BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

ISLAND COUNTY CITIZENS' GROWTH MANAGEMENT COALITION, et al.,	)	No. 98-2-0023c
Petitioners,	)	FINAL DECISION AND ORDER
v.	)	
ISLAND COUNTY,	)	
Respondent,	)	
and	)	
RESOURCE GROUP, INC., et al.,	)	
Intervenors.	)	

We congratulate Island County on its long-awaited adoption of a comprehensive plan (CP) and full set of implementing regulations. After years of wheel spinning, the County has taken giant steps in the past year to bring itself into compliance with the Act. This has been a monumental task. The thousands of hours of work by citizens, planning commission (PC), staff and Board of County Commissioners (BOCC) is quite remarkable. There is a great deal in these ordinances of which the County should be proud.

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PROCEDURAL HISTORY

The procedural history is included by reference and attached as Appendix I.

BURDEN OF PROOF

As in all cases before us, the burden is on petitioners to demonstrate that the actions taken by Island County are not in compliance with the requirements of the Growth Management Act (GMA, Act) RCW 36.70A.320(2). Pursuant to RCW 36.70A.320(3), the Board "shall find compliance unless it determines that the action by [Island County] is clearly erroneous in view of

the entire record before the Board and in light of the goals and requirements of [the GMA]." For us to find Island County's action clearly erroneous, we must be "left with the firm and definite conviction that a mistake has been made." *Department of Ecology v. PUD 1*, Wn.2d 179, 201 (1993).

The issues in this case are extensive, complex and inter-related. For that reason, we will discuss the areas of major concern by topic rather than by specific issues.

NRL – FOREST

The Coalition claimed the following regarding the County's failure to designate any forest lands of long-term commercial significance:

(1) The County's determination that there were no forest lands of long-term commercial significance was based on a severely flawed analysis.

(2) The County's Commercial Forest Land Study (Study) erred by assuming that the Act's definition of commercially significant forest land is synonymous with those forest lands suitable for industrial forestry practices. The Act does not support the view that smaller tracts which have been "economically and practically managed" by families and individuals for years fail to meet the GMA definition of commercial forest lands.

(3) The industrial forestry perspective of the County's study resulted in a vast understatement of "candidate" tracts for commercial forest designation. In 1997, the United States Forest Service estimated that there was a total of 73,000 acres of forest lands in Island County: 11,000 publicly owned, 2,000 industrial forestry classification, and 60,000 non-industrial classification. The Island County study determined that the existing forest land base (candidate lands) was 14,090 acres. The Study's arbitrary 20 acre threshold for minimum parcel size excluded approximately 59,000 acres from consideration.

(4) The Study misrepresented the productivity of Island County forest land by stating that a site index of 111 was "considered low for commercial productivity." Site index 111 for Douglas Fir is actually at the mid-range of medium productivity. Further, the Soil Conservation Service rating system indicates that 85% of the prime forest land of Island County met at least medium productivity levels.

(5) The Study contained misleading comparisons to counties of much greater size.

(6) The Study's reliance on local conditions and adjacent uses to exclude forest lands

from designation should not be allowed. Those conditions included:

(a) No mills in Island County. There are "several small portable and stationary mills presently operating" in Island County. Further, the question should not be "if the mill is in the same county, but whether it is relatively close at hand."

(b) Urbanization has created unacceptably high conflicts between forestry and other land uses. These pressures are not unique to Island County and cannot be used to exclude designation.

The County responded:

(1) Under GMA, it was the obligation of the BOCC to determine what existing forest lands have long-term commercial significance and thus must be designated under RCW 36.70A.170 and protected under .060.

(2) Designation of forest lands under 36.70A.170 and protection of those lands under .060 are to achieve goal (8) of maintaining the forest industry. They are not surrogates for the desire to preserve greenspace.

(3) To be designated as forest lands under RCW 36.70A.170, land must be capable of being economically and practically managed for long-term commercial timber production.

(4) In its designation process, Island County carefully and methodically considered all the factors required by RCW 36.70A.170; .030(8), and (10); and WAC 365-190-060. The County supported its process by referencing *Manke Lumber Company v. Diehl,* 91 Wn. App. 793 (1998) (*Manke)* and concluding:

> "The Manke decision thus makes clear that the criteria of the statute and the WAC guidelines may properly be used to exclude from long-term designation under RCW 36.70A.170 lands which are currently forested and being managed for timber production. Counties are expected to apply those criteria in an analysis of local conditions. When they do so and their decision is based on the record of local conditions, the outcome must be sustained on appeal, even where significant acreage of forested land is not designated for long-term preservation under RCW 36.70A.170."

(5) The Coalition arguments provided no basis to overturn the County's decision because:

(a) The Coalition misstated the law by (1) minimizing the legislative

direction that "forest land" must be capable of being economically and practically managed for long-term commercial production and (2) by ignoring the WAC regulations for designation of forest land.

(b) The County's study did not equate "Industrial Forestry" with "Commercial Forestry."

(c) The County properly considered the productivity of its forest lands.

(d) The fact that Island County has no large or isolated blocks of timberland clearly affects the long-term commercial significance of its lands.

(e) The fact that the Island County study used a 20-acre threshold for minimum parcel size was far from arbitrary and exclusionary since studies showed that an 80-acre minimum would be preferable.

(f) The absence of mills does affect the commercial viability of Island County's forest land. Additionally, it is considerably more difficult to cross county lines from Island County then on the mainland.

The County concluded:

"In the end, it was not any one factor but the combination of factors which let (*sic*) to the conclusion of the Stevens Report.

> Too many factors important to the protection and enhancement of the economic viability of commercial forestry are clearly absent in Island County.

Record No. 4595, p. 25. The Coalition appears to wish that some form of "micro-forestry" – in which the landowner eschews modern commercial forestry techniques such as clear cutting, spraying and burning, was commercially viable for the long-term, so that owners of existing forest land could be frozen by regulation into such a use. The County Commissioners were clearly justified in concluding, based on the Stevens Report, that while such "craft" forestry may continue – and they encourage it – the remaining timberlands in Island County are not long-term commercial forest lands within the meaning of RCW 36.70A.170."

The Coalition replied:

(1) The Act does not give the County discretion regarding whether to identify and conserve forest lands of long-term commercial significance.

(2) This Board has the authority and the duty to find the County's decision clearly erroneous if the County relied on a report that does not address the core issues of the economic viability of small wood lot forestry in Island County.

(3) There was inadequate evidence in the County's study upon which to base a conclusion that continuation of non-industrial private forest land owners (NIPFs) forestry in Island County was infeasible.

After reiterating many other points made in its opening brief, the Coalition concluded:

> "The evidence is clear: Island County relied principally on the Stevens Report and that study was fundamentally flawed in concluding that small wood lot owners in Island County do not offer a long-term opportunity for viable commercial forestry. The so-called "combination of factors" cited by Island County, Co. NRL Br. at 19-20, is simply a combination of irrelevant or erroneous factors. Stevens never really analyzed the commercial viability of small wood lot forestry in the peculiar situation of Island County. Stevens used gross generalizations regarding more difficult economics faced by small wood lot owners generally, without ever assessing whether those generalities <u>as applied in Island County</u> require a conclusion that commercial forestry is not viable in the long-term in Island County. Other factors cited by Stevens and Island County simply provide a "clearly erroneous" basis for reaching the conclusion that Island County did. Comparisons with large counties, identifying the lack of mills on the Island County side of the County line, and mischaracterizing the productivity of DF-111 lands do not provide a "combination" of accurate or relevant factors supportive of the County's conclusion. The Board should remand this matter to Island County for additional analysis specific to the economic and commercial viability of commercial forestry on small wood lots in Island County."

Board Discussion

Until recently we might have been swayed by some of petitioners' arguments on this issue. However, recently the *Manke* case affirmed the trial court's reversal of a portion of our decision in *Diehl, et al., v. Mason County*, #95-2-0073.

That decision dealt with Mason County's interim resource ordinance. The ordinance provided that in order to even be considered for designation as forest land under RCW 35.70A.170, land must have met several threshold criteria, including forest tax status, 5,000-acre minimum block size and 80-acre minimum parcel size. We concluded that those criteria unjustifiably excluded lands of long-term commercial significance. We particularly took issue with the 5,000-acre block

size exclusion.

Manke set forth the criteria for designating long-term commercial forest land under RCW 36.70A.170:

> "The GMA sets forth objectives and minimum guidelines that local governments must follow when classifying land. "Forest land" is defined as "land primarily devoted to growing trees for long-term commercial timber production on land that can be economically and practically managed for such production…and that has long-term commercial significance." RCW 36.70A.030(8). "Long-term commercial significance" includes "the growing capacity, productivity, and soil composition of the land for long-term commercial production, in consideration with the land's proximity to population areas, and the possibility of more intense uses of the land." RCW 36.70A.030(10).
>
> In determining whether forest land is "primarily devoted to growing trees for long-term commercial timber production," local governments "shall" consider:
>
>> (a) The proximity of the land to urban, suburban, and rural settlements; (b) surrounding parcel size and the compatibility and intensity of adjacent and nearby land uses; (c) long-term local economic conditions that affect the ability to manage for timber production; and (d) the availability of public facilities and services conducive to conversion of forest land to other uses.
>
> RCW 36.70A.030(8).
>
> Guidelines for further classification of forest lands are codified at WAC 365-195-060. The GMA provides that these "*minimum* guidelines" apply to all jurisdictions, but also "shall allow for regional differences that exist in Washington state. The intent of these guidelines is to assist counties and cities in designating the classification of … forest lands…" RCW 36.70A.050 (emphasis added).
>
> The WAC guidelines for designating forest lands provide:
>
> In classifying forest land, counties and cities should use the private forest land grades of the department of revenue (WAC 458-40-530). This system incorporates consideration of growing capacity, productivity and soil composition of the land. Forest land of long-term commercial significance will generally have a predominance of the higher private forest land grades.

However, the presence of lower private forest land grades within the areas of predominantly higher grades need not preclude designation as forest land.

Each county and city shall determine which land grade constitutes forest land of long-term commercial significance, based on local and regional physical, biological, economic, and land use considerations.

Counties and cities shall also consider the effects of proximity to population areas and the possibility of more intense uses of the land as indicated by:

(1) The availability of public services and facilities conducive to the conversion of forest land.
(2) The proximity of forest land to urban and suburban areas and rural settlements.
(3) *The size of parcels: Forest lands consist of predominantly large parcels.*
(4) The compatibility and intensity of adjacent and nearby land use and settlement patterns with forest lands of long-term commercial significance.
(5) *Property tax classification: Property is assessed as open space or forest land pursuant to chapter 84.33 or 84.34 RCW.*
(6) Local economic conditions which affect the ability to manage timberlands for long-term commercial production.
(7) History of land development permits issued nearby.

WAC 365-190-060 (emphasis added)."

Focusing on this language the Court continued at 806:

"The Board determined that certain criteria used to designate LTCFL under the County's IRO did not comply with the GMA or the WAC minimum guidelines because: (1) the County mapped land ownership before promulgating criteria for designating forest land of long-term commercial significance; (2) the County limited designation as LTCFL to parcels (*sic*)[blocks] over 5,000 acres; and (3) the County made tax classification a criteria (*sic*) for designating LTCFL. The Board concluded that application of these criteria resulted in improper exclusion of forest land from LTCFL designation. We apply the above WAC guidelines to Mason County's IRO and conclude that the record does not support the Board's finding of non-compliance."

The Court stated at 807:

> "The Board misapplied the GMA when it determined that the County could not limit LTCFL designations to parcels (*sic*)[blocks] greater than 5,000 acres. Because circumstances vary from county to county, minimum guidelines provide simply that counties may consider the "size of the parcels." The guidelines also note the expectation that "[f]orest lands consist of predominantly large parcels." WAC 365-190-060(3).
>
> The County did not violate these minimum guidelines when it specified a threshold size for determining what parcels were large enough to be considered LTCFL lands. We hold that the Board misinterpreted the GMA in concluding that Mason County could not establish a minimum parcel (*sic*)[block] size of 5,000 acres when designating forest land of long-term commercial significance."

The Court also held that we could not find that land had been unjustifiably excluded when petitioners had not identified specific parcels of land and shown that they had been improperly excluded from designation.

Even though the County's response brief contained a major discussion of the *Manke* remand, petitioners failed to respond or indicate why that decision should not apply in this case.

Manke holds that local governments have a great deal of discretion in choosing threshold criteria for forest land designation under RCW 36.70A.170. Certainly a minimum parcel size of 20 acres is within allowed discretion. That was the exclusionary criterion that petitioners blamed for the exclusion of 59,000 acres from consideration, leaving only 14,000 acres to be considered as candidate lands. Within that 14,000 acres the largest block of forest land in the County is 1,230 acres. As the County's forest study stated at p.7:

> "…to conserve commercially viable forest lands you must have a sizeable land base that is sufficient to maintain and enhance the industry. It is difficult to conclude that 14,000 acres spread over the entire county is a sufficient or efficient land base for commercial timber to continue to be economical and practical to manage for the long-term."

The record showed that the County considered all the factors listed in the *Manke* decision. Further, the County's concerns about local conditions that threaten commercial viability such as

small parcel and block sizes, blocks divided by major roads, close proximity of conflicting uses, 40-acre limit on clear cuts that may be lowered to 2 ½ acres, log trucks forced to take ferries or the congested two lane highway through Deception Pass, are relevant under *Manke.*

It is unfortunate that the County's study contained some statements and generalities which other experts considered to be incorrect or misleading. However, under *Manke*, there must be clear evidence in the record to show that the use of that study actually prevented specific lands that should have been designated from being designated. Petitioners referencing general areas on a map during the hearing on the merits does not meet that test.

Given careful consideration of the evidence in the record and the *Manke* decision, petitioners have not met their burden of convincing us that the County was clearly erroneous in its decision that no forest lands of long-term commercial significance exist in Island County.

NRL – AGRICULTURE

Petitioner Wright claimed that the County failed to comply with 36.70A.020(8), .030(2), .170 and .060 when it reduced resource lands designation from 15,591 to 1,900 acres. He supported that contention with the following arguments:

(1) RCW 36.70A.020(8) clearly states "maintain and enhance natural resource based industries."

(2) The County, by grossly reducing the acreage has not complied with .020(8).

(3) RCW 36.70A.060 and .170 clearly dictate that the County "shall adopt development regulations…to assure the conservation of agriculture, forest and mineral resource lands."

(4) Invalidate the County's future resource land designation of 1,900 acres and return the resource land designations which would approximate the 15,591 acres of the existing land use plan.

Petitioner Wright also claimed that the County's failure to allow landowners in agricultural production with less than ten acres to opt into agricultural resource lands designation failed to comply with the Act. He supported that contention with the following arguments:

(1) The majority of winegrowers in Western Washington have less than 10 acre

parcels.

(2) RCW 36.70A.030(2) as well as the Island County CP cite viticulture as commercial agricultural activity.

(3) Ex. 8000 states "In fact, unique owners may be able to manage vegetables, berries and flowers to be viable on much smaller parcels."

(4) Winegrowers should be afforded the "opt-in" provision in the CP in order to provide an equal opportunity to exist with other agricultural industries.

The Coalition also quoted RCW 36.70A.020(8) and the complimentary requirements to designate and conserve agricultural lands, RCW 36.70A.060 and -.170. They contended that, given those requirements, the County's designation suffered from several flaws:

(1) The County impermissibly gave the landowners control of the designation process by excluding lands not in current use from consideration. The Supreme Court decision in *Redmond v. Growth Hearings Bd.*, 136 Wn.2d 38, 53 (1998)(*Redmond*), held:

> "One cannot credibly maintain that interpreting the definition of 'agricultural land' in a way that allows landowners to control its designation gives effect to the Legislature's intent to maintain, enhance and conserve such land…We decline to interpret the GMA definition in a way that vitiates the stated intent of the statute."

