Handout, Dec. 10, 2007

26 ⁸⁷ Created by the Board from the Official Kittitas County Zoning Map.

- 1 Gen Com - General Commercial zone
- 2 Hwy Com - Highway Commercial zone
- 3 CZ - Current zoning
- 4 CLU - Current land use
- 5 PZ - Projected zoning
- 6 PLU - Projected land use
- 7 UGN - In or out of Urban Growth Node

8 Both KCC 17.32 Limited Commercial Zone, and KCC 17.40 General Commercial Zone,
 9 should be limited to UGAs or LAMIRDs in the KCC. At this time, only the General
 10 Commercial Zone specifies this zone is to “provide a classification consistent with existing
 11 business districts in unincorporated towns (i.e. Vantage, Easton) where a wide range of
 12 community retail shops and services are available.”⁸⁸ The Purpose and Intent statement
 13 under KCC 17.40 seems to indicate this zone is limited to designated urban growth areas,
 14 but until the County comes into compliance with the Board’s Order in Case No. 07-1-0004c,
 15 the General Commercial Zone fails to comply with the land use.

16 The Limited Commercial Zone specifies “[T]he minimum lot size for all dwelling units
 17 shall meet the requirements of the residential district.”⁸⁹ This statement is found under lot
 18 size requirements and seems to limit the location of this zone to UGAs, but this zone is
 19 currently found only in UGNs, which are out of compliance pursuant to the Board’s FDO in
 20 07-1-0004c.

21 The Petitioners are correct in their evaluation that both the Limited Commercial and
 22 General Commercial zones have few, if any, siting limitations or building standards. The
 23 County’s Limited Commercial Zone has some limitations, but the General Commercial Zone
 24 fails to have any limitations whatsoever as to lot size, maximum lot coverage, floor area,
 25 yard setback requirements or building height. Without such limitations, a commercial
 26 structure of unlimited floor area or height could be constructed in this zone.

The County’s Limited Commercial and General Commercial zones are currently

⁸⁸ KCC 17.40.010.

⁸⁹ KCC 17.32.030.

1 located in the expanded UGA of Ellensburg, outside the town of Cle Elum, and in various
2 UGNs. The City of Ellensburg's expanded UGA has been withdrawn and the County is
3 currently re-designating UGNs to comply with the GMA and the Board's FDO in 07-1-0004c.
4 Until these actions are completed by the County, KCC 17.32, Limited Commercial, and KCC
5 17.40, General Commercial, are out of compliance with the GMA.

6 **Conclusion:**

7 The Petitioners have carried their burden of proof and shown by clear and convincing
8 evidence the action of the County in adopting KCC 17.44, KCC 17.32, and KCC 17.40 is
9 clearly erroneous in view of the entire record before the Board and in light of the goals and
10 requirements of the Growth Management Act. The Board finds Kittitas County's KCC 17.44,
11 KCC 17.32 and KCC 17.40 fail to protect the rural area as required by RCW's 36.70A.020(1-
12 2, 12), 36.70A.070, and 36.70A.110.

13 **Issue No. 7:**

14 Does Kittitas County's failure to require GMA-compliant rural and resource land
15 densities when parcels are subdivided through the County's "onetime split" process in
16 chapters 17.29 and 17.31 KCC violate RCW 36.70A.020 (1-2, 5, 8-10, 12), 36.70A.040,
17 36.70A.060, 36.70A.070, 36.70A.110, 36.70A.130, and 36.70A.177?

18 **The Parties' Position:**

19 **Petitioners:**

20 The Petitioners argue the County allows property owners to create a one-time split of
21 their properties zoned Commercial Agriculture or Agriculture-20, which allows property
22 owners to divide their properties below density levels approved by the GMA.

23 For clarity, the Agriculture-20 zone, in KCC 17.29.040, provides:

24 Minimum lot (homesite) requirements in the agricultural (A-20) zone are:
25 Twenty acres for any lot or parcel created after the adoption of the ordinance
26 codified in this chapter, **except that one smaller lot may be divided off
any legal lot; provided such parent lot is at least eight acres in size;**
and provided, that such divisions are in compliance with all other county
regulations (e.g., on-site septic system). Parcels must be located within the
Agriculture-20 zone at the date of the adoption of this code. Once this

1 provision has been applied to create a new parcel, it shall not be allowed for
2 future parcel subdivision, while designated commercial agricultural zone.
3 Onetime splits shall be completed via the short plat process. The onetime
4 parcel split provision should be encouraged where it is adjacent to ongoing
5 commercial agricultural practices, especially since the intent of this provision is
6 to encourage the development of homesite acreage rather than removing
7 commercial agricultural lands out of production. (Emphasis added).⁹⁰

8 The Petitioners contend, even though KCC 17.29.040 and KCC 17.31.040 place
9 limitations on the size of the "parent" lot, there are no minimum lot sizes on the other one-
10 time split parcel. This lack of minimum lot sizes, the Petitioners claim, allows building lots of
11 any size, including lots less than one acre, and violates the GMA.⁹¹

12 The same argument can be applied to the County's Commercial Agricultural Zone, or
13 ALOLTCS, which also requires a minimum lot size of 20 acres.⁹² According to the
14 Petitioners, the County is required to adopt development regulations to protect agricultural
15 lands of long-term commercial significance.⁹³ The Petitioners cite *City of Moses Lake v.*
16 *Grant County* as an example where this Board has upheld a 40-acre minimum lot size as
17 appropriate to protect "farmland from loss or damage."⁹⁴ The Petitioners also cite the
18 Supreme Court's *Lewis County* case to show certain development violates the GMA when it
19 fails to "conserve agricultural prime soils and [to] prevent residential densities inconsistent
20 with agriculture."⁹⁵

21 The Petitioners contend the effects of a one-time split are two-fold: (1) a split
22 removes farmland from production and allows non-farm development adjacent to viable
23 farming operations and; (2) a split fails to conserve agricultural lands by taking the acreage

24 ⁹⁰ KCC 17.29.040.

25 ⁹¹ Petitioners HOM brief at 29.

26 ⁹² Id.

⁹³ RCW 36.70A.040(4)(b).

⁹⁴ *City of Moses Lake v. Grant Co.*, EWGMHB Case No. 99-1-0016, Order on Pet. Motion for Reconsideration, p.4 (Aug. 16, 2000).

⁹⁵ *Lewis County*, 157 Wn.2d at 507-508, 139 P.3d at 1105.

1 out of production and allowing non-compatible uses on existing farms.

2 According to the Petitioners, the County fails to require a minimum lot size for the
3 one-time split parcels and fails to require buffers between the split parcel and adjoining
4 agricultural land. In addition, the Petitioners contend there is no requirement the split
5 parcel shall be used for the farmer owner or operator for a residence. In other words, the
6 Petitioners argue, it could be for the purpose of selling real estate for home construction,
7 thus allowing two residences on what should be one parcel.

7 **Respondent:**

8 The Respondent contends the one-time split will never result in a greater density
9 than what the County identifies as rural and the lot will not be allowed to be split off from a
10 parcel smaller than eight acres. The reason given by the County for one-time splits is to
11 "minimize the impact upon rural and agricultural lands."⁹⁶ The Respondent argues the
12 newly split off lot and the remaining parent parcel would be at least two lots on eight acres.