(2) The County's use of a 40-acre threshold was clearly erroneous. The rationale for this threshold was not clearly stated in the Plan but may have been based on the Plan's stated assumption that the "scattered tracts on which [micro-farming] is occurring are not critical to its growth or continuance, since new entrants will select from the full range of rural parcels within the County, not simply from parcels currently in use for micro-farming." Refuting this assumption the Coalition stated:

> "This rationale for the 40-acre threshold suffers from several flaws.
>
> First, there is no basis for the County's assertion that all rural parcels in the County are suitable for "micro-farming." There are simply no facts in the record to support this assertion.
>
> Second, the statement overlooks the necessity of taking steps to "discourage incompatible uses" in the vicinity of designated agricultural lands. RCW

36.70A.020(8). See also RCW 36.70A.060. As more and more lands in the rural parts of the County are developed, there will be fewer and fewer areas available where even "micro-farming" can exist compatibly with its neighbors. It is critical that the County now designate areas that are commercially viable for micro-farming so that incompatible uses in the vicinity can be avoided.

The Plan recognizes the need to take action to buffer farmlands from incompatible uses. Plan at 1-46. "Incompatible development adjacent to agricultural lands increases pressures to convert these properties.…Right to farm measures must be adopted to enhance the farm economy." Id. The Plan also recognizes that "[s]mall farms are gaining increased importance in the County….It is important that the County recognize the changing trends of farming in the County and provide for the appropriate land use regulations to allow them to prosper." Id. Yet incongruously, while recognizing the increased importance of the small farms, the County artificially excludes farms smaller than 40 acres from inclusion in the commercial agricultural designation. The use of the 40 acre threshold is clearly erroneous."

(3) The Plan at 1-46 includes a requirement that "50 percent or more of the [farm] block is underlain by prime soils." Yet three sentences earlier, the Plan acknowledges that "many" actively managed farms "are not underlain by 50 percent or more prime soils. Some commercial farms with relatively little prime soil have been in operation in Island County for many years." Therefore, 50 percent prime soil criterion in its designation process was clearly erroneous.

As to the conservation of agricultural lands, the Coalition contended that the County's EDU program impermissibly allowed urban growth on agricultural lands.

The County responded that its decision regarding which cultivated lands have long-term commercial significance and which do not was clearly supported by the record and by the policies and requirements of the GMA. The County supported this contention with the following arguments and description of the process:

(1) Mr. Wright is wrong as to the designation of agricultural lands under .170. His argument assumes that lands with AG and FM zoning under the County's pre-GMA plan, were resource lands of long-term commercial significance under GMA. The County's record showed that this was not the case. Further, if he had totaled the acres subject to

Rural Forest (14,000), Rural Agriculture (8,715) and Commercial Agriculture (1,900) under the County's GMA CP, he would have found over 9,000 more acres subject to these designations than in the old plan.

(2) The zoning code's provisions for commercial "opt-in" by small farms are appropriate. It was within the discretion of the BOCC to determine that properties less than 10 acres in size are not entitled to the benefit of that ordinance, even if their owners grow and sell some sort of agricultural product from the land.

(3) "The legislature did not intend to designate all land which ever has been tilled; it intended to designate and conserve a land base which has long-term commercial significance, in order to preserve the agricultural industry."

(4) The Supreme Court in *Redmond* held:

> "While the land use on the particular parcel and the owners' intended use for the land may be considered along with other factors in determination of whether a parcel is in an area primarily devoted to commercial agricultural production, neither current use nor land owner intent of a particular parcel is conclusive for purposes of this element of the statutory definition."

The County interpreted this paragraph:

> "In other words, a county can consider whether land is in cultivation in making its decision about whether land has long-term commercial significance, but the fact that it is, or is not, in cultivation does not conclude the issue. Any interpretation of *Redmond* which <u>required</u> a county to designate lands which it knew were not in commercial production would on its face make the designation of lands for commercial production absurd."

(5) The County must also analyze whether the land has "long-term commercial significance for agricultural production." The County therefore considered the difficulties of sustaining farming and the potential for greater worth in development potential than farming.

(6) The Planning Commission recommended that the following lands be mapped for consideration for designation under RCW 36.70A.170:

a. Include lands which meet all of the following criteria:

1. has agricultural tax status;

2. is at least 20 acres in size (including two or more adjacent parcels

in the same ownership);

3. has prime soils as identified by the Soil Conservation Service (the SCS has identified no "unique soil" in Island County; and

4. is presently "primarily devoted to commercial production" of agricultural products (unless follow as part of a planned laying out of land in long-term commercial use).

b. In addition, include all lands which meet the following criteria, whether or not those lands would meet all of the criteria above:

1. land for which development rights or view easements have been sold;

2. land which has been acquired by a public body as a means to maintain agricultural use; and

3. land which has been committed to permanent resource use through a transfer of development rights or reservation of land for resource use as part of a clustered development.

(7) The BOCC authorized a study, Island County Agricultural Study (Ag Study). The Ag Study showed that 13,042 acres were in an agricultural tax program; 9,935 acres of those were in parcels of 20 acres or more in contiguous ownership; another 2,481 acres were excluded because they were underlain by no prime soils. 1,000 acres with no previous agricultural zoning were added to "candidate" lands because they were in agricultural tax status.

(8) The Ag Study concluded that a 40-acre minimum should be used to qualify as long-term commercially significant, supported by the following logic:

> "For purposes of designation of <u>long-term commercial lands,</u> scattered 20 acre tracts were ignored, although they are suitable for <u>rural ag designation.</u> Scattered 20 acre tracts which are currently agricultural tax status are largely fungible with any other 20-acre tract in the rural areas of the county. <u>In terms of long-term significance, a key issue is whether the land needs to be available to successor owners in order to support the agriculture industry in the county. New entrants into small scale farming are unlikely to limit their search for land to tracts which are currently designated for agriculture. Similarly there is no reason to believe that when existing owners leave a micro-farming operation they will be able to find a buyer to replace that operation on that property.</u> The nature of micro-farming is that it is dependent on individual operators for its location and continuation. Therefore, in the unique circumstances of Island County, with its thousands of rural parcels of a size appropriate for micro-

farming, the specific parcels currently in use for micro-farming are not significant to preserving opportunities for micro-farming."

(9) The County further concluded that 50 percent of a farm unit needed to be underlain by prime soils to be designated "Resource Agricultural."

(10) The County decided on the following criteria for dividing the candidate lands between lands with long-term commercial significance (Commercial Ag) and lands of local significance (Rural Ag):

"Farm units that meet the following criteria qualify as resource Agricultural Land and shall be classified in the Commercial Agriculture classification:

1. The Farm Unit is at least forty (40) acres in size; and
2. At least fifty percent (50%) of the Farm Unit is composed of prime soils; and
3. The Farm Unit is primarily devoted to active Commercial production through cultivation and/or management; or
4. The Farm Unit qualifies for designation under designation criteria #1 and #3 above and, the Owner of the Farm Unit requests designation.

I.C.C. §17.03.100(c).

Parcels that meet the following criteria qualify as rural Agricultural Land and shall be classified in the Rural Agricultural classification:

1. The Lot Tract or Parcel is at least twenty (20) acres; or smaller Contiguous Lots owned by the same Owner that, in combination, are at least twenty (20) acres in size; and
2. The Lot or Parcel was classified in the open agricultural tax classification or, if withdrawn, all taxes, interest and penalties were not paid in full as of the effective date of this Chapter.

I.C.C. §17.03.090(c).

(11) The County relied on the more direct knowledge of individual landowners because its knowledge about individual farms was limited.

(12) There is no evidence that any property "escaped" designation because of a discretionary decision once the owner knew of the County's plans. Further, Finding 120 supports use of tax status:

"Because of the marginal economics of both agriculture and forestry in Island

County, the County finds that without the tax benefit of being enrolled in a current use tax program, it is highly unlikely that a private property could have long-term significance for commercial production of forestry or agricultural products. Although the decision to enroll the property in a current use tax program was originally that of the owner, the county finds that any owner actually devoting their property to long-term commercial production of forest or agricultural products would have been forced to make such an election."

(13) The 40-acre threshold for Commercial Ag is within the County's discretion. To support that assertion the County's brief at p.28 states:

"It must be recalled that Island County has some 30,000 parcels within its unincorporated area and only 622 parcels in an agricultural tax status. Id. p.4. Many of those 30,000 parcels would support the sort of 2,3,4-acre and even 20-acre micro-farms which pop up across the county. The issue for the Commissioners was whether there was anything unique about parcels less than 40 acres in size which made it important that they be "frozen" in agricultural designation. The County had to recognize that a Commercial Agriculture designation would (hopefully) limit the buyers for any parcel which was designated to those individuals acquiring the property to farm it. If the next entrant into agriculture in Island County was as likely to instead buy another rural parcel because, the parcels were fungible, there is no basis to designate the currently farmed parcels "Commercial Ag."

The Coalition then suggests that the County had a duty to take steps to discourage incompatible uses next to every 2-acre berry patch in the County. Coalition brief, p.59, 1. 15. Indeed, the duty under RCW 36.70A.060 to prevent adjacent and nearby uses from interfering with commercial agriculture lands is one very good reason not to designate scattered micro-farms as "commercial agriculture" under RCW 36.70A.170. To do so would allow anyone on essentially any rural parcel to start a "farming" operation, declare themselves to have long-term commercial significance, and thereby restrict the uses which could be made of neighboring properties or engage in what might otherwise be viewed as a nuisance. The County Commissioners quite properly chose not to give every landowner who decided to "farm" their rural property that sort of power."

(14) It was proper to require at least 50 percent prime soils in order for land to be automatically included in Commercial Ag.

"The error in the Coalition's reasoning is that it assumes that any existing farm

necessarily has long-term commercial significance. Clearly the legislature recognized that was not true when it carefully defined both "agricultural land" and "long-term commercial significance," and when it directed DCTED to develop guidelines for designation of agricultural lands. The use of 50% prime soils comes straight out of the WAC guidelines. It is not clearly erroneous."

(15) The County's Earned Development Units (EDU) program is essential to the preservation of what long-term farming still exists in Island County.

(a) The opportunity to preserve "development value" in its agricultural lands is critical to permitting the County's farmers to ride out the inevitable economic downturns which they face.

(b) In response to Island County's farmers' difficulties in financially surviving, the BOCC asked the cooperative extension service for help in devising a program which would do as much as government can do to support and encourage, not hinder, agriculture in the County.

(c) Mr. Don Meehan, from the extension service pointed out that "anyone with a large commercial agriculture operation needs land value because that is how they get their loans." Meehan thus proposed a combination of providing true "development value" to existing farms through EDUs, with a farm management plan that would have to be approved by the County prior to any EDUs being available, which would insure the EDUs were located so that they caused the least possible interference with on-going agriculture.

The County concluded:

"The County's findings are not clearly erroneous given the record before the county and the local circumstances unique to Island County. The fact that they would not be true in Clark or Jefferson or Skagit or Kittitas Counties, and indeed the fact that the EDU program might have the effect of hastening rather than delaying the demise of farming in those counties, is irrelevant here. Given the facts here, this Board cannot find the County's conclusion that the EDU program will help preserve commercial agriculture in Island County is clearly erroneous. It must be sustained."

Petitioner Wright responded:

"The reality is that the reduction did occur and result was the addition of Resource Lands to the Rural Land Element. This petitioner asks The Board to rule on just

exactly what "maintain and enhance" constitutes if Island County is allowed such an action. Clearly, the Legislature intent was to preserve and protect Resource Lands. These lands must exist not just for the current generation of farmers, but in perpetuity.

Island County places a great deal of emphasis in its Commercial Agriculture Designation on "bigness" or size and the concept of long-term commercial significance. It assumes a mind set of current farming methods and traditional farming operations. Clearly, this attitude precludes any future farming applications which could prove to be an economically viable enterprise. And what would be the resulting effect if there wasn't Resource Lands for future generations?"

As to his opt-in claim, Petitioner Wright replied:

"As stated in this petitioners brief, the GMA as well as Island County cite viticultural as a proper Resource Land operation. Yet, the county has refused to recognize the "smallness" concept that pervades this fledgling industry.* The "opt-in" provision offered by Island County amounts to a Comprehensive Plan amendment that purportly (*sic*) will cost $800.00, an amount which will surely prohibit and/or hinder viticulture as an industry due its lack of participation in a current use taxation program."

The Coalition answered the County's arguments with the following:

(1) The County did not seem to understand the implications of its designation criteria: that the criteria utilized by Island County gives conclusive effect to landowner intent and current use contrary to the holding in *Redmond*.

(2) The County turns the Act on its head, justifying non-designation on the basis that farmland is frequently more valuable for development purposes and, therefore, it is only because of the current desire of current landowners to farm that the land is being farmed at all. The County states that it "must recognize the pressures whoever owns the property today or 20 years from now will face." These development pressures are precisely the reason that land needs to be designated; they do not provide a justification for non-designation.

(3) Given the evidence in the record, the County did not have discretion to utilize the 40-acre threshold for Commercial Ag designation. The Coalition supported this statement with the following argument:

"In our Opening Brief, we demonstrated that the record reveals that commercially viable "micro-farming" is occurring on parcels smaller than 40

acres. See Op. Br. at 59-61. We demonstrated there was no evidence in the record to support the County's claim that virtually all rural lands are available for micro-farming and, therefore, no protection is needed. In response, the County essentially concedes our point, offering no evidence that the parcels suitable for micro-farming are so prevalent that they need no protection. The County cites only to an unsupported conclusory statement in the Agricultural Study that "[n]ew entrants into small scale farming are unlikely to limit their search for land to tracts which are currently designated for agriculture." This conclusory statement – unsupported by citation or discussion of any probative evidence – does not amount to "substantial evidence" supporting the County's claim.

The County's argument also lacks legal support. Essentially the County is arguing that if agricultural land is very abundant, then no designation or conservation regulations are necessary. See Co. NRL Br. at 28 (the "issue for the Commissioners was whether there was anything unique about parcels less than 40 acres in size which made it important that they be 'frozen' in agricultural designation"). But the Act requires designation not for "unique" parcels but for all parcels which can be used for commercially viable agricultural purposes in the long-term.[16]

Finally, the County argues that if it designated micro-farming agricultural lands it would create a need for protective regulations that would restrict the uses on neighboring properties. See Co. NRL Br. at 28. The County apparently is taking issue with the legislative judgement that the preservation of agricultural lands is so important that regulations of this type (e.g., "right to farm" regulations) must be adopted. If the County disagrees with this legislative policy determination, then it should go to the Legislature and attempt to persuade it to reverse course. But until and unless Island County is successful with this effort, the mandate of the Act remains clear: designate all agricultural lands of long-term commercial significance and then adopt regulations to protect it. (emphasis supplied) The County's use of an artificial 40-acre threshold – in the face of persuasive evidence that smaller farms are quite viable, Ex. 3047 (attached to Op.Br.), fails to comply with this legislative mandate."

(4) The County was wrong to exclude consideration of farms with less than 50 percent prime soil. DCTED does not specify that consideration of unique and prime soils should be done in an exclusionary sense. There is nothing in the DCTED rules that supports Island

County's scheme of excluding from consideration lands that do not 50 percent unique or prime soils on them.

(5) The EDU program is inconsistent with the GMA requirement to "conserve" designated agricultural land.

(a) The EDU program allows farmers to develop some of their designated land in an effort to provide economic incentive for the conservation of the remainder. The Act does not allow this.

(b) The County can maintain the value of the agricultural lands for farmers to obtain credit from banks without sacrificing designated agricultural lands. The transfer of development rights from designated lands to non-designated county lands inside the UGAs is one example of this.

Board Discussion

As background for our discussion of these commercial agriculture designation and conservation issues we look to what we have said about these issues in previous decisions.

RCW 36.70A.020(8) provides 3 prongs:

(1) To maintain and enhance;

(2) To encourage conservation; and

(3) To discourage incompatible uses.