12 **Intervenors:**

13 The Intervenors contend the Petitioners are attempting to shift the burden to the
14 County to prove both rural character and conservation of farmland requires a prohibition of
15 the local option known as the "one-time" split".⁹⁷ The Intervenors argue the Petitioners fail
16 to provide evidence the County's provisions fail to meet their stated purpose, which is to
17 avoid "removing commercial agricultural lands out of production."⁹⁸ The one-time split,
18 according to the Intervenors, results in a variety of lot sizes consistent with rural character
19 and the traditional rural landscape.

20 The Intervenors contend the Petitioners claim any resultant one-acre parcel is below
21 the density threshold for rural lands, contrary to RCW 36.70A.177(2)(b), the cluster zoning
22 provision. But according to the Intervenors, the GMA does not reject the one-time split;

23 _____
24 ⁹⁶ Respondent HOM brief at 8.

25 ⁹⁷ KCC 17.29.040 and KCC 17.31.040.

26 ⁹⁸ Id.

1 does not reject small-lot home sites of one acre when tied to a larger parent parcel; does
2 not say how large or small the parent parcel must be; and does not reject density averages
3 achieved by innovative techniques, like the one-time split. Accordingly, the Intervenor
4 argue the Petitioners have their personal preferences on how to achieve the GMA goals and
5 the County has its preferences, but the County requires deference according to the GMA. In
6 *City of Arlington v. CPSGMHB*, the court determined the Board shifted the burden back to
7 the County to “justify” a decision.⁹⁹ According to the Intervenor, all the parties involved in
8 this case, and this Board, have stated accurately that the decisions made by local
9 government are entitled to a presumption of validity. The one-time split fulfills this
10 requirement and is authorized by the GMA.

11 **Petitioners Reply:**

12 The Petitioners contend the one-time split provision violates RCW 36.70A.177.
13 According to the Petitioners, this statute is limited to “areas designated as agricultural lands
14 of long-term commercial significance under RCW 36.70A.170.”¹⁰⁰ The County’s one-time
15 split provision applies to both rural and agricultural land, which limits the Intervenor’s
16 argument to only half of the problem. In addition, RCW 36.70A.177(d) allows the innovative
17 technique of “quarter/quarter zoning”, which permits one residential dwelling on a one-acre
18 minimum lot for each one-sixteenth of a section of land.”¹⁰¹ The Intervenor, according to
19 the Petitioners, argue this provision permits the County’s one-time split on agricultural land.
20 However, the Petitioners contend, RCW 36.70A.177 requires “one-sixteenth of a section of
21 land” or 40 acres, before a split is authorized.¹⁰² The County allows one-time splits on
22 parcels as small as eight acres.

23 The Petitioners argue RCW 36.70A.177 allows only “one residential dwelling” for
24 each “one-sixteenth of a section of land”, whereas the County allows two residential
25

26 ⁹⁹ *City of Arlington v. CPSGMHB*, WA App. ___,154 P.3d 936 (2007).

¹⁰⁰ RCW 36.70A.177.

¹⁰¹ *Id.*

¹⁰² *Id.*

1 dwellings.¹⁰³ The Petitioners also contend the County fails to require a minimum lot size to
2 prevent conflict between residential and farming activities. The Petitioners cite the Supreme
3 Court's decision in *Lewis County* concerning RCW 36.70A.177, which said, "...counties may
4 choose how best to conserve designated lands as long as their methods are 'designed to
5 conserve agricultural lands and encourage the agricultural economy.'"¹⁰⁴

6 **Board Analysis:**

7 The Petitioners are only addressing KCC 17.29, Agriculture Zone, and KCC 17.31,
8 Commercial Agriculture Zone, listed in this issue. The County's stated purpose and intent of
9 these two zones is to "...preserve fertile farmland from encroachment by non-agricultural
10 land uses; and protect the rights and traditions of those engaged in agriculture."¹⁰⁵ The
11 minimum lot size in both zones is 20 acres, but both zones allow a small lot, one-time
12 division or split. The question for the Board is whether the GMA authorizes a small lot
13 division under the limited regulations and circumstances provided by the County in these
14 two agricultural zones.

15 The GMA addresses agricultural lands in a number of provisions. RCW 36.70A.020(2)
16 Reduce sprawl, requires counties and cities to reduce sprawl by reducing the inappropriate
17 conversion of undeveloped land, while RCW 36.70A.020(8) Natural resource industries,
18 encourages counties and cities to conserve "agricultural lands, and discourage incompatible
19 uses."¹⁰⁶ Increasing density in designated agricultural lands, on its face, fails to conserve
20 large tracts of farmland.

21 RCW 36.70.040(4) requires local governments to designate and conserve agricultural
22 land to assure the maintenance and enhancement of the agricultural resource industry.

23 RCW 36.70A.060 requires counties to adopt development regulations that "assure
24 that the use of lands adjacent to agriculture... shall not interfere with the continued use, in
25

26 ¹⁰³ Id.

¹⁰⁴ *Lewis County*, 157 Wn.2d at 506-507, 139 P.3d at 1105.

¹⁰⁵ KCC 17.29 and KCC 17.31.

¹⁰⁶ RCW 36.70A.020(8).

1 the accustomed manner and in accordance with best management practices.”¹⁰⁷ Here,
2 again, a one-time, small lot split, which can be sold and used for non-farm related
3 purposes, may interfere with the adjacent farming practices. Without County standards or
4 limitations in place to protect farming activities, conflict between land owners may occur.

5 RCW 36.70A.070(5)(a) requires counties to “develop a written record explaining how
6 the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the
7 requirements of this chapter.”¹⁰⁸ As determined in another issue in this petition, the County
8 has failed to provide this written record, and thus fails to explain how a one-time split in the
9 two agricultural zones, which are part of the County’s rural element, harmonizes the
10 planning goals, specifically RCW 36.70A.020(8).

11 In addition, RCW 36.70A.070(5)(b), authorizes counties to use innovative techniques,
12 such as clustering, density transfer, design guidelines, conservation easements, and other
13 innovative techniques that will accommodate appropriate rural densities and uses that are
14 not characterized by urban growth and that are consistent with rural character.”¹⁰⁹ This
15 statute authorizes innovative techniques, perhaps a technique such as the one-time split,
16 when establishing a variety of rural densities and uses. However, the answer is in the
17 details found in RCW 36.70A.177.

18 To determine whether the County’s provisions and one-time split are acceptable
19 innovative techniques allowed in the two agricultural zones as the County contends, the
20 Board looks to the statute’s intent. RCW 36.70A.177 authorizes a county to use “...a variety
21 of innovative zoning techniques in areas designated as agricultural lands of long-term
22 commercial significance under RCW 36.70A.170.”¹¹⁰ This provision is only addressing the
23 County’s Commercial Agricultural Zone. The statute gives the County the authority to use
24 the innovative techniques listed under subsection (2)(a-e), other innovative techniques. The

23 ¹⁰⁷ RCW 36.70A.060(1).

24 ¹⁰⁸ RCW 36.70A.070(5)(a).

25 ¹⁰⁹ RCW 36.70A.070(5)(b).

26 ¹¹⁰ RCW 36.70A.177(1).

1 County can develop its own techniques as long as it conforms to the GMA. Not one of the
2 listed innovative techniques in RCW 36.70A.177(2), however, fit the County's one-time split
3 provision under its adopted development regulations, including (2)(c) Cluster zoning or
4 (2)(d) Quarter/quarter zoning. In addition, RCW 36.70A.177 encourages counties to limit
5 non-agricultural uses to lands with poor soils or otherwise not suitable for agricultural
6 purposes. The County's development regulations are inadequate to prevent prime
7 agricultural land from being lost to small, one-time lot divisions.

8 The Board agrees with the Petitioners. The County's development regulations
9 concerning one-time splits are inadequate to protect agricultural land, and its innovative
10 technique of a one-time split allows two residential dwellings in the Agricultural-20 zone and
11 Commercial Agriculture zone, essentially doubling the density allowed in the zones. The
12 County's development regulations also fail in light of the Supreme Court's *Lewis County*
13 decision. The Board agrees with the County that a one-time split may be an allowable
14 "innovative technique", but only if it conforms to the GMA statutes mentioned, does not
15 exceed the permitted density, or create non-conforming lots.

16 **Conclusion:**

17 The Petitioners have carried their burden of proof and shown by clear and convincing
18 evidence the action of the County in adopting KCC 17.29 and KCC 17.31 is clearly erroneous
19 in view of the entire record before the Board and in light of the goals and requirements of
20 the Growth Management Act. The Board finds the above mentioned Kittitas County chapters
21 fail to protect the agricultural area as required by RCW's 36.70A.020(8), 36.70A.070(5)(a)
22 and (b), and 36.70A.177 and is not in compliance with the GMA.

23 **Issue No. 8:**

24 Does Kittitas County's failure to revise chapter 17.58 KCC (airport zone uses) to avoid
25 land uses that concentrate people, including either prohibiting residential uses, or limiting
26 them to one dwelling unit per five acres within airport safety zones comply with RCW
36.70A.020 (3, 5, 12), 36.70A.070, 36.70A.110, 36.70A.130, and 36.70A.510?

1 **The Parties' Position:**

2 **Petitioners:**

3 The Petitioners contend the County violates the GMA by allowing residential uses at
4 improper densities in airport zones and cite RCW 36.70.547 as the requirement for counties
5 and cities to "...discourage the siting of incompatible uses adjacent to such general aviation
6 airport."¹¹¹ Furthermore, the Petitioners argue that airports are considered Essential Public
7 Facilities (EPF) under the GMA,¹¹² and RCW 36.70A.200(2) provides that neither a
8 comprehensive plan nor a development regulation may preclude the siting of public
9 facilities. The Petitioners also contend the siting of high-density residential development
10 adjacent to the airport has been recognized by the Hearings Boards as inappropriate and
11 incompatible.¹¹³

12 The Petitioners then paraphrase WSDOT Aviation Division's recommendations and
13 concerns for incompatible development near airports and submit a chart comparing the
14 County's development restrictions on airport zone development and the Aviation Division's
15 recommendations.¹¹⁴ The Petitioners contend the County's failure to limit residential
16 development in the runway protection zone is particularly egregious, since this zone is
17 where many aircraft accidents occur. According to the Petitioners, the County's failure to
18 limit residential development according to these guidelines violates the GMA's requirement
19 that airports be protected as EPF's. The Petitioners are careful to point out they are
20 challenging the County's regulations for all of the County's general aviation airports, not just
21 Bowers Field, which was at issue in Intervenor Son Vida II's previous action before this
22 Board.

23 **Respondent:**

24 The Respondent contends the level of development allowed in Kittitas County in the

25 ¹¹¹ RCW 36.70.547 incorporated into the GMA by RCW 36.70A.510.

26 ¹¹² Citing Achen et al., Clark County et al., WWGMHB Case No. 95-2-0067, FDO at pp. 190-193 (Sept. 20, 1995).

¹¹³ Citing Son Vida II v. Kittitas County, EWGMHB Case No. 01-1-0017, FDO at pp. 8-10 (Jan. 23, 1998).

¹¹⁴ Petitioners HOM brief at pp. 33-34.

1 airport overlay zone is within the guidelines formulated by WSDOT. The Respondent points
2 to Exhibits "H", "I", and "J" as examples of the County's correspondence with WSDOT and
3 the County's compliance with its own development regulations.

4 **Intervenors:**

5 The Intervenors adopt by reference the separate brief of Intervenor Son Vida II.
6 They also contend the Eastern Board previously found the County's Airport Overlay Zone,
7 KCC 17.58, GMA compliant in *Son Vida II v. Kittitas County*.¹¹⁵

8 **Intervenor Son Vida II:**

9 Son Vida II argues the Board has already decided Issue No. 8 in a former Kittitas
10 County case, *Son Vida II v. Kittitas County*, and the issue should be dismissed under the
11 *Doctrine of Stare Decisis*.¹¹⁶

12 Son Vida II contends KCC 17.58 complies with the GMA for several reasons: (1) the
13 Eastern Board already concluded the Airport Overlay Zone and densities within the zone
14 comply with the GMA (Son Vida II references the letter from CTED to the City of
15 Ellensburg); and (2) the Eastern Board found the land use controls, such as structures,
16 density, and activities, in *Son Vida II v. Kittitas County*, to be GMA compliant and references
17 WSDOT Aviation Division's report.¹¹⁷

18 Son Vida II argues that WSDOT Aviation Division's suggested accident safety zones,
19 as opposed to those adopted by Kittitas County, are "very similar", and Son Vida II claims
20 the risk matrix submitted by the Petitioners is only part of WSDOT Aviation Division's
21 original matrix.¹¹⁸ Furthermore, Son Vida II argues the very agency that wrote the report
22 the Petitioners rely on found the City of Ellensburg and the County's original ordinance "an
23 exemplary land use model".¹¹⁹

24 ¹¹⁵ Id citation 74.

25 ¹¹⁶ *Floyd v. Dept. of Labor & Industries*, 44 Wn.2d 560, 565, 296 P.2d 563 (1954).

26 ¹¹⁷ Airports and Compatible Land Use, Vol. 1, WSDOT Aviation Division, Feb., 1999. Exh. 22G

¹¹⁸ Son Vida II's HOM brief at 8.

¹¹⁹ WSDOT Aviation Division letter to City of Ellensburg, June, 2001.

1 In their conclusion, Son Vida II contends the Board should determine this issue has
2 been heard before and decided in *Son Vida II v. Kittitas County*. The decision in that case
3 was that the County's ordinance was GMA compliant and, according to Son Vida II, nothing
4 has changed that would make KCC 17.58 non-compliant.

4 **Petitioners Reply:**

5 The Petitioners point out the County and Son Vida II are mistaken as to WSDOT
6 Aviation Division's technical recommendations, one of which was to "...revise existing airport
7 overlay zone as suggested (see attached) and apply to all public-use airports in Kittitas
8 County."¹²⁰ WSDOT Aviation Division's attachment concerned Easton State airport and
9 noted the suggested residential density ranges were being exceeded by the County.