WEAN v. Island County, #95-2-0063 (CO 4-10-96)

The allowance of agricultural and/or forest lands to be transfer-of-development-rights receiving properties discourages conservation of productive forest and agricultural lands and encourages incompatible uses. *WEAN v. Island County*, #95-2-0063 (CO 4-10-96)

The greatest threat to long-term productive RLs is nearby conflicting uses. *WEAN v. Island County*, #95-2-0063 (CO 4-10-96)

A designation ordinance that required a minimum 40-acre parcel, but also allowed subdivision into two 20-acre parcels, was inconsistent with a criterion to eliminate 20-acre parcels for resource designation. One or the other must be changed to comply with the GMA. *Friends v. Skagit County*, #95-2-0075 (CO 4-9-97).

Whether densities are characterized as "urban," "suburban," or "rural residential" they do not comply with the GMA when located in RLs. *Hudson v. Clallam County,* #96-2-0031 (FDO 4-15-97).

One of the major reasons for the enactment of the GMA was to stop the conversion of RLs into sprawling low-density development. Densities within designated agricultural resource areas must not interfere with the primary use of the lands for production of food or other agricultural products or fiber. *Hudson v. Clallam County,* #96-2-0031 (FDO 4-15-97).

A development regulation which allowed one unit per five acre density within agricultural RLs did not comply with the GMA. Additionally, such ordinance substantially interfered with RCW 36.70A.020(8) and was declared invalid. *Diehl v. Mason County,* #95-2-0073 (CO 12-18-98).

An ordinance which allowed subdivision of agricultural lands into parcels smaller than 10 acres in conjunction with a finding by the County that acreage smaller than 10 acres could not reasonably be expected to have long-term commercial significance for agricultural use did not comply with the GMA. Additionally, such an ordinance substantially interfered with RCW 36.70A.020(8) and was declared invalid. *Diehl v. Mason County,* #95-2-0073 (CO 12-18-98).

The County's December 15, 1997 Issue Paper at p. 4 indicated an awareness of these decisions:

> "Challenges to the failure of local jurisdictions to designate agricultural lands of long-term commercial significance, whether the failure is complete in that no lands were so designated, or only some lands were designated but significant additional lands were not designated, have consistently resulted in findings of non-compliance by Growth Management Hearings Boards when the Boards were presented with evidence that the designation criteria excluded lands that could have been designated (John E. Diehl v. Mason County, Skagit County v. Friends of Skagit County). Designation is not enough: in George F. Hudson v. Clallam County, the County's designation criteria and methodology survived the Board's review, but, as was the case in WEAN v. Island County (Second Compliance Hearing and Finding of

Invalidity), development regulations allowing rezoning, subdivision and uses incompatible with agriculture were found to be out of compliance and determined to be invalid. In the Island County decision, the Board found that the allowance of agricultural and forest lands to be transfer of development rights receiving properties, and the allowance of automatic reclassification of agricultural and forest lands to rural residential or residential densities, did not encourage the conservation, maintenance and enhancement of resource lands, and encouraged incompatible uses."

And at p.6 the County continued:

"As noted above, the Hearings Boards have found clustered development on agricultural lands to be incompatible with agricultural activities and inconsistent with the conservation of these lands. Protection measures including large lot zoning and allowing transfer of development rights from the undeveloped portion of the property would likely meet the approval of the Hearings Boards.

Not only must the lands themselves be protected from subdivision, the county is required to ensure that uses on lands adjacent to resource lands do not interfere with continuing well-managed agricultural activities on resource lands. This may be accomplished through such means as establishing a rural zoning density surrounding the resource lands, requiring new uses to maintain a large setback, and, as is required per RCW 36.70A.060, adoption of regulations requiring all users of new development within 300 feet of the property be notified of the proximity and impacts of the ongoing agricultural activities."

As to designation criteria the Issue Paper stated at p. 5:

"Given the pattern established by Hearings Board decisions, a failure to designate agricultural lands could withstand scrutiny only if well supported with detailed analysis demonstrating such an absence of lands meeting the criteria. A failure to designate and protect working farms over the protest of the owners would almost surely be reversed by the Growth Board.

Designation Criteria. Certain agricultural activities, such as raising specialty crops or produce for local sale, do not need large tracts of land to be economically feasible. Other farm activities, such as raising dairy cattle, typically require much larger tracts of land. Of the 573 parcels in an agricultural tax program in the county in 1995, only 44 were greater than 50 acres in size, and 342 were less than 20 acres in size. Of the farms greater than 50 acres, the average total size (often multiple parcels) is about 200 acres. There are probably many parcels in the county of less than 20 acres in size that can be characterized as primarily devoted to the raising of crops or other

> agricultural products which are then sold locally or on the mainland, generating some revenue and possibly even profit. With only a handful of parcels larger than 100 acres in Island County, using a very large parcel size threshold may leave very few lands designated, and may eliminate from designation lands that have long-term commercial significance. Using a parcel size threshold that is too small will result in over-designation and establishment of unwarranted protections for parcels not devoted to commercial production.
>
> Lands as small as perhaps 5 or 10 acres in size may meet the definition of agricultural lands of long-term commercial significance in Island County, provided they also meet other criteria. Separating these from other small holdings which are actively farmed, but are in the "lifestyle" category, do not seriously market any products, and have no long-term commercial significance is essential to accurate designation. Criteria must be established to accomplish this separation."

In addition to the decisions cited above, on May 11, 1999, we issued a compliance order that set forth our understanding of the *Redmond* decision in *Achen v. Clark County*, #95-2-0067.

Despite the County's awareness of our previous decisions and the requirements of the Act it chose a course of action that conflicts with the GMA in several ways.

In *Redmond*, the Court clarified the definition of "agricultural land" with its two components "primarily devoted to" and "long-term commercial significance." The Court made it clear that owners' current or intended use of the land was not conclusive in determining if property is primarily devoted to agriculture.

Ex. 2658, the December 12, 1997 PC recommendations, and discussions at the December 9, 1997 PC meeting indicate that land was excluded from consideration for reasons deemed inappropriate in the *Redmond* case. In order to be considered for designation:

> "4. is presently 'primarily devoted to commercial production' of agricultural products (unless follow as part of a planned laying out of land in long-term commercial use)."

The County stated in its brief that any interpretation of *Redmond* which required a County to designate lands which it knew were not currently in commercial production would be absurd. We disagree. It is the land's potential for long-term agricultural viability that is key, not current usage or current owner intent. As to "long-term commercial significance," we have previously

noted that there is nothing in the Act or the WACs that provide for the consideration of the proposed agricultural lands' capability of sustaining economic sustenance to the owners of the property. The *Redmond* decision confirmed that interpretation.

As to the County's use of a 40-acre threshold for Commercial Ag designation, the record is clear that using this very large parcel size threshold left few lands designated and eliminated from designation lands that have long-term commercial significance. In conflict with our decisions in Skagit and Mason Counties, Island County arbitrarily decided that acreage smaller than 40-acres could not be expected to have long-term commercial significance and at the same time allowed unlimited densities on 25 percent of those lands.

We find no evidence in the record to back the County's assertion that parcels smaller than 40 acres need not be conserved for long-term agricultural production through NRL designation. The County's assertion that any lot in the rural area would be suitable for "micro-farming" and therefore designation was not necessary rings quite hollow when in the next breath the County stated:

> "The Coalition then suggests that the County had a duty to take steps to discourage incompatible uses next to every 2-acre berry patch in the County. Coalition brief, p. 59, 1. 15. Indeed, the duty under RCW 36.70A.060 to prevent adjacent and nearby uses from interfering with commercial agricultural lands is one very good reason not to designate scattered micro-farms as "commercial agriculture" under RCW 36.70A.170. To do so would allow anyone on essentially any rural parcel to start a "farming" operation, declare themselves to have long-term commercial significance, and thereby restrict the uses which could be made of neighboring properties or engage in what might otherwise be viewed a s a nuisance. The County Commissioners quite properly chose not to giver every landowner who decided to "farm" their rural property that sort of power."

The County has turned the Act upside down. As explained by the Supreme Court in *Redmond*, it is the County's obligation to first designate and conserve agricultural lands of long-term commercial significance and to discourage incompatible neighboring uses. The County seems to be trying to protect rural uses from incompatible farming uses.

We agree with the Coalition's arguments in its reply brief at p. 32-33 on this issue. In addition, at the December 9, 1997 PC meeting, the County's legal adviser said:

> "I don't recommend that you attempt to map farms less than 20 acres because your rural zoning should protect farming on much smaller parcels."

We fail to see how rural zoning will protect smaller farmers when the County has chosen to allow all rural lands to be divided to 5-acre parcels with additional density bonuses allowed.

For the reasons stated above we are convinced that the County was clearly erroneous in its designation of agricultural lands of long-term commercial significance.

As to the conservation of agricultural lands, the County admitted that the EDU program uses designated agricultural lands as receiving properties for density credits and that there was no cap on the number of dwelling units that could be located in the 25 percent of the parcel designated as the receiving area.

We empathize with agricultural land owners and commend the County for its efforts to "put the profit back in farming." The profit needs to be in farming and not in developing agricultural land. The conservation of the agricultural land base is key for the viability of agriculture in the future. The EDU program is an excellent concept. However, if the EDU density credits use portions of the blocks of agricultural land as receiving properties, the remainder of the agricultural land is in greater peril. Kernels of new RAIDs can be formed with future need of urban services and more neighbors to complain about the "nuisance" of agricultural neighbors.

The County refers to our flexibility in *Hudson v. Clallam*. However, that program transferred the density credits into the unincorporated UGAs where it should be. Also, in Clallam County, much of the land designated under .170 had already been divided into very small parcels – a different situation then in Island County.

RCW 36.70A.177 allows limited clustering in designated agricultural lands but not of the scope and intensity allowed by the EDU program. Given the record in this case, a carefully crafted ordinance which severely limits the total number of dwelling units and resultant densities and allows a very small percentage of agricultural land to be converted could be found in compliance with the Act. However, designated agricultural lands cannot be used as receiving areas for EDU credits. **As written, the EDU provisions permit clusters of urban growth, fail to conserve**

designated agricultural lands and do not comply with the Act.

As to Petitioner Wright's claim that the County failed to comply with the Act when it reduced resource land designation from 15,591 to 1,900 acres, we have already dealt with the County's failure to designate appropriate agricultural lands under .170. However, we would also like to note that the County, responding to Mr. Wright's charge, chastised him for not seeing that if he had totaled the acres included in Rural Forest, Rural Agriculture and Commercial Agriculture, he would have found over 9,000 more acres subject to these designations than in the old plan. However, at the hearing on the merits the County kept reminding us that Rural Forest and Rural Agriculture are Rural, not natural resource, designations.

As to Petitioner Wright's "opt-in" challenge, petitioner has not met his burden of convincing us that the County was clearly erroneous in limiting opt-in candidates to parcels of 10 acres or more.

RURAL ELEMENT

Rural Forest and Rural Agriculture

Rural Forest (RF) and Rural Agriculture (RA) present something of a hybrid in the issues of this case because they pertain to forest and agricultural uses but they are rural zones. They are not designated under RCW 36.70A.170 and are not subject to the strict conservation requirements of the Act. That is one reason petitioners felt so strongly that these lands should actually have been designated Commercial Forestry and Commercial Agriculture.

The County explained that once it had determined what lands must be designated under .170 it asked two additional questions.

(1) What lands in the County, if not of long-term commercial significance, are of local significance as forest and agriculture lands and should be given encouragement by the County to remain in resource use?

(2) What is the best way to protect them and keep them in resource production?

This is what led to the RF and RA designations and provisions.

The Coalition, in addition to believing these lands should have been designated R/L under .170, listed additional flaws, two of which were:

(1) The CP designated RF and RA lands to encourage conservation of these lands. The minimum parcel size in these CP designations is 20 acres. The DRs establish parallel zone classification of RF and RA that have a 20-acre minimum lot size. The zoning code allows them to be rezoned to rural residential without requiring a corresponding CP change, creating a direct conflict between the 5-acre minimum lot size for rural zoned lands and the 20-acre minimum in the CP for lands designated RF and RA.

(2) The DRs allow residential urban growth in RA and RF designations through the EDU program which allows urban growth and a new pattern of low density sprawl on 25 percent of the parcel. If services are available there are no limits to the number of dwelling units that may be placed in the 25 percent. The program could come into compliance with the Act if it required all EDU to be transferred to land inside the UGA and only gave credit for permanent conservation easements.

Intervenor Roehl pointed out that the limitations of the land and the requirements of the overall zoning code indirectly set a cap on what is possible to develop on the 25 percent of the property to which development is limited. The County said it was willing to stipulate to re-look at the need for a cap.

The Coalition concluded that since much of the RF and RA lands should have been designated resource lands, the DRs that now govern RA and RF should be found invalid because of substantial interference with goals (1), (2), (5), (6), (8) and (10).

Board Discussion

We applaud the County for trying to find ways to keep lands that do not require resource designation under .170 in resource use. However, the means selected to accomplish this goal must not conflict with the requirements of the Act.

It is obvious that, as currently written, the EDU program allows the potential for new urban development in rural lands. It also allows more intense rural development that creates a new pattern of low density sprawl in conflict with RCW 36.70A.070(5)(iv). **The County is therefore not in compliance.**

As these are rural designations, the County may rezone the land to other rural designations. However, the County must deal with the inconsistency this will create between the CP and DRs. **As written the County is not in compliance.**

We have found that the County is not in compliance as to the designation of agricultural lands of long-term commercial significance and must reconsider its determination, avoiding the use of inappropriate and exclusionary criteria. It appears that many, if not all lands currently designated RA should have been designated commercial agriculture. It is imperative that lands currently zoned RA not be allowed to convert to other rural designations and be subdivided while the County reconsiders its designations.

The record shows that Island County is one of the most densely populated counties in the state and resource lands are under duress from neighboring uses. If agricultural lands are to be preserved, action must be taken swiftly or the situation will be like forest lands; none that qualify under .170 will be left. **We therefore find the RA designation in the CP and the DRs that govern RA, to the extent that they are less restrictive than allowed in Commercial Agriculture, invalid because of substantial interference with goals (1), (2), (6), (8) and (10) of the Act.**

Residential Densities in the Rural Area

The Coalition claimed that both the uniform 5-acre minimum lot size allowed on all Rural zone parcels and provisions that allowed density greater than one unit per 5 acres are in violation of the Act. They supported their claims with the following arguments:

(1) Under the GMA, the rural designation must reduce "the inappropriate conversion of undeveloped land into sprawling, low-density development." RCW 36.70A.070 (5)(c)(iii).

(2) The GMA requires rural densities "that are not characterized by urban growth and that are consistent with rural character." RCW 36.70A.070(5)(b).

(3) To be consistent with rural character, open space and the natural landscape must predominate over the built environment. RCW 36.70A.030(14)(a).

(4) Development must be compatible with the use of the land by wildlife and for fish and wildlife habitat. RCW 36.70A.030(14)(d).

(5) Rural development must not "require the extension of urban governmental services." RCW 36.70A.030(14)(f).

(6) Rural development must protect "natural surface water flows and ground water and surface water recharge and discharge areas." RCW 36.70A.030(14)(g).

(7) Island County has done a good job of recognizing many of these principles in portions of its Plan. But the offending CP policies and DRs undermine these principles and allow growth which will frustrate the goals of the GMA.

(8) The provisions of the CP and DR that allow a pattern of 5-acre lots throughout the Rural zone are not in compliance with the Act.

(a) The Island County uniform 5-acre lot size fails the Western Board's 1 du/5 acre rule and fails the Central Board's factors analysis in *Vashon-Maury v. King County*, #95-3-0008.

(b) The pattern of potential 5-acre or smaller lots will constitute urban growth because it covers 60 percent of the island.

(c) The pattern of future rural development contributed to the County's decision to not designate natural resource lands.

(d) The County is a sole source aquifer and there are significant water quality problems.