10 The Petitioners contend a citation by Son Vida II from a June 2001, letter from
11 WSDOT Aviation Division is out-of-date. In 2006, according to the Petitioners, WSDOT
12 Aviation Division was recommending changes to the Kittitas County ordinance, indicating
13 either the science changed or the Aviation Division reconsidered its 2001 assessment. The
14 Petitioners argue, and Son Vida II concedes, the County's mandate is to comply with the
15 GMA, not with WSDOT Aviation Division's opinion.¹²¹

16 The Petitioners contend they have shown significant differences between WSDOT
17 Aviation Division's recommendations and the County's Airport Overlay District.¹²² One key
18 area highlights the magnitude of the difference. According to the Petitioners, the County
19 fails to provide residential density limitations in the Runway Protection Zone, which is the
20 zone directly at the end of the runway and, an area which WSDOT Aviation Division
21 recommends residential use not be permitted.¹²³

22 The Petitioners contend Son Vida II's argument regarding balancing the goals of the
23 GMA is unpersuasive. The Petitioners argue that protecting Bowers Field and the other

23 ¹²⁰ Exhibit J to County's Response brief.

24 ¹²¹ Son Vida II's HOM brief at 7.

25 ¹²² Petitioners HOM brief at 31-34.

26 ¹²³ Table at Petitioners HOM brief at 33.

1 County airfields does not interfere with the other GMA goals. Son Vida II, according to the
2 Petitioners, has focused on the GMA goals and the alleged elevation of one goal over the
3 others by the Petitioners, when they should have focused on the GMA's requirements. The
4 Petitioners point to the Supreme Court's decision in *Lewis County*, which held if a GMA goal
and a specific GMA requirement conflict, the requirement controls.¹²⁴

5 As to the issue of *stare decisis*, the Petitioners argue both the legal issue and the
6 facts between this case and Case No. 01-1-0017 are different and *stare decisis* should not
7 control in the case. The Petitioners contend the Hearings Boards are expected to rule
8 consistently on issues presented to it, resolve only legal issues as presented, and not issue
9 advisory opinions on matters not included in petitions for review. Although this Board
10 declared the Airport Overlay Zone GMA-compliant in Case No. 01-1-0017, according to the
11 Petitioners, the Board's finding is only relevant to the legal issue posed by Son Vida II in
12 that case. The Petitioners contend this matter poses a very different question and the
13 factual record is also different. The Petitioners also argue the prior case only dealt with one
14 of the general aviation airports in the County and this current appeal addresses all of the
County's general aviation airports.

15 **Board Analysis:**

16 *Stare Decisis:*

17 The Board will address the issue of *stare decisis* first. This doctrine was developed by the
18 courts to accomplish stability in court-made law, but it is not an absolute impediment to change. *Stare decisis*
19 in legal terminology means precedent shall be followed, however, the doctrine is limited. In *Floyd v. Dept. of*
20 *Labor & Industries*, the Supreme Court said, "[T]he doctrine means no more than the rule laid down in a
21 particular case is applicable only to the facts in that particular case or to another case involving identical or
22 substantially similar facts."¹²⁵ In *Vergeyle v. Employment Security Department*, the Court of Appeals stated
that, "*stare decisis* plays only a limited role in the administrative agency context (but) agencies should strive
23 for equality of treatment."¹²⁶ This Board is required to make their decision based on the issues

24 ¹²⁴ *Lewis County v. WWGMHB*, 157 Wn.2d 488, 504, 139 P.3d 1096, 1104 (2006).

25 ¹²⁵ *Ibid* citation 76. *Floyd* at 565.

26 ¹²⁶ *Vergeyle v. Employment Security Dept.*, 28 Wn.App. 399 at p. 404 (1981).

1 presented and the facts developed. The facts of each case stem from the Record, which
2 represents the information before the legislative body when making its determination, the
3 arguments made by the parties' in their briefs, and any supplemental evidence which the
4 Board deemed necessary or of substantial assistance to them. In this regard, this Board
5 looks to the rationale and analysis of their prior decisions and then decisions of the other
6 Growth Boards when deliberating on a matter; however, because each case contains its
7 own unique set of facts and circumstances, the analysis of a prior decision may not
8 necessarily be applicable.

9 Because of the unique facts and circumstances that are presented in this case, we
10 conclude that the application of *Stare Decisis* is not appropriate. This is not to say that there
11 may be a time when the facts before a legislative body are so similar to those of a prior
12 matter that the doctrine would apply. But that is not the case in the current situation,
13 especially given the period of time that has elapsed between this case and the prior case
14 and the application of these changes to all of the County's general aviation airports.

15 Kittitas County's KCC 17.58, Airport zone:

16 The primary question with this issue is whether the County's development
17 regulations, which permit residential development of varying densities within the airport
18 overlay zone, are compliant with the GMA. The Board looks to two relevant statutes – the
19 GMA and the Planning Enabling Act, prior case law, and the parties' briefs and arguments to
20 determine whether the County is in compliance with the GMA.

21 Reference to General Aviation Airports (GAA) is contained in RCW 36.70A.510, which
22 states:

23 "[A]doption and amendment of comprehensive plan provisions and
24 development regulations under this chapter affecting a general aviation airport
25 are subject to RCW 36.70.547."

26 RCW 36.70.547, a provision of the Planning Enabling Act, states that every city and
county having a general aviation airport in its jurisdiction:

"[S]hall, through its comprehensive plan and development regulations,

1 discourage the siting of incompatible uses adjacent to such general aviation
2 airport.”

3 It is clear by these two statutes that there is a GMA requirement for cities and
4 counties to discourage incompatible uses adjacent to their airports.

5 There are several Western Board cases which address the concept of “incompatible
6 uses” as mentioned in RCW 36.70.547. In *Klein v. San Juan County*, the Western Board
7 stated:

8 A county is not compliant with GMA requirements regarding siting of general
9 aviation airports if it fails to preclude non-compatible uses within the final
10 approach areas.¹²⁷

11 In *Abenroth v. Skagit County*, the Western Board said:

12 RCW 36.70A.510 requires a local government to adopt land use policies and
13 DRs that preclude incompatible land uses adjacent to airports.¹²⁸

14 Furthermore, in *Achen v. Clark County*, the Western Board, in addressing the
15 application of RCW 36.70A.200, determined that residential development is usually an
16 inappropriate use:¹²⁹

17 [Development regulations] are appropriate vehicles to prevent encroachments
18 on surrounding airport property that make siting and maintenance of existing
19 airports difficult. Residential designation of surrounding properties is usually
20 inappropriate. (Board emphasis)

21 The issue currently before the Board stems from safety – which is why the
22 Petitioners are challenging the County’s residential densities within the Accident Safety
23 Zones. WSDOT Aviation Division’s Airport Land Use Compatibility Program (ALUCP) is
24 based on Title 14, CFR C-Part 77 – Objects Affecting Navigable Airspace, and recognizes the

25 ¹²⁷ Klein v. San Juan County, WWGMHB Case No. 02-2-0008, FDO (Oct. 18, 2002).

26 ¹²⁸ Abenroth v. Skagit County, WWGMHB Case No. 97-2-0060, FDO (Jan. 23, 1998).

¹²⁹ Achen v. Clark County, WWGMHB Case No. 95-2-0067, FDO (Sept. 20, 1995).