(e) 5-acre lots surround the cities of Oak Harbor and Langley and will thwart the long-term flexibility to expand the UGAs.

(f) The Coalition does not object to the density of 1 du per 5 acres in the rural area. But a pattern of 5-acre lots is inconsistent with the Act's requirements.

(g) A 1 du/5-acre density can be accommodated without creating more 5-acre lots by clustering and/or TDR provisions (provided the density and areal extent of the clusters or receiving areas are appropriately regulated).

(9) The Plan and DRs allow residential density greater than one unit per 5 acres in violation of the Act's goals and requirements. The CP and DR have created a rural

designation and zone that covers 60 percent of the County. In addition to the EDU program already discussed, Planned Residential Developments (PRDs) are allowed to create a density of 1 du per 2.5 acres in the rural area where the standard residential density is 1 du per 5 acres. Development at these densities is urban growth and very similar to the provisions this Board recently found invalid in Mason County.

(10) Residential densities allowed in the rural area greater than 1 du per 5 acres should be found invalid because they substantially interfere with the fulfillment of goals (1), (2), (8), (9) and (10) of the Act.

The County responded that it retained the 5-acre minimum lot size for valid reasons:

(1) A twelve year history of the 5-acre zoning shows that an average of only 60 lots per year were added to the Rural zone lot supply. This shows that new lot creation plays a very small part in meeting the County's housing needs.

(2) The County's Rural zone contains 79,500 acres divided into 26,644 lots. Slightly over 23,000 of these lots are under 5 acres with the average being 3 acres. Another 2,200 lots are less than 10 acres and so could not be further subdivided. Only 5 percent of the lots are large enough to be further platted or short platted and constitute 40 percent of the Rural zone acreage.

(3) There is no rational or factual basis for further down zoning.

(4) PRD requirements have been modified to further protect rural character.

(a) The County's study showed that it approves only three PRDs each year and that the density and quantity of open space were not nearly as important as design and layout of the site in affecting rural character.

(b) The County therefore adopted revisions to the PRD criteria that would enhance design and layout requirements.

(c) The County also determined that cluster development would not occur without bonus densities.

The Coalition replied:

(1) According to County analysis, two-thirds of the Rural zone is currently in lots with a size of 5 acres to more than 80 acres. It is this portion of the Rural zone, approximately 40 percent of the County area, that the Act mandates be protected from new urban-type

development or low-density sprawl.

(2) A pattern of 5-acre lots allowed throughout the rural area present an "undue threat" to NRLs, critical areas (CAs), and future expansion of UGAs. The County has not denied this.

(3) Coalition requests a base density of 1 unit per 10 acres with a density bonus to 1 unit per 5 acres under an appropriate cluster ordinance.

(4) PRD density bonuses allowing 1 unit per 2.5 acres everywhere in the rural designation not only fail to comply but should be declared invalid.

Board Discussion

The County defended its 5-acre zoning throughout the rural zone with two main points: (1) not many people have divided their land under this zoning density in the past few years; and (2) it could find no logical reason for larger rural lot requirements. We can think of several logical reasons why the remaining 40 percent of Rural zone acreage should not all be allowed to divide to 5 acres and smaller.

First, reacting to the statewide gobbling up of rural lands with sprawl, the Legislature said "Stop". GMA changed the land use pattern that counties may permit in rural areas. Pre-existing parcelization may not be able to be undone, but that is no reason to perpetuate the past with continued reliance on consumptive land use patterns.

Second, an area wide pattern of 5-acre lots would conflict with the viability of resource lands and critical areas and would thwart the long term flexibility to expand the UGAs. In *Achen* (FDO 9-20-95) we said that rural lands have very necessary and important functions, including an important symbiotic relationship to provide necessary support of and buffering for NRLs. This record is replete with evidence that logging and farming are under siege in Island County from conflicting uses and unhappy neighbors. This County action would only exacerbate that situation.

Third, we have found that the County must go back and reconsider its designation of agricultural lands under .170. Further, the County's record shows that it has not completed its designation process for mineral lands of long-term commercial significance. We have said in previous

decisions that allowing new 2.5 and 5-acre lots adjacent to designated mineral sites is non-compliant. It is, therefore, illogical as well as non-compliant for the County to allow further division into 5-acre lots in the rural zone until the resource land designations are completed.

Fourth, the County stated that a reason for not designating more agricultural lands was that "micro-farmers" could pick from a myriad of suitable lots in the rural zone. With the continuation of 5-acre rural zoning that scenario seems very unlikely. Further, this record shows that more and more of the "micro-farms" are organic and need buffering from neighboring developments' domestic pesticides, weed killers, etc.

As to provisions that allow densities greater than 1 unit per 5 acres, we previously discussed the problems with the EDU program in the RF section. The PRDs need to have a limit on their total size and intensity not only to be compatible with rural character, but to ensure that urban services will not be needed in the future. We commend the County for the improvements it has made in the PRD ordinance to protect rural character. **However, as written the PRD's do not comply with the Act.**

The County stated that historically there have been spurts of intense land subdivision when landowners knew a more stringent set of ordinances were coming. We are very concerned about the potential "rush to the counter" that might occur after this decision and before the County can take remedial action. Since the threat to the imperiled natural resource lands is potentially so egregious from these 5 and 2.5 acre densities in the Rural zone, we feel invalidity is appropriate now. **However, we will give the County until August 10, 1999, to adopt an interim ordinance that would limit subdivision to 10-acre lots with 1 du per 5-acre allowed density in PRDs until the needed compliant analysis is done on the Rural zone. If this action is not taken, we will make a finding of invalidity.**

Finally, the Coalition claimed that rural character is not protected by the allowance of long-term mining operations everywhere in the rural area. The County responded that this complaint should be rejected because it was not within the issues framed by the amended prehearing order. We agree with the County. The Coalition's issue statements were extensive and detailed. Mining concerns, however, were not even mentioned.

RAID ISSUES

The GMA was amended in 1997 to permit limited areas of more intensive rural development. RCW 36.70A.070(5)(d). Commercial, industrial, residential, shoreline, or mixed-use areas of more intensive rural development are not subject to the Act's requirements to assure "visual compatibility of rural development with the surrounding rural area" and to reduce the "inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area." RCW 36.70A.070(5)(d)(i). However, areas of more intensive rural development are not "mini-UGAs" or a rural substitute for UGA, and they are subject to the limitations of RCW 36.70A.070(5)(d)(iv).

The County must minimize and contain existing areas or uses of more intensive rural development. RCW 36.70A.070(5)(d)(iv). Lands included in these existing areas or uses must not extend beyond the logical outer boundary of the existing area or use, thereby allowing a new pattern of low-density sprawl. *Id.* The Act defines "existing areas" as those that are "clearly identifiable and contained and where there is a logical boundary delineated predominantly by the built environment, but that may also include undeveloped lands if limited as provided in [RCW 36.70A.070(5)(d)]." *Id.* The Act does not define "existing uses" other than to say an existing area or use is one that was in existence on July 1, 1990. RCW 36.70A.070(5)(d)(v). When evaluating densities and uses in areas of more intensive rural development, the question is not whether urban densities and uses are allowed. The question is whether the allowed densities and uses reflect the existing density or uses contained within a specific RAID. RCW 36.70A.070(5)(d)(iv).

How the County Designated RAIDs

The County has identified areas of more intensive development, calling them RAIDs. The declaration of County planner Jeff Tate set forth the methodology used by the County in designating RAIDs. The following is an abbreviated summary of the County's methodology.

The County identified all long plats and subdivisions, as inventoried in a 1995 Private Residential Community/Private Residential Development study. For each long plat and subdivision, the County's information included: the year the plat was created, the size of the plat and the number

of lots in the plat, total number of unimproved lots within each plat, the number of available lots within each plat (i.e., the total number of lots less unimproved lots, lots with septic denials, and lots subject to a water moratorium), and the average lot size within each plat. The County identified 348 long plats and subdivisions to consider for RAID designation.

Next, plats created after July 1, 1990, were deleted as potential RAIDs. Plats created prior to 1966 and previously zoned Rural Residential with an average parcel size greater than 2.5 acres, less than 40 percent developed, and with less than 10 improved residential parcels with water hook-ups were deleted as potential RAIDs. The County examined the "built environment" of the remaining plats and subdivisions.

For purposes of identifying the built environment, the County considered parcels with an assessed features and structures value of $25,000 or more as developed, with the remaining parcels undeveloped. The County relied on the County Assessor's records to make this determination; the County did not identify the location of structures on the ground.

For those plats within saltwater intrusion areas, no land outside the plat boundary was included. The remaining plats were further studied to determine the logical outer boundary. This further study included evaluation of Assessor's maps and database, and topographic maps. The plat boundary became the RAID boundary where there was no significant small-lot parcelization around or adjacent to the plat; where there was small-lot parcelization, the County attempted to create a logical outer boundary around plats and all lots that were adjacent to, or in between plats. Those lands adjacent to plats were reviewed parcel by parcel, applying the designation criteria (i.e., the parcels surrounding the plat had to be predominantly 2.5 acres or smaller; in those areas where the parcels met the size requirements, the community had to be primarily built out (determined using the $25,000 assessed value). Analysis of the surrounding small-lot parcelization was based on Assessor's information from 1995. Topographic features were used to make sure the boundaries remained logical and avoided a meandering boundary.

The County used a 1996 report by the Island County Economic Development Council as a framework for identifying the commercial portions of non-residential and mixed used RAIDs. The Rural Center zones, located in Clinton and Freeland, were expanded to create a more logical

transition between existing commercial centers and residential neighborhoods. This initial identification yielded 10 non-residential and mixed use RAIDs, consisting of a total of 1,125 acres.

After the County's initial identification of residential, non-residential and mixed-use RAIDs, County Commissioners and Planning Commissioners performed a windshield survey of the proposed RAIDs within their districts. After consulting with staff, the Commissioners enlarged, reduced, or eliminated certain RAIDs. At this stage, the RAIDs were presented for public review, along with the Phase A Draft Comprehensive Plan. There were 14,500 acres of residentially zoned land and 1,125 acres of non-residential and mixed-use lands within the proposed RAIDs.

Significant public comment was received on the proposed RAIDs. In addition, the Island County Public Works Department and the Island County Health Department reviewed the initial RAIDs designations. The Health Department reviewed the proposed RAIDs based on existing approved water systems, water resource quality and quantity with regard to saltwater intrusion, and on-site sewage system potential. The Health Department also provided the Planning Department with development-limiting factors. Public Works review was based on slope stability issues, access issues, and drainage issues. Conclusions reached by these Departments resulted in the elimination or modification of a number of RAIDs.

As a result of the comments received, the residential RAIDs were reduced from 14,500 to 10,400 acres and the non-residential and mixed use RAIDs were increased from 1,125 to 1,175 acres. Another public comment period followed, along with the Phase B Draft Comprehensive Plan.

During this time, staff identified additional non-residential uses not already included within a RAID boundary. These uses included retail services, real estate offices, doctor/dentist offices, etc. The Planning Commission determined to designate only those uses that were retail in nature (e.g., gas stations, mom & pop convenience stores) with a commercial zoning designation. Ten such areas (Rural Service zones) were identified, consisting of a single parcel with an existing use (prior to 1990). These areas were identified as non-residential/mixed use RAIDs. At the completion of this phase of public review, residential RAIDs consisted of 9,950 acres and non-

residential and mixed used RAIDs consisted of 1,175 acres.

After more refinement, the Board of Commissioners adopted the final Comprehensive Plan including 41 residential RAIDs consisting of 10,240 acres, 22 mixed use RAIDs and 5 non-residential RAIDs consisting of 1,240 acres. There are 14,987 parcels within the RAIDs, of which 8,217 are developed and 6,770 are undeveloped.

Appropriateness of County's Criteria

Although the GMA does not reference criteria for designating areas of more intensive rural development, the Coalition objected to the County's designation criteria. The Coalition asserted that "many important criteria . . . were not considered by the County when it designated its RAIDs." Coalition's Opening Brief at 29. Specifically, the Coalition made three arguments: (1) the County did not find that the water system of some commercial RAIDs was capable of supplying the water necessary to build-out the RAID without creating saltwater intrusion for existing development; (2) the County did not find that residential RAIDs have sufficient water for build-out; and (3) the County should have "more carefully evaluated for the impacts of critical areas," such as steep slopes. Contrary to the Coalition's assertion, the record shows that the County considered these "criteria."

The Health Department reviewed proposed RAIDs to estimate the development potential for existing platted unimproved lots. Ex. 11, Tab 4 (Island County Health Department RAID Review, 4/3/98) (R3954). The Health Department stated: "Water resource approvals are based upon quality and quantity which are interrelated in Island County due to the risk of saltwater intrusion. . . . Based upon proposed additional withdrawals within the RAID boundary, RAID's were rated low, medium or high as to risk of saltwater intrusion for additional withdrawals over approved and available water system connections." *Id.* The Health Department identified saltwater intrusion problems, affecting water quality and quantity, with several RAIDs and recommended smaller boundaries on some RAIDs. According to the declaration of Jeff Tate, a number of RAIDs were eliminated or modified as a result of the Health Department's conclusions. The record shows that the County considered water quality and quantity and modified its proposed RAID designations as a result of this consideration.

The Public Works Department reviewed proposed RAIDs for, among other things, slope stability and bluff erosion problems. Ex. 11, Tab 5 (Public Work's Staff Recommendations, 4/2/98) (R3954). The Public Works Department identified areas of known slope stability problems and recommended exclusion of these areas from RAIDs. The record shows that the County evaluated steep slopes in its RAID designation process.

Application of County's Criteria

The Coalition also asserted that the County's RAID designation process was flawed, stating that the County "either did not collect the data required by its designation criteria or it did not map the data required by its designation criteria so that the criteria could be properly considered by the public and implemented by the decision-makers." Coalition's Opening Brief at 28. As to residential RAIDs, the Coalition argued: (1) the County did not appropriately apply its criteria to pre-1966 short subdivisions; (2) the County did not evaluate short subdivisions for water hookups and average lot size; and (3) the County's maps were difficult to use. As to non-residential and mixed-use RAIDs, the Coalition argued that there was a lack of data in the record (e.g., uses as of 1990) and the mapping of the collected data was inadequate.

The County's initial consideration of lands for RAID designation began with long plats and subdivisions, not short plats. The County first considered short plats when it evaluated those short plats located around or adjacent to identified long plats or subdivisions in an effort to determine logical outer boundaries for RAIDs. In other words, the County included short plats only to the extent it determined was necessary to create logical outer boundaries. The Coalition does not explain how this fails to comply with the requirements of the Act. **We are not persuaded that the County's action was clearly erroneous.**

The Coalition also asserted that the non-residential and mixed-use RAIDs were not properly designated because information on uses as they existed in 1990 was not in the record and mapping of data was "inadequate." **Absent argument that a non-residential or mixed-use RAID allows uses that are more intensive than existed in 1990, the Coalition fails to meet its burden of demonstrating that the County did not comply with the Act. We are not persuaded that the County's action was clearly erroneous.**

Logical Outer Boundaries, Densities and Uses

The Coalition argued that the County erred in drawing the logical outer boundaries of RAIDs and that the County impermissibly allowed urban densities and uses within RAIDs. In determining whether the RAID boundaries are the logical outer boundaries, we reviewed aerial photographs and maps contained in the record. In determining whether the densities allowed in RAIDs reflect the existing areas or uses, we reviewed the County's RAID Data Tables and New Lot Analysis (specifically, the net theoretical potential new lot data). Ex. 11, Tab 1 (R4810) and Tab 3 (R4381). Using the RAID Data Tables, the minimum required lot size was compared with the size of existing improved parcels. Where the minimum lot size was significantly smaller than the size of existing improved parcels, the New Lot Analysis was reviewed to determine if a significant number of new lots could be developed.

The Coalition directed us to aerial photographs of Elger Bay and Saratoga Shores RAIDs, and argued that these RAID boundaries extend beyond their logical outer boundaries. The Coalition argued that these two RAIDs should be invalidated. Further, they referred us to maps in the record and asked us to "invalidate every RAID that extends substantially beyond logical boundaries delineated predominantly by the built environment as that built environment is shown on the large scale aerial photos." Coalition's Opening Brief at 27.

The Coalition also identified Country Club and Lost Lake RAIDs as areas that extend beyond their logical boundaries, but not to the extent to warrant invalidation. The Coalition referred us to maps in the record and asked us to "find RAIDs like Country Club, that demonstrate less extensive extensions beyond logical boundaries, not in compliance with the Act . . . ." Coalition's Opening Brief at 28.

We have examined the record and are persuaded that Harrington Lagoon, Land's Hill, Livingston Bay Heights, Penn Cove, Teronda West, Useless Bay/Bayview, West Beach, and West Deer Lake RAIDs are not delineated by logical outer boundaries of the existing area or use, as required by the GMA. In these areas where we find noncompliance, we also find that the risk of the development of a new pattern of low-density sprawl is also present. Consequently, each of the non-compliant RAIDs is also determined to substantially interfere with goal (2) of the Act.

The Harrington Lagoon RAID inexplicably includes the Lawana Beach plat, which is less than 40

percent developed and includes a 31-acre undivided parcel. The Lawana Beach plat does not fall within the logical outer boundary of the Harrington Lagoon area of more intensive rural development. Inclusion of the Lawana Beach plat within the RAID would allow the development of a new pattern of low-density sprawl and, consequently, substantially interferes with the fulfillment of GMA goal 2, RCW 36.70A.020(2). **The designation of the Harrington Lagoon RAID, including the applicable portions of the CP, DRs and zoning maps, does not comply with the Act and is declared invalid.**

The Land's Hill RAID consists of a small subdivision, Land's Hill Estates, and a number of large lots up to 57 acres. The record does not support the inclusion within the RAID of these large lots outside of the Land's Hill Estates plat. We find that the inclusion of these parcels within the RAID would allow the development of a new pattern of low-density sprawl and, consequently, substantially interferes with the fulfillment of GMA goal (2). **The designation of the Land's Hill RAID, including the applicable portions of the CP, DRs and zoning maps, does not comply with the Act and is declared invalid.**

The Livingston Bay Heights RAID consists of the Livingston Bay Heights plat with a few larger lots immediately to the south and west, and a number of large lots of up to 17 acres to the north. The record does not support the inclusion within the RAID of these large lots to the north of the Livingston Bay Heights plat. We find that the inclusion of these parcels within the RAID would allow the development of a new pattern of low-density sprawl and, consequently, substantially interferes with the fulfillment of GMA goal (2).

The densities allowed in the Livingston Bay Heights RAID are also noncompliant. This RAID has a total of 49 parcels on 135 acres. The minimum lot size 0.33 acre. The majority of parcels are between 1 and 5 acres. There are no improved parcels less than 0.67 acre (there is only one unimproved parcel between 0.34 and 0.67 acre). The County's New Lot Analysis reveals the potential for the development of 172 new lots in this RAID. We find that the density that would result from the County's 0.33-acre minimum lot size allows the development of a new pattern of low-density sprawl and, consequently, substantially interferes with the fulfillment of GMA goals (1) and (2). **The designation of and density allowed in the Livingston Bay Heights RAID, including the applicable portions of the CP, DRs, and zoning maps, does not comply with**

the Act and is declared invalid.

The Penn Cove RAID consists of a mostly developed subdivision in the southernmost portion connected by a number of larger lots to mostly undeveloped subdivisions in its northern portion. We find that the inclusion of the connecting strip of larger lots within the RAID would allow development of a new pattern of low-density sprawl and, consequently, substantially interferes with the fulfillment of GMA goal (2). **The designation of the Penn Cove RAID, including the applicable portions of the CP, DRs and zoning maps, does not comply with the Act and is declared invalid.**

The Teronda West RAID consists of a northern half, consisting mostly of the Teronda West plat, and a southern half, consisting of mostly unimproved parcels ranging from 6 to 22 acres. The southern boundary of the RAID is contiguous with federal land. We find that inclusion of the lands in the southern half within the Teronda West RAID would allow the development of a new pattern of low-density sprawl and, consequently, substantially interferes with the fulfillment of GMA goal (2). **The designation of the Teronda West RAID, including the applicable portions of the CP, DRs and zoning maps, does not comply with the Act and is declared invalid.**

Useless Bay/Bayview is a 680-acre RAID consisting of an aggregate of a number of subdivisions and commercial uses and includes 357 acres zoned RF or RA, a golf course, and a large wetlands system. An additional 500 acres of lands can be added to the RAID upon approval of conservation easements limiting development on the wetlands portion of these added lands in exchange for being included in the RAID. The logical boundaries of the existing development in this area generally surround the subdivisions; the boundaries drawn by the County, apparently in an effort to create one, all-inclusive RAID, extend beyond the logical outer boundary of the existing area. We find that boundaries of this RAID will not minimize and contain the existing areas or uses, but would allow the development of a new pattern of low-density sprawl and, consequently, substantially interfere with the fulfillment of GMA goal (2). **The designation of the Useless Bay/Bayview RAID, including the applicable portions of the CP, DRs and zoning maps, does not comply with the Act and is declared invalid.**

The West Beach RAID consists of mostly developed subdivisions in the southern part of the RAID connected by a strip of larger, waterfront lots along West Beach Road to an undeveloped subdivision (Sea View) in the northern part of the RAID. We find that, because of the inclusion of the connecting larger lots and the undeveloped Sea View plat, the boundaries of this RAID will not minimize and contain the existing areas or uses, but would allow the development of a new pattern of low-density sprawl and, consequently, substantially interfere with the fulfillment of GMA goal (2). **The designation of the West Beach RAID, including the applicable portions of the CP, DRs and zoning maps, does not comply with the Act and is declared invalid.**

The record does not reveal why the West Deer Lake RAID was created. The area is not platted and is not adjacent to any other plat. The parcels within this RAID are unremarkable when compared with surrounding, non-RAID parcels; the lots within the RAID do not appear to be significantly smaller than surrounding parcels, and there does not appear to be existing "more intensive rural development," as contemplated by the Act. We find that designation of the West Deer Lake RAID allows the development of a new pattern of low-density sprawl and, consequently, substantially interferes with the fulfillment of GMA goal (2). **The designation of the West Deer Lake RAID, including the applicable portions of the CP, DRs and zoning maps, does not comply with the Act and is declared invalid**.

The Coalition's argument that the County impermissibly allows urban uses within RAIDs was not supported. We note that uses allowed within RAIDs must reflect those uses existing in 1990. However, we found no evidence in the record to support the Coalition's claim.

With the exception of Clinton and Freeland discussed below, Petitioners have not met their burden of showing that the County's designation of other RAIDs was clearly erroneous.

<u>Clinton and Freeland RAIDs</u>

The County stated that it has not yet resolved the issue of whether the Clinton and Freeland RAIDs should be designated non-municipal UGAs. The County "recognizes that Clinton and Freeland have many urban characteristics and that it may be appropriate to designate these areas as urban growth areas." County's Response Brief, Ex. 7 (Resolution C-169-98 (CPP #1)). The

County committed to subarea planning to determine potential UGA boundaries, urban land use designations, and capital facilities needs. *Id.*

We agree with the County's apperception – Clinton and Freeland have many urban characteristics, including many small lots spread over a large area and significant commercial development. These RAIDs look less like limited areas of more intensive rural development and more like urban growth. The only difference between these RAIDs and an UGA is the absence of planning and funding for necessary urban services. *See* RCW 36.70A.030(14)(f).

We find that the Clinton and Freeland RAIDs, with their current boundaries and allowed densities, are not limited areas of more intensive rural development, but constitute non-municipal urban growth. The designation of these RAIDs allows the development of a new pattern of low-density sprawl and permits urban growth outside of a designated UGA. **Designation of the Clinton and Freeland RAIDs does not comply with the Act. We do not now find substantial interference with the goals of the Act. However, if the County does not complete its non-municipal UGA analysis and designate these areas as UGAs in a timely manner, we will reconsider the need for a finding of invalidity.**

CRITICAL AREAS

The Coalition and WEAN's issues on critical areas are so numerous, intricate and complex that, if we tried to include all claims and the parties major arguments on them, this FDO would be 300 pages long. We have carefully considered all the claims and responses and will highlight the issues of greatest concern to us. This approach is not meant to discount the amazing number of hours Mr. Erickson and other WEAN members spent over the past many years trying to ensure the protection of critical areas in Island County. In this section we will refer to the Coalition and WEAN as WEAN.

WEAN has provided us with a myriad of excellent ways the County could make its ordinance better and more protective of CAs. Our task however, is not to determine if the County could make its ordinance better, but if the methods chosen by the County to designate and protect CAs and their buffers comply with the goals and requirements of GMA.

Intervenor Roehl stated:

> "The listing and distinguishing of conditional, permitted, and exempted uses in critical areas and the creation of processes that are proportional to the action sought is critical to the long range credibility of any system of law. Laws and regulations that are over-zealous in their application and yield glaring anecdotal evidence of unreasonable application are laws that beg for reactionary results from a public otherwise pre-disposed to hold the rule of law in high regard. Whether such reaction takes the form of over-reaching changes to the laws as political winds shift, or whether it takes the form of simple scorn and dis-regard (*sic*) for them by the citizens the net effect is the same. They don't work and in many cases they are counter-productive to their aims."

The last two purposes listed in Section 17.02.020 of Ordinance C-62-98 state:

> v. permit a broad range of development design opportunities with flexibility to encourage more creativity in balancing the needs of environmental protection with the accommodation of future growth.
>
> w. provide for regulatory review processes which are proportional in scale, time, and cost to scope and scale and costs of development actions proposed.

Regulations which are "proportional", "reasonable" and "flexible" are an excellent goal, as long as the functions and values of the critical areas are maintained. This is often a difficult tightrope for local governments to walk. It is also often not easy for us to discern whether the County has jumped off the tightrope or not. It is WEAN's burden to show that the County was clearly erroneous in the choices it made trying to be proportional, flexible and reasonable.

We agree with WEAN that County discretion in designating and protecting CAs is not unlimited. There are clear parameters. The County must: (1) comply with GMA; (2) protect CAs; (3) allow no net loss of CA functions; and (4) include best available science (BAS).

The County has done an excellent job on its public participation process. However, as we said in our first case, *CCNRC v. Clark County*, Case #92-2-0001, and consistently since that time, our review involves both the process used and the result obtained to determine if

compliance with GMA has been achieved. Even though the County utilized an excellent process, certain elements of its product do not comply with the Act.

On September 14, 1998, Island County adopted Ordinance C-62-98, amending Chapter 17.02 ICC to provide regulations designating and protecting Fish and Wildlife Habitat Conservation areas (FWHCAs) and readopting amendments to its wetlands regulations which it had adopted in April, 1998 as an emergency ordinance. The remainder of the CA provisions are beyond the reach of this decision. It is sad that the County went through such contortions to avoid opening up other sections of its critical areas ordinance to BAS scrutiny and our review, but that is certainly their right to do so.

Island County relied on its pre-GMA regulations to designate and protect wetlands, floodplains, geologically hazardous areas and critical aquifer recharge areas. These regulations are in several chapters of the County Code and difficult for people to use. Therefore, the County created ICC 17.02.107, "Critical Areas Umbrella Section." ICC 17.02.107.B directs the reader to the specific regulation governing each kind of critical area and contains the provisions which apply to all critical areas. WEAN challenged the following provisions contained in the umbrella section:

(1) Permitted Uses, ICC 17.02.107 C.1 and C.2;
(2) Modification for Single Family Homes on Existing Lots, ICC 17.02.107.D;
(3) Exemptions ICC 17.02.107.E; and
(4) Functionally Isolated Buffers, ICC 17.02.107.H.

Although 17.02.107.C.1, C.2 and D could be improved, petitioners have not met their burden of showing that the County's adoption of them was clearly erroneous.

<u>Exemptions ICC 17.02.107.E</u>

Exemptions 1, 3, 4, 5 and 7 require the use of best management practices (BMPs). A County official stated that the County is unable to enforce BMP violations until the County produces a BMP manual. **Therefore, until this manual is produced and the BMP requirements are enforced, we are unable to find compliance with these exemptions.**

We stated in the September 16, 1998 compliance Order in *FOSC v. Skagit County*, #96-2-0025

that if BMPs are relied upon for protection of CAs, some type of monitoring and enforcement must be included to ensure that the BMP plans are actually implemented and followed. Since the County has chosen to use exemptions relying on BMPs for protection, the County must provide effective monitoring to ensure that BMPs are working and proper restoration has occurred. A contingency plan must also be in place in case the BMPs do not effectively protect the function and values of critical areas. Letters from Dr. Judy Meyer, Department of Ecology (DOE) and Department of Transportation all point out the importance of monitoring. We also held in *Advocates v. Shelton*, #98-2-0005 that monitoring the implementation and effectiveness of BMPs is necessary to meet the CA protection requirements of the Act.

The County contended that it had monitoring requirements in place. However, counting the number of complaints received over two years is not the kind of monitoring that is required. **Until an effective monitoring program is in place, we are unable to find compliance.**

WEAN expressed great concern that there was no requirement for pre-notification to help prevent inadvertent destruction of CAs and their buffers. The County replied that this would negate the advantage of having exemptions. Intervenor Roehl pointed out that many of these actions would require grading or other permits and therefore the County would be notified. When the County institutes a more effective monitoring program it will be better able to tell if a pre-notification requirement would make sense for at least some of the exempted activities.

As to Exemption (1), Existing and Ongoing Agriculture Activities, we have an additional major concern. We stated in *FOSC v. Skagit County*, #96-2-0025 (FDO 1-3-97) that the provision of RCW 36.70A.060(1) that regulations cannot prohibit uses lawfully existing on the date of their adoption pertain to natural resource lands and are not included in RCW 36.70A.060(2) pertaining to CAs. Further, we said in the September 16, 1998 compliance order in the same case that the GMA gives protection to designated agricultural resource lands from incompatible adjacent uses and brings into play the balancing act between GMAs goals for the conservation of the agricultural industry and protection of critical areas. This balancing is not appropriate for non-designated agricultural uses.

The County's agricultural exemption applies to all existing and on-going agricultural activities

whether they are on lands designated under .170 or not. This application of the agriculture exemption to lands not designated as long-term agriculture would allow avoidance of CA protection throughout rural Island County. This clearly fails to comply with the Act's requirement for protection of critical areas. **This provision so threatens CAs that by August 10, 1999, the County must amend the agriculture exemption to make it perfectly clear that it only applies to ongoing agricultural activities on lands designated under .170. If the County does not take such action by that date an order of invalidity on the agriculture exemption will be issued without further hearings.**

As to the remainder of WEAN's claims regarding the exemptions section, petitioners have not met their burden of convincing us that the County was clearly erroneous.

Functionally Isolated Buffers, ICC 17.02.107.H

ICC 17.02.107.H states the following:

> **Functionally isolated buffer areas.** Areas which are functionally separated from a critical area and do not protect the critical area from adverse impacts due to pre-existing roads, structures or vertical separation, shall be excluded from buffers otherwise required by this chapter. The Director may require a Biological Site Assessment to determine whether the buffer is functionally isolated.

The record contains letters from the Department of Fish and Wildlife (DFW), DOE and Community Trade and Economic Development (CTED) stating that this section should be deleted. Interruptions to buffers from driveway accesses, dirt roads, and scattered residences in rural landscapes do not necessarily fragment buffers to the extent that they no longer provide an important function.

Further, this is one section with which we have public participation concerns. This section's addition to the ordinance was first raised during the public comment period, so citizens had to comment "off the cuff" and were given no opportunity for written comment. Neither the process nor the substance of section ICC 17.02.107.H comply with the Act.