1 National Transportation Safety Board's (NTSB) six Accident Safety Zones¹³⁰:

2 Zone 1: Runway Protection Zone

3 Zone 2: Inner Safety Zone

4 Zone 3: Inner Turning Zone

5 Zone 4: Outer Safety Zone

6 Zone 5: Sidelines Safety Zone

7 Zone 6: Traffic Pattern Zone

8 It can be surmised from the ALUCP Matrix that residential development is considered
9 an incompatible use by the agency, with the agency recommending for every zone to either
10 prohibit residential use completely or allow limited density.¹³¹ For example, WSDOT-
11 Aviation Matrix recommends no residential development within Accident Safety Zones 1, 2,
12 and 5 and low-density residential uses within Zones 3, 4, and 6 (e.g. 1 du/2.5 acre – 1 du/5
13 acre).

14 Utilizing the best available objective information, such as the National Transportation
15 Safety Board (NTSB) data and analysis, case law relative to liability and risk, and current
16 risk identification, WSDOT Aviation Division formulated its recommendations to prevent
17 incompatible uses from being permitted within airport overlay zones. The Aviation Division
18 found the most critical areas to protect from incompatible land use are those areas below
19 the approach and departure paths to an airport.¹³² According to WSDOT Aviation Division,

20 “[B]asing land use decisions upon fact, historic data, and applying best
21 practice recommendations supplied by the Airport Land Use Compatibility
22 Program, assists jurisdictions in crafting defensible, objective zoning laws and
23 aid in avoiding costly litigation.”¹³³

24 ¹³⁰ See Petitioners’ Exhibit 22G, Appendix A – Aircraft Accident Safety Zone Diagram

25 ¹³¹ Petitioners’ Exhibit 22G: Airports and Compatibility Land Use, Vol. 1, Appendix B, pp. 40-43, WSDOT Aviation
26 Division, Feb. 1999.

¹³² Id to citation 91, p. 13; *see also*, Petitioners’ Exhibit 22G, at 21

¹³³ Id, p. 17.

1 As close as WSDOT Aviation Division comes to saying residential use is an example
 2 of incompatible use is found on page 21 of the *Airports and Compatible Land Use*
 3 document. The Aviation Division states:

4 Utilizing the information gathered by the NTSB and plotted by Hodges and
 5 Shutt, the WSDOT Aviation Division developed a matrix of recommendations
 6 for land use compatibility based on the accident rate per acre within the
 7 particular zone. The recommendations focus densities and incompatible land
 8 uses away from the critical areas of flight.”¹³⁴ (Board emphasis)

9 In addition to discouraging incompatible uses, RCW 36.70.547 also requires formal
 10 consultation with WSDOT Aviation Division and other interested parties. Although
 11 consultation is required, each jurisdiction has discretion as to their final adopted
 12 comprehensive plan and development regulations, as long as they are within the guidelines
 13 and requirements of the GMA. Recognizing that one size does not fit every situation,
 14 WSDOT Aviation Division and the Department of Community, Trade and Economic
 15 Development (CTED) developed a matrix “offering a menu of recommendations for
 16 compatible development adjacent to an airport.”¹³⁵ A comparison between WSDOT Aviation
 17 Division’s matrix and KCC 17.58, the County’s airport development regulations, indicates
 18 significant differences between the two.

17 Airport Safety Zone	WSDOT-Aviation Recommendation	KCC 17.58.050(2) Use Table
18 Zone 1 19 Runway Protection	Prohibit all residential land uses	Encourages land uses that a relatively unoccupied by people (i.e. mini-storage, parking lot) No stated prohibition on residential uses
21 Zone 2 22 Inner Safety	Prohibit all residential land uses	Outside Ellensburg UGA: 1 du/3 acres Inside Ellensburg UGA: 1 du/acre

24 ¹³⁴ Id p. 21.

25 ¹³⁵ Airports and Compatible Land Use, Vol. 1, WSDOT, p. 14, Feb. 1999.

1	Zone 3 Inner Turning	Less than 4000 feet of runway: Prohibit all residential uses Runway 4000 – 5999 feet: 1 du/5 acres Over 6000 feet of runway: 1 du/5 acres	Outside Ellensburg UGA: 1 du/3 acres Inside Ellensburg UGA: land zoned AG-3 – 1 du/3 acres Inside Ellensburg UGA: land zoned UR or RR – 1 du/acre
2			
3			
4	Zone 4 Outer Safety	Less than 4000 feet of runway: 1 du/5 acres in rural or urban areas Runway 4000 – 5999 feet: 1 du/5 acres in rural; 1 du/2.5 acres in urban Over 6000 feet of runway: 1 du/5 acres in rural; 1 du/2.5 acres in urban	Outside Ellensburg UGA: 1 du/3 acres Inside Ellensburg UGA: land zoned UR or RR – 1du/acre
5			
6			
7			
8			
9	Zone 5 Sideline	Prohibit all residential land uses	No stated prohibition on residential uses
10			
11	Zone 6 Airport Operations	Less than 4000 feet of runway: 1 du/5 acres in rural or urban areas Runway 4000 – 5999 feet: 1 du/5 acres in rural; 1 du/2.5 acres in urban Over 6000 feet of runway: 1 du/5 acres in rural; 1 du/2.5 acres in urban	Outside Ellensburg UGA : 1 du/3 acres Inside Ellensburg UGA: 1 du/acre
12			
13			
14			
15			

Table based on KCC 17.58.050(2) and Appendix B of the ACLUP Land Use Matrix

Clearly, there is a substantial difference between the County's airport development regulations and WSDOT Aviation Division's recommendations. The difference is primarily in the residential densities allowed within the specific zones. The question becomes whether the County's development regulations are sufficient to comply with RCW 36.70A.510.

WSDOT Aviation Division submitted numerous letters throughout the County's process making a number of important recommendations. As a technical agency with expertise in this area, the Board gives substantial weight to WSDOT Aviation Division's

1 recommendations.¹³⁶

2 WSDOT Aviation Division's Airports and Compatible Land Use document was written
3 to provide information and direction concerning airports to Washington's cities and counties.
4 WSDOT knows there will be land use conflicts. In the document, the Aviation Division
5 wrote,

6 "It is in [the] interest of both parties to incorporate proactive language,
7 policies and procedures which protect the airport and the community from
8 incompatible land use decision-making."

9 The County's airport zone, KCC 17.58 was originally adopted in 2001, and
10 subsequently amended in 2006, with the adoption of Ordinance 2007-22. In their
11 recommendation letter and report dated July 25, 2006, WSDOT Aviation Division made
12 numerous specific recommendations.¹³⁷ Although many of the recommendations were
13 adopted by the County in KCC 17.58, none of the recommendations concerning the six
14 zones that make up the Airport Overlay Zone were adopted. One of those recommendations
15 concerned the Runway Protection Zone, Zone 1 for which WSDOT Aviation Division stated,

16 "WSDOT's program recommends against residential uses in the runway
17 protection zones located at each runway end and suggests communities allow
18 only minimal development in these areas."¹³⁸

19 The County did not adopt this recommendation and currently has no residential
20 restrictions. Another recommendation concerned "High-intensity" land use and
21 recommended residential cluster developments should be discouraged within the extended

22 ¹³⁶ As the Central Board expressed in *Pruitt v. Town of Eatonville*, CPSGMHB Case No. 06-3-0016 (FDO, Dec. 18, 2006)
23 the Hearings Boards shall give "substantial weight to the WSDOT Aviation Division's comments and concerns...":

24 [T]he provisions of RCW 36.70A.510 and RCW 36.70.547 provide explicit statutory direction for local
25 governments to give substantial weight to WSDOT Aviation Division's comments and concerns related
26 to matters affecting safety at general aviation airports. Eatonville "*shall . . . discourage the siting of
incompatible uses adjacent to [Swanson Field].*" RCW 36.70.547.

¹³⁷ Letter from WSDOT Aviation Division, July 25, 2006.

¹³⁸ *Id.*

1 runway centerline. Again, the County did not adopt restrictions and currently has no stated
2 prohibition against clustering in Zones 2 and 3.

3 On June 12, 2007, WSDOT Aviation Division submitted its final comments concerning
4 the amendments to the Kittitas County Development Code. In that letter, WSDOT said
5 “[W]e support the proposal and view it as an important step towards protecting the
6 county’s public use airports from incompatible development.”¹³⁹ WSDOT Aviation Division’s
7 support was for the recommendations by the Planning Commission and indicted the
8 recommendations recognized all general aviation airports and clarified the County’s existing
9 airport overlay zone.

10 It’s clear to the Board the County adopted the recommendation to recognize all
11 general aviation airports in KCC 17.58, but it’s also clear there were no changes made to
12 the Airport Overlay Zones, specifically Zones 1, 2 and 5, which fail to have any restrictions
13 on residential use, this in light of the safety concerns expressed by WSDOT in its manual,
14 and recommendations in its letter of July 26, 2006.

15 The Board agrees with the Petitioners. Given the potential seriousness of the
16 consequences of not restricting residential use in Zones 1, 2 and 5, and the requirement of
17 RCW 36.70A.510, the Board finds the County out of compliance. This issue concerns all the
18 airports in Kittitas County, not just Bowers Field. The letter sent to the County dated July
19 25, 2006, was a strong indication WSDOT Aviation Division considered KCC 17.58 outdated
20 and in need of significant changes. The development regulations adopted by the County fail
21 to discourage the siting of incompatible uses, such as residential urban density, within close
22 proximity and adjacent to its general aviation airports. WSDOT Aviation Division’s
23 recommendations for airport zones are based on best available fact, in-depth safety and
24 flight studies, and case law. The adopted regulations in Kittitas County’s KCC 17.58 for
25 Zones 1, 2 and 5 fail to take into consideration the safety concerns and other consequences
26 of allowing residential uses in these zones.

¹³⁹ Letter from WSDOT Aviation Division, June 12, 2007.

1 **Conclusion:**

2 The Petitioners have carried their burden of proof and shown by clear and convincing
3 evidence the action of the County in adopting KCC 17.58 is clearly erroneous in view of the
4 entire record before the Board and in light of the goals and requirements of the Growth
5 Management Act. The Board finds the above mentioned Kittitas County chapter fails to
6 protect the County's airports as required by RCW 36.70A.020(3) and RCW 36.70A.510.

7 **VI. INVALIDITY**

8 The request for an order of invalidity is a prayer for relief and, as such, does not
9 need to be framed in the PFR as a legal issue. *See King 06334 Fallgatter VIII v. City of*
10 *Sultan (Feb. 13, 2007) #06-3-0034 Final Decision and Order Page 12 of 17 County v.*
11 *Snohomish County, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 13,*
12 *2003) at 18. The Petitioners have requested the Board to find Issue Nos. 1 through 8*
13 *invalid to protect a finding of non-compliance from vested development.*

14 **Applicable Law:**

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

16 (1) A board may determine that part or all of a comprehensive plan or
17 development regulation are invalid if the board:

18 (a) Makes a finding of noncompliance and issues an order of remand under
19 RCW 36.70A.300;

20 (b) Includes in the final order a determination, supported by findings of fact
21 and conclusions of law, that the continued validity of part or parts of the plan
22 or regulation would substantially interfere with the fulfillment of the goals of
23 this chapter; and

24 (c) Specifies in the final order the particular part or parts of the plan or
25 regulation that are determined to be invalid, and the reasons for their
26 invalidity.

(2) A determination of invalidity is prospective in effect and does not
extinguish rights that vested under state or local law before receipt of the

1 board's order by the city or county. The determination of invalidity does not
2 apply to a completed development permit application for a project that vested
3 under state or local law before receipt of the board's order by the county or
city or to related construction permits for that project.

4 **Discussion and Analysis:**

5 A finding of invalidity may be entered only when a board makes a finding of non-
6 compliance and further includes a "determination, supported by findings of fact and
7 conclusions of law that the continued validity of part or parts of the plan or regulation
8 would substantially interfere with the fulfillment of the goals of this chapter." RCW
9 36.70A.302(1). The Board has also held that invalidity should be imposed if continued
10 validity of the non-compliant Comprehensive Plan provisions or development regulations
11 would substantially interfere with the local jurisdiction's ability to engage in GMA-compliant
planning.

12 The Petitioners ask this Board to issue a finding that the actions of the County
13 substantially interfere with the fulfillment of the goals of the GMA. In the discussion of the
14 legal issues in this case, the Board found and concluded that Kittitas County's adoption of
15 Ordinance No. 2007-22 was clearly erroneous and non-compliant with the requirements of
16 RCW 36.70A.070, and .110. Specifically, the Board finds that Kittitas County's actions
17 reflected in Issue No.1, substantially interfere with the following goals of the GMA:

18 **Goal 1** of the GMA, RCW 36.70A.020(1), provides that "Urban growth: Encourage
19 development in urban areas where adequate public facilities and services exist or can be
20 provided in an efficient manner."

21 Clearly, from our findings herein, the actions of the County have substantially
22 interfered with this goal. The County's adoption of Ordinance 2007-22, which includes KCC
23 16.09 Performance based clustering, KCC 17.08 Accessory dwelling units, KCC 17.22 Urban
24 residential zone, KCC 17.28 Agriculture-3, KCC 17.30 Rural-3, and KCC 17.56 Forest and
25 range zone, allows urban density in the rural area and fails to provide adequate public
26 facilities and services in an efficient manner.

1 **Goal 2** of the GMA, RCW 36.70A.020(2), provides that reducing sprawl is a key goal
2 of the Act: "Reduce the inappropriate conversion of undeveloped land into sprawling, low
3 density development."

4 The County's adoption of Ordinance 2007-22, which includes KCC 17.28 Agriculture-3
5 and KCC 17.30 Rural-3, allows unlimited urban density in the rural area. The County's action
6 clearly allows small urban-like lots, which affects water quality and quantity; allows growth
7 in the rural area, which makes intensive use of land to such a degree as to be incompatible
8 with the primary use of land for agriculture; and allows densities inconsistent with rural
9 character.

10 **Goal 8** of the GMA, RCW 36.70A.020(8), "Natural resource industries, maintain and
11 enhance natural resource-based industries, including productive timber, agricultural, and
12 fisheries industries. Encourage the conservation of productive forest lands and productive
13 agricultural lands, and discourage incompatible uses."

14 Clearly, the designation and division of thousands of acres of rural land into three-
15 acre lots fails to maintain and enhance the natural resource-based industries in Kittitas
16 County and frustrates this goal. There is a clear danger these lands will be lost to the
17 agricultural and forest industries, if invalidity were not found.