As WEAN stated:

> "Could there be a clearer route to a net loss of wetland functions than reducing protection from already minimal or substandard buffers based on scientifically flawed

> criteria with minimal information and no public oversight? Any one of these factors by itself would be sufficient to cause a net functional loss. Together, they assure that it will occur."

In order to comply with the Act this section must either be deleted or reopened for full public process and a reasoned analysis of the agencies' and WEAN's concerns.

Fish and Wildlife Habitat Conservation Areas (FWHCAs)

WAC 365-190-080(5) defines FWHCAs as:

> Land management for maintaining species in suitable habitats within their natural geographic distribution so that isolated subpopulations are not created.

This definition is adopted in the County's CP FWHCA overlay.

Much of WEAN's argument on this issue deals with the County's failure to adequately protect species and habitats from fragmentation. WEAN produced from the record many documents by experts who showed how fragmentation leads to extinction.

Coastal Bluffs and Prairies

One of WEAN's major concerns was that the County didn't list as conservation areas coastal bluffs and prairies inventoried by the Washington Natural Heritage Program. These are rare and high quality plant communities and ecosystems. GMA requirements focus on conservation of habitats, with a secondary safety net for species that need protection. Loss of rare habitats will almost always result in loss of rare organisms. In order to fulfill the definitional goal of preventing the creation of isolated subpopulations of species, it is essential to maintain these very high quality and generally rare habitats.

We could not find discussion in the record or in the County's brief as to why the County had not responded to WEAN's pleas for the designation of these habitats.

In order to achieve compliance the County must either designate these habitats or provide a reasoned analysis of why they should not be designated.

Species and Habitats of Local Importance

WEAN's second major concern was the County's failure to adequately designate species and habitats of local importance. WEAN claimed:

(1) The CP said the County would adopt criteria for designation. The County has developed criteria for nomination but none for designation. Therefore designation by the BOCC is purely arbitrary.

(2) The County said it had listed the great blue heron, common loon, osprey, pileated woodpecker and trumpeter swan. However, WEAN pointed out that the great blue heron and osprey will not officially be designated until management plans are completed.

(3) Whidbey Audubon and WEAN's nominations have not been acted upon by the County.

At the July 27, 1998 PC hearing the County's consultant, Andrew Castelle, said that since species previously protected by the County had "dropped off the list", a "B team" of species needed to be developed, and protected species would need to be protected through streams, wetlands and their buffers.

The completion of the "B team" designation has not occurred. The County will not be in compliance until it has adopted criteria for designation, adopted management plans for the great blue heron and osprey and has appropriately dealt with WEAN and Audubon's nominations already submitted to the County.

<u>Reliance on Wetlands for Protection</u>

Another major concern WEAN raised was the County's stated reliance on wetlands and their buffers to protect wildlife functions. WEAN pointed out that the County's substandard 25-foot wetland buffers would not protect much of anything.

The minutes of their January 16, 1998 workshop reflect that the County's legal advisor reported:

> "The 25 foot buffer in Category B wetlands is generally reserved for very low value wetlands in most jurisdictions. A 25 foot buffer on certain kinds of shoreline wetlands is not necessarily going to do a good job of protecting wetlands."

The same minutes reflect that the DOE representative pointed out that his agency was making its buffer recommendations based on BAS and stated: "Anything below 50 feet is considered to not

pick up the functions that wetlands provide."

The County's brief at 7 states:

> "It [the PC] further found that the existing County regulations pertaining to wetlands and deep water habitats also address habitat and water quality issues and provide protection to many of the Listed Species and to many other species contained in the Department of Fish and Wildlife's PHS list."

WEAN claimed that the GMA requirement for use of BAS was not met. Without doing the proper analysis to determine if the wetlands ordinance actually does protect wildlife, the PC proclaimed that it did.

The record is clear that, according to BAS a wetland buffer of at least 50 feet is necessary to provide wildlife protection. We understand that the wetland buffer sizes are not able to be directly challenged in this appeal. **However, if the County is relying in part on Category B wetlands and their 25-foot buffers to protect wildlife functions, the County is not in compliance with the Act.**

<u>Type 5 Stream Buffers</u>

The other major concern raised by WEAN under FWHCAs is the gross inadequacy of the County's Type 5 stream buffers of 25 feet. WEAN claimed that the County had not used BAS in choosing 25 feet. WEAN produced a myriad of documents from the record to support this accusation. The majority of these studies showed that a minimum of 15 meters was needed for in-stream water quality. Additionally, 85 percent of wildlife use riparian buffers and require much wider buffers than those required for in-stream water quality. WEAN claimed that the County failed to even consider these buffers as wildlife corridors.

The County responded that they had hired Andrew Castelle, a well-respected authority on these issues, to ensure that BAS was properly utilized. The County referenced charts provided by Mr. Castelle showing that for some water quality factors the first 25-50 feet provide 80 percent of the effectiveness of the buffer. The County chose 25 feet in part to lessen the need for variance provisions. It also provided for an increase in buffer width if determined that individual circumstances warrant a larger buffer.

Board Discussion

In *FOSC v. Skagit County*, #96-2-0025, we determined that, while at the low end of the range of scientific recommendations, 50 foot buffers for type 5 streams achieved compliance because the buffers were within the range of BAS shown in that record. Many of the studies provided in this record are the same as those in the Skagit County case. WEAN is correct that the majority of these studies state that a minimum of 15-30 meters, not feet, is needed. None of the BAS, not even Mr. Castelle's own work supports 25 foot buffers for in-stream water quality, let alone other buffer functions.

Finding 21 does allow the Director of Planning and Community Development Department to increase the buffer where individual circumstances warrant a larger buffer. However, Finding 22 acknowledges that while Chapter 17.02 currently authorizes such increases, the department has never invoked this authority. Even with more detailed guidance which is now provided, there is no assurance of minimal effective protection. The BSA's "holistic" approach is a good idea. However, 25 feet is not shown to assure protection in any circumstances.

The County's adoption of 25-foot buffers for Type 5 streams fails to include BAS, fails GMA's critical area protection standards, and substantially interferes with GMA's goals for the protection of the environment.

<u>Estuarine Wetlands</u>

WEAN claimed that the County had failed to classify all estuarine wetlands as Category A and therefore was not in compliance with the Act.

The County stated that, through the combination of Findings 21 and 22 in Ex. C, plus striking "introduced" from the definition of Category A Wetlands, ICC 17.02.110A.3(a)(ii), the County has insured that all estuarine wetlands will be treated as Category A.

This approach may be clear to the County, however, it is far from clear to us. We agree with CTED's December 10, 1998, letter to the County which stated:

> "The estuarine wetlands should be specifically designated as Category A wetlands in section 17.02.110A.3(a)."

In order to achieve compliance, the County needs to specifically designate all estuarine wetlands as Category A in section 17.02.110A.3(a).

Shoreline Setbacks

17.02.110.C.4 states in part:

> "4. Protection Standards: Commercial and Recreational Shellfish, Kelp and Eelgrass Beds, Herring and Smelt Spawning Areas. The following standards apply to property adjacent to or containing commercial or recreational shellfish areas, kelp or eelgrass beds or herring or smelt spawning areas…
>
> …b) New Development.
>
> i) Residential and Non-Residential…
>
> …(2) All new non-water-dependent development shall provide a 75-foot buffer to protect commercial and recreational shellfish, kelp and eelgrass beds, and herring and smelt spawning areas. The buffer shall be measured from the ordinary high water mark.
>
> (a) Where there are existing (legally established) principal residences that encroach on the established buffer within 200 feet of either side of the proposed building site, the required buffer for the proposed structure may be reduced by review and approval of the Director to the average of the setbacks of the existing adjacent principal residences.
>
> (b) In those instances where only one existing legally established principal single-family residence is within 200 feet of either side of the proposed building site, the buffer of the proposed structure may be reduced (with approval of the Director) to the average of the buffer for the existing adjacent principle residence and 75 feet."

WEAN claimed that this allowance for narrowing of already insufficient buffers failed to comply with the Act. Letters from the DFW and DOE confirm the seriousness of this provision. WEAN pointed out that just because previous development has been allowed to locate very close to these fragile CAs was no excuse to carry on the assault with new development.

We agree with WEAN, DOE and DFW. Neither the Act's requirement for use of BAS nor

the protection of CAs is met with this provision to allow infill development to continue the pattern of impinging on critical areas.

Stipulated Remand Issues

The County has stipulated to make the following changes:

(a) amend ICC 17.02.107.E.7 to prohibit use of heavy equipment in a wetland FWHCA or their buffers;

(b) amend the CP to define steep slopes as those with the slope of 40 percent or greater;

(c) amend ICC 17.02.150.M.2 to regulate dredge or fill in streams; and

(d) review ICC 17.02.150.M.1(a) and stormwater regulations to determine whether they adequately address discharges to streams and, if not, amend Chapter 17.02 to provide adequate protection.

WEAN has withdrawn its SEPA claims. In all claims pertaining to CAs other than the ones we have dealt with here, petitioners have not met their burden of convincing us that the County was clearly erroneous.

GENERAL ISSUES

70/30 Population Split (Rural/Urban)

The Coalition contended that Island County's use of a 70/30 split in combination with other planning decisions made by the County, violates the Act's goals and requirements which seek to encourage compact urban growth in urban areas and seeks to protect rural character. We have already dealt with the "other planning decisions" in the rural area.

As to the 70/30 split, we would normally agree heartily with petitioners. However, this is a truly unique situation. Island County is made up of two Islands, totally separated in every way but sharing a common county government. Stanwood, in Snohomish County, is Camano Island's UGA. It would make no sense to create an UGA on Camano Island to improve this ratio. There are only three cities on Whidbey Island, all of which are accepting their fair share of growth. We have already said that Freeland and Clinton should be made non-municipal UGAs with urban

services and densities. This will improve the split. **Under this unique record, we are unconvinced that the County is clearly erroneous on this issue.**

Consistency With Plans of Adjacent Jurisdictions

The County's CP must be consistent with the plans of adjacent counties or cities. RCW 36.70A.100. The Coalition asserted that the County's CP was not consistent with the CPs of Langley and Coupeville because these jurisdictions used different OFM population series and planning periods. The Coalition asked us to find the land use element of the CP out of compliance with the Act. The County acknowledged these inconsistencies.

All three municipalities in Island County, Oak Harbor, Langley and Coupeville, adopted their CPs long before the County adopted its CP. If the County had utilized the planning periods used by Langley and Coupeville, it would have, at most, a 15-year CP. Instead of adopting a less-than 20-year CP, the County and the cities established a process for harmonizing the planning periods by 2006. Ex. 7 (CPP 3). The inconsistency will not result in a failure to accommodate the population allocated to Langley and Coupeville, because the full 2020 OFM forecast has been allocated to and accepted by each municipality. Ex. 7 (CPP 9). The record is clear that the County and its cities have committed to coordinated planning.

In this case, we do not see how the differences between the County's and cities' population planning series and planning periods fails to comply with the goals and requirements of the Act. **We find that, under the unique circumstances of this case, where all municipalities have adopted their CPs long before the County adopted its CP, the County's actions were not clearly erroneous.**

Affordable Housing

The County must adopt DRs that are consistent with and implement the CP. RCW 36.70A.040. The Coalition asserted that the County failed to adopt DRs to implement the affordable housing provisions of the housing element of its CP. The whole of the Coalition's argument provided:

> "Counties are obligated to adopt development regulations implementing the comprehensive plan. *See* RCW 36.70A.040. Island County's housing element includes an affordable housing section. CP at 4-1 to 4-25. The County has not

> adopted development regulations to implement the affordable housing section of the Plan. The Board should find the County's failure to adopt affordable housing regulations is inconsistent with the requirements of the Act." Coalition's Opening Brief at 63.

The County responded that the Coalition "sites to the Housing Element generally, but offers no specificity as to what the County has specifically failed to develop DRs to implement." County's Response at 4. Only in reply to the County did the Coalition offer any specific details. The Coalition stated: "Key provisions not implemented are CP Policies B, C, H, I, J, and K at page 4-25." Coalition's Reply Brief at 50.

Although the County "acknowledges that it intends to do more to achieve the GMA planning goal for housing," County's Response at 5, the County does not concede that its DRs do not implement its CP. The Coalition's conclusory statement that the County's DRs do not implement the County's affordable housing policies is insufficient to meet the burden of showing that the County's actions fail to comply with the Act. **We are not persuaded that the County's actions were clearly erroneous.**

Transportation Concurrency

The GMA requires the County to:

> adopt and enforce ordinances which prohibit the development approval if the development causes the level of service on a transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development. . . . "concurrent with the development" shall mean that improvements or strategies are in place at the time of development, or that a financial commitment is in place to complete the improvements or strategies within six years.
> RCW 36.70A.070(6)(b).

The County has adopted such a concurrency ordinance (chapter 11.04 Island County Code). However, the Coalition argued that the County's ordinance does not comply with the requirements of the Act because the ordinance (1) included exemptions not authorized by the GMA; (2) created a presumption of concurrency in certain circumstances; (3) impermissibly imposed a consistency precondition on a city or town concurrency determination; and (4) did not

address state transportation facilities that are not facilities of state-wide significance.

The Coalition contended that the County's ordinance impermissibly exempted certain activities from a concurrency determination. The County pointed out that these were no true exemptions from concurrency. The County has agreed to keep track of these activities and "pick up the tab" itself. The Coalition has not explained how the County's "exemptions" will prevent the County from prohibiting development approval of those developments that will cause the level of service to decline below the County's adopted level.

The County's ordinance provides 30 days for agencies affected by a proposed development to provide the results of their own concurrency test for a proposal. The Coalition argues that "the GMA does not allow a county to assume concurrency in the absence of a positive demonstration of concurrency." Coalition's Opening Brief at 66. The County responds that, because a concurrency certificate is required before an application is determined to be complete (and vested), the County determined that a reasonable time to comment was needed. The Coalition has not shown how the County's time limit for agency comment will prevent the County from prohibiting development approval of those developments that will cause the level of service to decline below the County's adopted level.

The Coalition argued:

> "While the County's Concurrency Ordinance appropriately includes provisions for determining concurrency with regard to transportation facilities in adjacent cities and towns, it impermissibly limits this provision by precluding its use if the other jurisdiction's comprehensive plan has not been determined to be consistent with the County's Comprehensive Plan." Coalition's Opening Brief at 66.

The County responded that the Coalition misconstrued the ordinance and that this provision requires an agency to have a capital facilities plan and requires consistency for both land use and population projections.

Even if the Coalition's reading were correct, they did not show how this provision would prevent the County from prohibiting development approval of those developments that would cause the level of service to decline below the County's adopted level.

Finally, the Coalition argued that the County's ordinance did not address state-owned facilities which are not of state-wide significance. The GMA was amended in 1998 to address the relationship between local concurrency ordinances and state-owned transportation facilities. RCW 36.70A.070(6)(a)(iii)(C) ("The concurrency requirements of (b) of this subsection do not apply to transportation facilities and services of state-wide significance except for counties consisting of islands whose only connection to the mainland are state highways or ferry routes"). The County responded that the 1998 amendments require the County to amend its transportation element to account for state-owned facilities no later than December 31, 2000. *See* Ex. 8 (HB 1487, § 1 (codified at RCW 36.70A.040(7))).

We agree with the County. HB 1487 requires compliance with these 1998 amendments by the end of 2000. **The County's ordinance currently complies with the requirements of the GMA. We find that the County's concurrency provisions are not clearly erroneous.**

Adequacy Of Public Facilities And Services

GMA goal (12) provides that the County must "[e]nsure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards." RCW 36.70A.020(12). The "adequacy" component of this "concurrency goal" requires the County to "determine its current adequacy level [for each public facility and service] as well as its future ability to add to those facilities and services." *Taxpayers for Responsible Government v. City of Oak Harbor*, #96-2-0002.

We note that the Coalition and the County reached a stipulated agreement on two adequacy issues. The two stipulations are: (1) the County will amend facilities plan policy 3.3.2 to provide that no adequacy exemptions are permitted; and (2) ICC 11.02.040F does in fact describe the minimum procedures for an adequacy determination. These issues will not be discussed.

The Coalition asserted that the County failed to comply with goal 12 because the capital facilities element of the CP (1) creates a presumption of adequacy in some circumstances and (2)

impermissibly imposes a consistency precondition on a city or town adequacy determination. These arguments are essentially identical to the Coalition's arguments regarding transportation concurrency. These arguments fail for the same reasons. The Coalition has not shown how the County's capital facilities plan will not ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

We find that the adequacy provisions of the County's capital facilities plan are not clearly erroneous.

Vesting

The Coalition claimed that the County had impermissibly expanded the vesting provisions of its zoning ordinance. The Coalition explained vesting as mandated by state law:

> "Where a County establishes a rezone or rezone-like process which nvolves first a preliminary approval and then a final approval, the landowner does not obtain a vested right until the initial approval has been granted. [citation omitted]. . . . Simply filing a rezone (or rezone-like) application does not create vested rights. [citation omitted]." Coalition's Opening Brief at 73.

The County's zoning ordinance provides that applications that have not been granted preliminary approval before December 1, 1998, will be vested to the regulations in place at the time of application. *See* ICC 17.03.050H(2). The Coalition argued that this provision "unnecessarily and therefore impermissibly expand[s] vesting and substantially interfere[s] with the goals of the Act because [it] allow[s] new urban growth to occur in areas outside of designated UGAs." Coalition's Opening Brief at 74. The Coalition is concerned that applications filed "months or years prior to a grant of preliminary approval" would vest and undermine the protections afforded by the County's CP and regulations. *Id.* at 73-74.

The County responded that it has interim application procedures in place that were determined by us to be sufficient to allow the recession of invalidity in *WEAN v. Island County*, WWGMHB #95-2-0063. "If dire consequences flow from the subsection, it can only be for applications that are not subject to the interim applications procedures ordinance." County Response Brief at 6.

The County showed that it has one subdivision application and one short subdivision application pending which were filed and vested prior to our April 10, 1996 determination of invalidity. All pending applications submitted after that date and before December 1, 1998, must comply with the interim application procedures.

The Coalition's argument fails for two reasons. First, it has made no showing that the County's "expanded" vesting provision fails to comply with the requirements of the Act. The GMA does not explicitly prohibit such a provision and the Coalition did not identify any specific application that would "undermine the protections afforded by" the County's CP and regulations. (Although the Coalition names the Saratoga Resort site plan application, it does not attempt to explain how the Act is frustrated.) Second, even if we were to find this vesting provision invalid, its determination would not apply to those applications already filed; the remedy available from the Board would not provide the satisfaction sought by the Coalition. **Consequently, we find that the County's vesting provision is not clearly erroneous.**

Miscellaneous Other Issues

Given the length of this decision we have not discussed some other issues and sub-issues raised by petitioners. **We find that petitioners, under the clearly erroneous standard, failed to meet their burden of proof regarding those issues.**

Invalidity

We received requests from petitioners for declarations of invalidity on many of the issues raised in this case. After careful consideration of all those requests, we only declare invalid the most egregious of the noncompliant provisions whose continued validity most threaten the County's future ability to achieve compliance with the Act.

ORDER

Having reviewed the record presented, having considered the oral and written arguments of the parties and having deliberated on the matter, we find that portions of the CP and DRs and maps are noncompliant with the Act and are remanded to the County. In order to achieve compliance the County must do the following within 180 days of the date of this order (November 30, 1999):

1. Reconsider the designation of agricultural lands of long-term commercial significance avoiding the use of inappropriate and exclusionary criteria.

2. Reconsider the provisions of the EDU section which allow designated agricultural lands to be used as receiving properties and fail to severely limit the amount of development that can occur on these lands.

3. Reconsider the provisions of the EDU in rural designations to ensure that development density is capped to preclude future need for urban services and conflicts with resource use and rural character.

4. Review and rewrite the provision for rezone from RF or RA to R to deal with the inconsistency between the CP and the DRs that the current approach will create.

5. Reconsider the retention of the allowance of 5-acre lots throughout the Rural zone. Ensure a variety of rural densities and preclude a pattern of 5-acre lots from presenting an undue threat to NRLs (both current and future), CAs, and future expansion of UGAs. Since RA and RF can be readily rezoned to 5 acres, they do not meet the "variety" requirement.

6. Limit the overall size and intensity of development allowed in PRDs to ensure compatibility with rural character and preclude the future need for urban services.

7. Reconsider the outer boundary designations of the following RAIDS: Harrington Lagoon, Land's Hill, Livingston Bay Heights, Penn Cove, Teronda West, Useless Bay/ Bayview, West Beach and West Deer Lake.

Ensure that boundaries contain and constrain limited areas of more intensive rural development; reflect boundaries based on built environment in 1990; do not include post 1990 development if that provides the opportunity for inclusion of other undeveloped lands and therefore allows development of a new pattern of low-density sprawl.

8. Lower the density allowed in Livingston Bay Heights to prevent over-intensification of development.

9. Reassess the designations, densities and uses allowed in Freeland and Clinton RAIDS. Either (a) do proper analysis, make provision for urban services and designate as non-municipal UGAs; or (b) restrict boundaries, uses and densities allowed.

10. For exemptions ICC 17.02.107.E (1), (3), (4), (5) and (7) that rely on BMPs, finish producing the BMP manual and enforce the requirement to use BMPs. Also, provide monitoring to ensure the effectiveness and implementation of BMPs.

11. Functionally Isolated Buffers: Either delete ICC 17.02.107.H or reopen for full public process and reasoned analysis of agencies' and WEAN's concerns.

12. Either designate coastal bluffs and prairies listed by the Washington Natural

Heritage Program or provide a reasoned analysis of why they should not be designated.

13. Adopt criteria for designation of species and habitats of local importance, adopt management plans for great blue heron and osprey and appropriately deal with nominations already submitted by WEAN and Audubon.

14. Clarify if the County is partially relying on Category B wetlands and their 25-foot buffers to protect wildlife functions. If the answer is no, analyze the adequacy of remaining provisions to protect wildlife functions. If yes, increase the buffers to at least 50 feet.

15. Increase buffer widths for Type 5 streams using BAS and GMA's critical protection requirements.

16. Specifically designate all estuarine wetlands as Category A in section 17.02.110.A.3.a.

17. Delete 17.02.110.C.4.b.i.(a) and (b) dealing with reduction of shoreline setbacks.

18. Amend ICC 17.02.107.E.7 to prohibit use of heavy equipment in a wetland FWHCA or their buffers.

19. Amend the CP to define steep slopes as those with the slope of 40 percent or greater

20. Amend ICC 17.02.150.M.2 to regulate dredge or fill in streams.

21. Review ICC 17.02.150.M.1.a and stormwater regulations to determine whether they adequately address discharges to streams and, if not, amend Chapter 17.02 to provide adequate protection.

22. Amend facilities plan policy 3.3.2 to provide that no adequacy exemptions are permitted.

23. Clarify that ICC 11.02.040.F does in fact describe the minimum procedures for an adequacy determination.

In order to achieve compliance the County must limit the ongoing agriculture exemption in ICC 17.02.107.E.1 to agricultural uses on lands designated under .170 by <u>August 10, 1999.</u>

In addition to noncompliance, the following are found to be in substantial interference with the goals of the Act:

(1) The portions of 17.03.035.A, .090, .180, and .220 that pertain to Rural Agriculture, to the extent that they are less restrictive than allowed in Commercial Agriculture, substantially interfere with goals (1), (2), (6), (8) and

(10).

(2) 25-foot buffers for Type 5 streams substantially interfere with goals (9) and (10).

(3) The Harrington Lagoon, Land's Hill, Livingston Bay Heights, Penn Cove, Teronda West, Useless Bay/Bayview, West Beach, and West Deer Lake RAIDs including the applicable portions of the CP, DRs and zoning maps. These RAIDS substantially interfere with goal 2 of the Act. Livingston Bay Heights RAID also substantially interferes with goal 1.

Finally, if the County does not take required remedial action by August 10, 1999, the following will be invalidated without further hearing:

(1) On-going agriculture exemption ICC 17.02.107.E.1.

(2) The Rural 5-acre zone.

Findings of Fact pursuant to RCW 36.70A.270(6) are adopted and appended as Appendix II. Findings of Fact and Conclusions of Law pursuant to RCW 36.70A.302(1)(b) are adopted and appended as Appendix III.

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

Pursuant to WAC 242-02-830(2) a motion for reconsideration may be filed within ten days of issuance of this final decision.

So ORDERED this 2nd day of June, 1999.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____ Nan A. Henriksen

Board Member

_____ Les Eldridge
Board Member

_____ William H. Nielsen
Board Member

APPENDIX I
PROCEDURAL HISTORY

On December 4, 1998, the Western Washington Growth Management Hearings Board (Board) received a petition for review from the Island County Citizens' Growth Management Coalition (ICCGMC) and on December 7, 1998, we received petitions for review from Richard W. Wright and Whidbey Environmental Action Network (WEAN) and ICCGMC (Steve Erickson). On January 4, 1999, we received amended petitions from WEAN and ICCGMC and ICCGMC (David Bricklin). Petitioners challenge Island County's adoption of the comprehensive plan; zoning code (ICC 17.03); site plan review ordinance (ICC 16.15); clearing and grading ordinance (ICC 11.02); concurrency ordinance (ICC 11.04); adequacy ordinance (ICC 11.05); storm water and surface water ordinance (ICC 11.03); storm water design manual; concurrency and adequacy management program; the designation document for "critical drainage areas"; and fish and wildlife habitat conservation areas/readoption of emergency wetlands amendments (ICC 17.02). All were published on October 7, 1998.

A telephonic prehearing conference was held January 6, 1999, at 9:00 a.m.

We received the following motions and issued the following orders:

January 4, 1999 motion to Intervene from Thomas J. Roehl, the Island County Property Rights Alliance, Craig Smith, et ux, Lawrence Schall, et al., James D. Henderson, et ux. and the Frei Family.

January 6, 1999 motion to Intervene from Resource Group, Inc.

We issued a Prehearing Order and Order of Consolidation on January 7, 1999.

January 19, 1999, we issued an Order Granting Intervention to Resource Group, Inc.

January 27, 1999 Motion to Intervene from James and Marilyn Adams.

January 28, 1999 Motion to Supplement the record received from proposed intervenors Adams.

January 29, 1999 Motion to Dismiss for Lack of Jurisdiction and Memorandum in Support received from the County.

January 29, 1999 Motion to Supplement the Record and Memorandum In Support received from the County.

January 29, 1999 Motion to Dismiss SEPA claims for failure to exhaust administrative remedies received from the County.

January 29, 1999 Motion to Dismiss issues not properly raised before the County and Memorandum in Support received from the County with attachments 1 through 20.

January 29, 1999 Dispositive Motion regarding noncompliance with GMA's requirements for public participation received from ICCGMC and WEAN.

January 29, 1999 Motion to Supplement the Record received from ICCGMC and WEAN.

January 29, 1999 corrections and additions to the record received from ICCGMC and WEAN.

January 29, 1999 Dispositive Motion regarding issues 12 and 25 received from the Coalition with Ex. 4390/4387, 4391/4387 and proposed Ex. 9112.

January 29, 1999 Motion to Intervene received from Second Wind at Ten, LLC.

January 29, 1999 Motion to Intervene received from Bayview Cash Store, LLC, Bayview F&G LLC, and Bayview Farm and Garden, Inc.

We issued an Amended Prehearing Order on February 3, 1999.

February 4, 1999 letter with Stipulation to Include Exhibit 9113 in the Record and proposed order received from the Coalition and the County.

We issued an order for the above stipulation on February 4, 1999.

February 11, 1999 Second Motion to Supplement the Record and Memorandum In Support received from the County with Ex. 1-5.

February 11, 1999 Motion to Supplement the Record received from the Coalition.

February 15, 1999 Motion to Supplement the Record received from WEAN and the Coalition.

February 16, 1999 Third Motion to Supplement the Record and Memorandum in Support

received from the County.

A Motions Hearing was held on February 16, 1999 in Island County.

On February 18, 1999 we issued an Order Granting Intervention to Roehl et al, Second Wind at Ten and Bayview Cash Store et al.

February 22, 1999 Motion to Intervene received from City of Langely.

On March 1, 1999, we issued an Amended Order Granting Intervention, an Order on Dispositive Motions and an Order on Motions to Dismiss.

On March 5, 1999, we issued an Order Granting Intervention to the City of Langley.

March 4, 1999 Motion to Supplement the Record with Exhibit lot and Exhibits 1-84 received from the Coalition and WEAN.

March 22, 1999 Motion to Supplement the Record received from the City of Langley.

March 24, 1999 First, Second and Third Motions to Limit the Scope of the Hearing on the Merits received from the County.

March 24, 1999 Fourth and Fifth Motions to Supplement the Record and Memoranda of Support received from the County.

March 26, 1999 Motion to Supplement the Record received from the Coalition and WEAN.

April 1, 1999 Sixth Motion to Supplement the Record and Memorandum in Support received from the County.

The Hearing on the Merits was held April 6 and 7, 1999 in the Oak Harbor City Council Chambers.

On June 2, 1999, we issued a Stipulated Order on Postponed Issues.

APPENDIX II

FINDINGS OF FACT
PURSUANT TO RCW 36.70A.270(6)

NRL – Forest:

1. Under Washington Court of Appeals decision in *Manke Lumber Co. v. Diehl* (*Manke)*, local governments have a great deal of discretion in choosing threshold criteria for forest land designation under RCW 36.70A.170.

2. The choice of a minimum 20-acre parcel size criterion for forest land designation is within the County's discretion.

3. The record shows that the County considered all the factors listed in *Manke*. Further, the County's concerns about local conditions that threaten commercial viability such as small parcel and block sizes, blocks divided by major roads, close proximity of conflicting uses, 40-acre limit on clear cuts that may be reduced to 2½ acres, log trucks forced to take ferries or the congested two-lane highway through Deception Pass, are relevant under the *Manke* decision.

4. The Court also held in *Manke* that we could not find that land had been unjustifiably excluded when petitioners had not identified specific parcels of land and shown that they

had been improperly excluded from designation. Petitioners made no such showing in this case.

5. We find that, under this record and *Manke*, the County's actions were in compliance with the GMA.

NRL – Agriculture:

6. The *Redmond v. Growth Bd* (*Redmond*) decision made clear that owners' current or intended use of the land was not conclusive in determining if property is primarily devoted to agriculture.

7. The record reflects that land was excluded from consideration for reasons deemed inappropriate in *Redmond.*

8. The record reflects that the County's arbitrary use of a 40-acre threshold left few lands designated, and eliminated from designation lands that have long-term commercial significance.

9. Despite the County's awareness of our previous decisions and the requirements of the Act, Island County arbitrarily decided that acreage smaller than 40 acres could not be expected to have long-term commercial significance and at the same time the County allowed unlimited densities on 25 percent of those lands designated.

10. The County's assertion that agricultural parcels smaller than 40 acres need not be designated under .170 because any lot in the rural area would be suitable for "micro-farming" was unsupported by the record.

11. It is the County's obligation to first designate and conserve agricultural lands of long-term commercial significance and to discourage incompatible neighboring uses, not to fail to designate in order to protect rural uses from incompatible neighboring farming uses.

12. The County admitted that the EDU program designated agricultural lands as

receiving properties for density credits and that there was no cap on the number of dwelling units that could be located in the 25 percent of the parcel designated as the receiving area. These provisions permit clusters of urban growth and fail to conserve designated agricultural lands and do not comply with the Act.

Rural Forest and Rural Agriculture:

13. The EDU program provides no cap on the number of dwelling units that can be located in the receiving area, thereby allowing a new pattern of low-density sprawl and threatening rural character and neighboring resource uses.