18 **Goal 9** of the GMA, RCW 36.70A.020(9), "Open space and recreation. Retain open
19 space, enhance recreational opportunities, conserve fish and wildlife habitat, increase
20 access to natural resource lands and water, and develop parks and recreation facilities."

21 The County's adoption of Ordinance 2007-22, which includes KCC 17.28 Agriculture-
22 3, and KCC 17.30 Rural-3, by allowing unlimited three-acre parcels of land throughout the
23 rural area fails to retain open space, fails to enhance recreational opportunities, and fails to
24 conserve fish and wildlife habitat. Intense urban development segregates large tracts of the
25 rural area and fragments wildlife habitat.

26 **Goal 10** of the GMA, RCW 36.70A.020(10), "Environment. Protect the environment
and enhance the state's quality of life, including air and water quality, and the availability of
water.

1 The County's adoption of Ordinance 2007-22, which includes KCC 17.28 Agriculture-
2 3, and KCC 17.30 Rural-3, allows urban density in the rural area, which fails to protect the
3 environment, particularly water quality. Three-acre urban density increases the number of
4 septic systems and individual wells affecting ground water quality and quantity.

5 **Goal 12** of the GMA, RCW 36.70A.020(12), "Public facilities and services. Ensure
6 that those public facilities and services necessary to support development shall be adequate
7 to serve the development at the time the development is available for occupancy and use
8 without decreasing current service levels below locally established minimum standards."

9 The County's adoption of Ordinance 2007-22, which includes chapters KCC 16.09,
10 KCC 17.08, KCC 17.22, KCC 17.28, KCC 17.30, KCC 17.56, allows urban development in the
11 rural lands without the public facilities and services, such as public sewer, public water, and
12 public transportation, to adequately support the development without decreasing current
13 service levels for urban density.

14 Accordingly, the Board enters a determination of invalidity and specifically finds
15 chapters KCC 16.09, KCC 17.08, KCC 17.22, KCC 17.28, KCC 17.30, KCC 17.56 of Ordinance
16 2007-22 out of compliance and invalid and remands Ordinance No. 2007-22 to Kittitas
17 County to take legislative action consistent with this Order.

18 **Conclusion:**

19 The Board finds that a determination of invalidity is properly issued and actions
20 found out of compliance in Issue No. 1 are invalid.

21 **VII. FINDINGS OF FACT**

- 22 1. Kittitas County is a county located East of the crest of the Cascade
23 Mountains and opted to plan under the GMA and is therefore required
24 to plan pursuant to RCW 36.70A.040.
- 25 2. Kittitas County adopted the Kittitas County Development Code Update
26 as Ordinance No. 2007-22 on July 19, 2007.
3. Kittitas County allows densities in the Agriculture-3 (KCC 17.28) and Rural-3
(KCC 17.30) which are urban in the rural element and not in compliance with
the Growth Management Act. The County has not developed a written record

1 explaining how the rural element harmonizes the planning goals in the GMA
2 and meets the requirements of the Act. Kittitas County, in adopting KCC
3 16.09, KCC 17.08, KCC 17.12 (zoning map), 17.22, and 17.56, allows urban-
4 like densities in the rural areas.

- 5 4. Kittitas County by adopting KCC 17.29 and KCC 17.36 impermissibly
6 allows urban uses in its rural areas and fails to include standards to
7 protect the rural character as required by RCW 36.70A.020(10), RCW
8 36.70A.070(5)(b) and (c), and RCW 36.70A.110(1). The Petitioners
9 failed to brief KCC 16.09 and KCC 17.12 in this issue and, therefore,
10 these two provisions are deemed abandoned.
- 11 5. Kittitas County impermissibly allows urban uses in its agricultural lands
12 of long-term significance, and fails to include standards to limit such
13 uses and protect the commercial agricultural zone as encouraged and
14 required by RCW's 36.70A.020(1, 8), 36.70A.060, 36.70A.070, and
15 36.70A.177.
- 16 6. Kittitas County's KCC 16.04 fails to protect water quality and quantity
17 as required by RCW's 36.70A.020(10) and 36.70A.070(5)(c)(iv).
- 18 7. Kittitas County's KCC 17.32, KCC 17.40 and KCC 17.44 fail to protect
19 the rural area as required by RCW's 36.70A.020(1-2, 12), 36.70A.070,
20 and 36.70A.110.
- 21 8. Kittitas County's KCC 17.29 and KCC 17.31 fail to protect the rural area
22 and ALOLTCS as required by RCW's 36.70A.020(8), 36.70A.070(5)(a)
23 and (b), and 36.70A.177.
- 24 9. Kittitas County's KCC 17.58 fails to protect the County's airports as
25 required by RCW 36.70A.020(3) and RCW 36.70A.510 (with reference
26 to the Planning Enabling Act statute RCW 36.70.547).

VIII. CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties to this action.
2. This Board has jurisdiction over the subject matter of this action.
3. Petitioners have standing to raise the issues raised in the Petition for Review.

- 1 4. Petition for Review in this case was timely filed.
- 2 5. Kittitas County has allowed urban densities in the rural areas and failed
- 3 to develop a written record explaining how the rural element
- 4 harmonizes the planning goals in the GMA. This action is not in
- 5 compliance with the GMA.
- 6 6. Kittitas County has allowed urban uses in its rural areas and fails to
- 7 include standards to protect the rural character. This action is not in
- 8 compliance with the GMA.
- 9 7. Kittitas County allows urban uses in its agricultural lands of long-term
- 10 significance, and fails to include standards to limit such uses and
- 11 protect the commercial agricultural zone as encouraged. This action is
- 12 not in compliance with the GMA.
- 13 8. Kittitas County fails to protect water quality and quantity as required by
- 14 RCW's 36.70A.020(10) and 36.70A.070(5)(c)(iv) by allowing multiple
- 15 subdivisions of common ownership side-by-side, which then use
- 16 multiple exempt wells. This action is not in compliance with the GMA.
- 17 9. Kittitas County allows commercial development throughout the County
- 18 along designated roads and highways, within improperly designated
- 19 urban areas called Urban Growth Nodes, and in the unincorporated
- 20 expansion areas outside of the UGAs of Ellensburg and Cle Elum. This
- 21 action is not in compliance with the GMA.
- 22 10. Kittitas County allows increased density and non-conforming lots in the
- 23 rural areas, including the Agriculture-20 Zone and the Commercial
- 24 Agriculture Zone. This action is not in compliance with the GMA.
- 25 11. Kittitas County allows unlimited urban residential development within
- 26 the Airport Overlay Zone designations, primarily in Zones 1, 2, and 5.
- This action is not in compliance with the GMA.

IX. INVALIDITY FINDINGS OF FACT
Pursuant to RCW 36.70A.300 (2)(a)

We incorporate the Findings of Fact above and add the following:

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1. The Board finds and concludes that the County's actions in adopting KCC 17.28 Agricultural-3 Zone, and KCC 17.30 Rural-3 Zone substantially interferes with the goals of the GMA because they fail to preserve and protect the rural area within the County.
2. The Board finds and concludes that the County's actions in adopting KCC 16.09 (Performance Based Cluster Platting), KCC 17.08 (Detached Accessory Dwelling Units), KCC 17.12 (zoning map), KCC 17.22 (Urban Residential zone), and KCC 17.56 (Forest and Range zone), substantially interferes with the goals of the GMA because they fail to preserve the rural area within the County.
3. The County adopted regulations which allow densities greater than 1 du/5 acres in the rural area interfering with RCW 36.70A.020(1).
4. The County's action allows inappropriate conversion of undeveloped land in sprawling, low-density development interfering with RCW 36.70A.020(2).
5. The County's action conflicts with the natural resource industries, open space and recreation and interferes with RCW 36.70A020(8) and (9).
6. The County's action fails to protect surface and ground water quality and availability and interferes with RCW 36.70A.020(10) and (12).
7. The Board finds and concludes that the continued validity of these actions of the County would substantially interfere with the goals of the GMA and their invalidity would cause no hardship upon the County during the period necessary to bring this issue into compliance.

X. CONCLUSIONS OF LAW
Pursuant to RCW 36.70A.300 (2) (a)

1. The Board has jurisdiction over the parties and subject matter of this case.

1 36.70A.070 and 36.70A.110 and substantially interferes with GMA Goals
2 RCW 36.70A.020 (1-2, 8-10, 12) and the Board finds these provisions
3 invalid.

4 3. Therefore the Board remands Ordinance No. 2007-22 to Kittitas County
5 with direction to the County to achieve compliance with the Growth
6 Management Act pursuant to this decision no later than **September
7 17, 2008, 180 days** from the date issued. The following schedule for
8 compliance, briefing and hearing shall apply:

- 9 • The County shall file with the Board by **September 30, 2008, an
10 original and four copies** of a **Statement of Actions Taken to
11 Comply** (SATC) with the GMA, as interpreted and set forth in this
12 Order. The SATC shall attach copies of legislation enacted in order to
13 comply. The County shall simultaneously serve a copy of the SATC,
14 with attachments, on the parties. **By this same date, the County
15 shall file a "Remanded Index," listing the procedures and
16 materials considered in taking the remand action.**
- 17 • By no later than **October 14, 2008¹⁴⁰**, Petitioners shall file with the
18 Board an **original and four copies** of Comments and legal arguments
19 on the County's SATC. Petitioners shall simultaneously serve a copy of
20 their Comments and legal arguments on the parties.
- 21 • By no later than **October 28, 2008**, the County and Intervenors shall
22 file with the Board an **original and four copies** of their Response to
23 Comments and legal arguments. The County and Intervenors shall
24 simultaneously serve a copy of such on the parties.
- 25 • By no later than **November 12, 2008**, Petitioners shall file with the
26 Board an **original and four copies** of their Reply to Comments and
27 legal arguments. Petitioners shall serve a copy of their brief on the
28 parties.

29 ¹⁴⁰ October 14, 2008, is also the deadline for a person to file a request to participate as a "participant" in the compliance
30 proceeding. *See* RCW 36.70A.330(2).

- 1 • Pursuant to RCW 36.70A.330(1) and WAC 242-02-891¹⁴¹ the Board
2 hereby schedules a telephonic Compliance Hearing for **November 19,**
3 **2008, at 10:00 a.m. The compliance hearing shall be limited to**
4 **consideration of the Legal Issues found noncompliant and**
5 **remanded in this FDO.** The parties will call **360-407-3780**
6 **followed by 211432 and the # sign.** Ports are reserved for: **Mr.**
7 **Scully, Mr. Caulkins, Mr. Slothower, Mr. Cook, and Mr. McElroy.**
8 If additional ports are needed please contact the Board to make
9 arrangements.

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

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

11 **Reconsideration:**

12 **Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this**
13 **Order to file a petition for reconsideration. Petitions for reconsideration shall**
14 **follow the format set out in WAC 242-02-832. The original and four (4) copies of**
15 **the petition for reconsideration, together with any argument in support thereof,**
16 **should be filed by mailing, faxing or delivering the document directly to the**
17 **Board, with a copy to all other parties of record and their representatives. Filing**
18 **means actual receipt of the document at the Board office. RCW 34.05.010(6),**
19 **WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite**
20 **for filing a petition for judicial review.**

18 **Judicial Review:**

19 **Any party aggrieved by a final decision of the Board may appeal the decision to**
20 **superior court as provided by RCW 36.70A.300(5). Proceedings for judicial**
21 **review may be instituted by filing a petition in superior court according to the**
22 **procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil.**

22 **Enforcement:**

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25 ¹⁴¹ The Presiding Officer may issue an additional notice after receipt of the SATC to set the format and additional
26 procedures for the compliance hearing.

1 The petition for judicial review of this Order shall be filed with the appropriate
2 court and served on the Board, the Office of the Attorney General, and all parties
3 within thirty days after service of the final order, as provided in RCW 34.05.542.
4 Service on the Board may be accomplished in person or by mail. Service on the
5 Board means actual receipt of the document at the Board office within thirty
6 days after service of the final order.

5 **Service:**

6 This Order was served on you the day it was deposited in the United States mail.

7 RCW 34.05.010(19)

8 SO ORDERED this 21st day of March 2008.

9 EASTERN WASHINGTON GROWTH MANAGEMENT
10 HEARINGS BOARD

11 _____
12 John Roskelley, Board Member

13 _____
14 Dennis Dellwo, Board Member

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16
17 **Concurring Opinion of Board Member Joyce Mulliken:**

18 I concur with the conclusions drawn by my colleagues in this matter. I write
19 separately to address Kittitas County's rural densities.

20 As this Board concluded in its August 20, 2007, Final Decision and Order in Kittitas
21 County Conservation v. Kittitas County, EWGMHB Case No. 07-1-0004c, the densities
22 permitted by Kittitas County within the Agricultural-3 and Rural-3 zones are urban in nature
23 and prohibited by the County's Rural Element. Case No. 07-1-0004c, FDO, at 17. A similar
24 issue has been presented in this matter, with Petitioners' continuing to question the
25 County's densities within rural areas. (See Legal Issue 1, *supra*). I believe it is vital, for
26 both petitioners and respondents alike, that the Board acts consistently with its prior

1 decisions, especially if the facts and circumstances are related. And therefore, I concur that
2 this Board should respond similarly to the issue of rural densities as it did in Case No. 07-1-
3 0004c. However, it is the Petitioners' repeated attempts to have the Board delineate a
4 standard for rural density that would apply to all counties throughout Washington State,
5 regardless of regional differences, which is troubling. This is especially true given the fact
6 that this Board's conclusions in the prior case are currently on appeal before the Court of
7 Appeals Docket Nos. 07-2-00549-1 and 07-2-00552-1.

8 As I noted in the prior decision, my concern is in the long-term viability of the
9 agricultural industry within Kittitas County. When land is covered with impervious surface,
10 the likelihood of its return to agricultural production is slim – a fact that has been
11 demonstrated in urban counties such as King County – and something Kittitas County could
12 address by adopting alternative methods to ensure farmers' economic success and the
13 conservation of agricultural lands. *Id.*, at 61. Although my concern for the conservation of
14 agricultural lands is also tempered by the GMA's mandate that jurisdiction's be granted
15 discretion in planning choices so as to respond to the needs and character of their
16 community, Kittitas County has yet to demonstrate through written record how the County's
17 rural element harmonizes the planning goals in the GMA and meets the requirements of the
18 Act as required by RCW 36.70A.070(5)(a).

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Joyce Mulliken, Board Member