14. It appears that many, if not all lands currently designated RA should have been designated commercial agriculture. It is imperative that lands currently zoned RA not be allowed to convert to other rural designations and be subdivided while the County reconsiders its designations under .170.

Residential Densities in the Rural Area:

15. The County's decision to retain its 5-acre zoning throughout the Rural zone is not in compliance for the following reasons:

(a) GMA changed the land use pattern that counties may permit in rural areas. Pre-existing parcelization may not be able to be undone, but that is no reason to perpetuate the past with continued reliance on consumptive land use patterns.

(b) An area-wide pattern of 5-acre lots would conflict with the viability of resource lands and critical areas and would thwart the long-term flexibility to expand the UGAs.

(c) The County must complete its designation of agricultural and mineral lands of long-term commercial significance before it allows further division into 5-acre lots in the Rural zone.

16. PRDs must be limited in their total size and intensity not only to be compatible with rural character, but to ensure that urban services will not be needed in the future.

RAIDS:

17. The GMA was amended in 1997 to permit limited areas of more intensive rural development. However, areas of more intensive rural development are not "mini-UGAs" and they are subject to the limitations of RCW 36.70A.070(5)(d)(iv). The County must minimize and contain existing areas or uses of more intensive rural development. Lands included in these existing areas or uses must not extend beyond the logical outer boundary of the existing area or use, thereby allowing a new pattern of low-density sprawl. Areas of more intensive rural development are not a rural substitute for UGAs.

18. When evaluating densities and uses in areas of more intensive rural development, the question is not whether urban densities and uses are allowed. The question is whether the allowed densities and uses reflect the existing areas or uses contained within a specific RAID.

19. The County has identified areas of more intensive development, calling them RAIDs. The GMA does not specifically criteria for designating areas of more intensive rural development.

20. The record showed that the County considered water quality and quantity and modified its proposed RAID designations as a result of this consideration.

21. The record showed that the County evaluated steep slopes in its RAID designation process.

22. The County included short plats in its RAID designation process only to the extent it determined was necessary to create logical outer boundaries.

23. We examined the record and determined that Harrington Lagoon, Land's Hill, Livingston Bay Heights, Penn Cove, Teronda West, Useless Bay/Bayview, West Beach, and West Deer Lake RAIDs are not delineated by logical outer boundaries of the existing area or use, as required by the GMA. We find these RAIDs do not comply with the requirements of the GMA.

24. Three RAIDs have a minimum allowed lot size that does not reflect the existing

areas or uses contained within those RAIDs: Livingston Bay Heights, Clinton, and Freeland. Petitioner did not meet its burden of showing that the densities allowed by the County in other RAIDs was clearly erroneous.

25. Uses allowed within RAIDs must reflect those uses existing in 1990. We found no evidence in the record to support petitioner's claim that the County is permitting uses not present in 1990.

26. Clinton and Freeland have many urban characteristics, including many small lots spread over a large area and significant commercial development. The County has not yet resolved the issue of whether the Clinton and Freeland RAIDs should be designated non-municipal UGAs. The County committed to subarea planning to determine potential UGA boundaries, urban land use designations, and capital facilities needs for Clinton and Freeland.

27. We find that the Clinton and Freeland RAIDs, with their current boundaries and allowed densities, are not limited areas of more intensive rural development, but constitute non-municipal urban growth. The designation of these RAIDs allows the development of a new pattern of low-density sprawl and permits urban growth outside of a designated UGA. Designation of the Clinton and Freeland RAIDs does not comply with the Act.

Critical Areas:

28. Regulations which are "proportional", "reasonable", and "flexible" are an excellent goal, as long as the functions and values of the CAs are maintained.

29. County discretion in designating and protecting CAs is not unlimited. There are clear sideboards. The County must: (a) comply with the GMA; (b) protect CAs; (c) allow no overall net loss of CA functions; and (d) include best available science.

30. Even though the County utilized an excellent process certain elements of its product do not comply with the Act.

Exemptions ICC 17.02.107.E:

31. Exemptions 1,3,4,5 and 7 require the use of BMPs. The County is unable to enforce BMP violations until it produces a BMP manual. Until this manual is produced and the BMP requirements are enforced, we are unable to find compliance of these exemptions with the GMA.

32. The County's BMP monitoring provision is inadequate to ensure that BMPs are effective and are being implemented.

33. Exemption (1): Existing and Ongoing Agricultural Activities, applies to all existing and on-going agricultural activities whether they are on lands designated under .170 or not. This application of the agricultural exemption to lands not designated as long-term agriculture would allow avoidance of critical areas protection throughout rural Island County. The exemption clearly fails to comply with the Act's requirement for protection of critical areas.

ICC 17.02.107.H Functionally Isolated Buffers:

34. This provision was adopted without proper public participation process and in spite of substantial evidence in the record that it did not comply with BAS or critical area protection requirements.

Fish and Wildlife Habitat Conservation Areas (FWHCAs):

35. The record showed that coastal bluffs and prairies, rare and high quality plant communities inventoried by the Washington Natural Heritage Program, have not been listed as FWHCAs.

36. The County has not adopted criteria for designation of Species and Habitats of Local Importance. Therefore, designation by the BOCC is arbitrary. The County has not officially designated the great blue heron and osprey because designation is contingent on the adoption of management plans not yet completed. WEAN and Audubon have submitted nominations that have not yet been acted upon by the County.

37. The record showed that the County was relying in part on wetlands and their buffers to protect wildlife functions. BAS in the record showed that the County's 25-foot buffers for Category B wetlands are totally inadequate for this purpose.

38. The record showed that BAS did not support the County's adoption of 25-foot buffers for type 5 streams.

Estuarine Wetlands:

39. The County's means of assuring that all Estuarine Wetlands are classified as Category A is confusing and ineffective. The County must clearly and specifically designate all estuarine wetlands as Category A in section 17.02.110.A.3(a), in order to comply with the GMA.

Shoreline Setbacks:

40. 17.02.110.c.4(b)(i)(2)(a) and (b) allow reduction of setbacks to allow infill development to continue the previous pattern of impinging on fragile critical areas. The BAS in the record does not support this provision.

70/30 Population Split (Rural/Urban):

41. Island County is made up of two Islands, totally separated in every way except sharing a common county government.

42. Stanwood, in Snohomish County, is Camano Island's UGA. It would make no sense to create an UGA on Camano Island to improve the 70/30 ratio.

43. There are only three cities on Whidbey Island, two are very small and all are accepting their fair share of growth.

44. The designation of Freeland and Clinton as non-municipal UGAs will improve the 70/30 ration.

45. Under this unique record, the County has complied with the GMA.

Consistency with Plans of Adjacent Jurisdictions:

46. All three municipalities in Island County, Oak Harbor, Langley and Coupeville, adopted their CPs before the County adopted its CP. Island County used different OFM population series and planning periods than Langley and Coupeville.

47. The inconsistency created by the use of different OFM population series and planning periods will not result in a failure to accommodate the population allocated to Langley and Coupeville, because the full 2020 OFM forecast has been allocated to and accepted by each municipality.

48. The record is clear that the County and its cities have committed to coordinated planning. The County and the cities established a process for harmonizing the planning periods by 2006.

49. Under the unique circumstances of this case, where all municipalities have adopted their CPs long before the County adopted its CP, the County's actions were in compliance with the GMA.

Affordable Housing:

50. The County acknowledged that it intends to do more to achieve the GMA planning goal for housing; however, the County did not concede that its DRs failed to implement the affordable housing policies of the housing element of its CP.

51. Petitioner's conclusory statement that the County's DRs do not implement the County's affordable housing policies is insufficient to meet the burden of showing that the County's actions fail to comply with the requirements of the Act.

52. We are not persuaded that the County's actions were clearly erroneous.

Transportation Concurrency:

53. The County has adopted a concurrency ordinance, as required by RCW 36.70A.070 (6)(b).

54. The County's ordinance exempts certain activities from a concurrency determination. The Act does not explicitly authorize exemptions. However, the Coalition has not explained how the County's exemptions will prevent the County from prohibiting development approval of those developments that will cause the level of service to decline below the County's adopted level.

55. The County's ordinance provides 30 days for agencies affected by a proposed development to provide the results of their own concurrency test for a proposal. The County determined that, because a concurrency certificate is required before an application is determined to be complete (and vested), a reasonable time for agencies to comment was needed. The Coalition has not shown how the County's time limit for agency comment will prevent the County from prohibiting development approval of those developments that will cause the level of service to decline below the County's adopted level.

56. The County's transportation concurrency ordinance requires an agency with jurisdiction over transportation facilities to have a capital facilities plan and requires consistency for both land use and population projections. The Coalition has not shown how this provision will prevent the County from prohibiting development approval of those developments that will cause the level of service to decline below the County's adopted level.

57. The GMA was amended in 1998 to address the relationship between local concurrency ordinances and state-owned transportation facilities. These 1998 amendments require the County to amend its transportation element to account for state-owned facilities no later than December 31, 2000.

58. The County's transportation concurrency ordinance complies with the requirements of the GMA.

Adequacy of Public Facilities and Services:

59. The Coalition has not shown how the County's capital facilities plan will not ensure

that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

60. The County's CFP is in compliance with the GMA.

Vesting:

61. The County's zoning ordinance provides that applications that have not been granted preliminary approval before December 1, 1998, will be vested to the regulations in place at the time of application.

62. The County has one subdivision application and one short subdivision application pending which were filed and vested prior to the April 10, 1996 determination of invalidity, in *WEAN v. Island County*, #95-2-0063. All pending applications submitted after that date and before December 1, 1998, must comply with the interim application procedures established in response to the April 10, 1996 determination of invalidity; the Superior Court determined that these interim application procedures to be sufficient to allow the us to rescind our finding of invalidity.

63. The Coalition has made no showing that the County's "expanded" vesting provision fails to comply with the Act. The GMA does not explicitly prohibit such a provision and the Coalition does not identify any specific application that will "undermine the protections afforded by" the County's CP and regulations.

64. We find that the County's vesting provision is in compliance with the GMA.

APPENDIX III

INVALIDITY FINDINGS OF FACT & CONCLUSIONS OF LAW

PURSUANT TO RCW 36.70A.302(1)(b)

We incorporate the Findings of Fact under Appendix II and add the following:

65. The record shows that Island County is one of the most densely populated counties in the state and resource lands are under duress from neighboring uses. If agricultural lands are to be preserved, action must be taken swiftly or the situation will deteriorate to that of forest lands in Island County; none will qualify under .170. Therefore, the portions of 17.03.035.A, .090, .180 and .220 that pertain to Rural Agriculture, to the extent that they are less restrictive than allowed in commercial agriculture, substantially interfere with goals (1), (2), (6) (8) and (10) of the Act.

66. The record shows that, according to BAS, 25-foot buffers for Type 5 streams does not assure protection of critical areas. The County's adoption of 25-foot buffers for Type 5 streams fails to include BAS, fails GMA's critical area protection standards, and substantially interferes with goals (9) and (10) of the Act.

67. The Harrington Lagoon RAID inexplicably includes the Lawana Beach plat, which is less than 40 percent developed and includes a 31-acre undivided parcel. The Lawana Beach plat does not fall within the logical outer boundary of the Harrington Lagoon area of more intensive rural development. We find that the inclusion of the Lawana Beach plat within the RAID would allow the development of a new pattern of low-density sprawl and, consequently, substantially interferes with the fulfillment of GMA goal (2). The designation of the Harrington Lagoon RAID, including the applicable portions of the CP, DRs, and zoning maps, does not comply with the Act and is declared invalid.

68. The Land's Hill RAID consists of a small subdivision, Land's Hill Estates, and a number of large lots up to 57 acres. The record does not support the inclusion within the RAID of these large lots outside of the Land's Hill Estates plat. We find that the inclusion of these parcels within the RAID would allow the development of a new pattern of low-

density sprawl and, consequently, substantially interferes with the fulfillment of GMA goal (2). The designation of the Land's Hill RAID, including the applicable portions of the CP, DRs, and zoning maps, does not comply with the Act and is declared invalid.

69. (a) The Livingston Bay Heights RAID consists of the Livingston Bay Heights plat with a few larger lots immediately to the south and west, and a number of large lots of up to 17 acres to the north. The record does not support the inclusion within the RAID of these large lots to the north of the Livingston Bay Heights plat. We find that the inclusion of these parcels within the RAID would allow the development of a new pattern of low-density sprawl and, consequently, substantially interferes with the fulfillment of GMA goal (2). (b) The Livingston Bay Heights RAID has a total of 49 parcels on 135 acres. The minimum lot size 0.33 acre. The majority of parcels are between 1 and 5 acres. There are no improved parcels less than 0.67 acre (there is only one unimproved parcel between 0.34 and 0.67 acre). The County's New Lot Analysis reveals the potential for the development of 172 new lots in this RAID. We find that the densities that would result from the County's 0.33-acre minimum lot size allows the development of a new pattern of low-density sprawl and, consequently, substantially interferes with the fulfillment of GMA goals (1) and (2). The designation of the Livingston Bay Heights RAID, including the applicable portions of the CP, DRs, and zoning maps, does not comply with the Act and is declared invalid.

70. The Penn Cove RAID consists of a mostly developed subdivision in the southernmost portion connected by a number of larger lots to mostly undeveloped subdivisions in its northern portion. We find that the inclusion of the connecting strip of larger lots within the RAID would allow development of a new pattern of low-density sprawl and, consequently, substantially interferes with the fulfillment of GMA goal (2). The designation of the Penn Cove RAID, including the applicable portions of the CP, DRs, and zoning maps, does not comply with the Act and is declared invalid.

71. The Teronda West RAID consists of a northern half, consisting mostly of the Teronda West plat, and a southern half, consisting of mostly unimproved parcels ranging from 6 to 22 acres. The southern boundary of the RAID is contiguous with federal land. We find that inclusion of the lands in the southern half within the Teronda West RAID

would allow the development of a new pattern of low-density sprawl and, consequently, substantially interferes with the fulfillment of GMA goal (2). The designation of the Teronda West RAID, including the applicable portions of the CP, DRs, and zoning maps, does not comply with the Act and is declared invalid.

72. Useless Bay/Bayview is a 680-acre RAID consisting of an aggregate of a number of subdivisions and commercial uses and includes 357 acres zoned RF or RA, a golf course, and a large wetlands system. An additional 500 acres of lands can be added to the RAID upon approval of conservation easements limiting development on the wetlands portion of these added lands in exchange for being included in the RAID. The logical boundaries of the existing development in this area generally surround the subdivisions; the boundaries drawn by the County, apparently in an effort to create one, all-inclusive RAID, extend beyond the logical outer boundary of the existing area. We find that boundaries of this RAID will not minimize and contain the existing areas or uses, but would allow the development of a new pattern of low-density sprawl and, consequently, substantially interferes with the fulfillment of GMA goal (2). The designation of the Useless Bay/ Bayview RAID, including the applicable portions of the CP, DRs, and zoning maps, does not comply with the Act and is declared invalid.

73. The West Beach RAID consists of mostly developed subdivisions in the southern part of the RAID connected by a strip of larger, waterfront lots along West Beach Road to an undeveloped subdivision (Sea View) in the northern part of the RAID. We find that, because of the inclusion of the connecting larger lots and the undeveloped Sea View plat, the boundaries of this RAID will not minimize and contain the existing areas or uses, but would allow the development of a new pattern of low-density sprawl and, consequently, substantially interferes with the fulfillment of GMA goal (2). The designation of the West Beach RAID, including the applicable portions of the CP, DRs, and zoning maps, does not comply with the Act and is declared invalid.

74. The record does not reveal why the West Deer Lake RAID was created. The area is not platted and is not adjacent to any other plat. The parcels within this RAID are unremarkable when compared with surrounding, non-RAID parcels; the lots within the RAID do not appear to be significantly smaller than surrounding parcels, and there does not

appear to be the "more intensive rural development," as contemplated by the Act. We find that designation of the West Deer Lake RAID allows the development of a new pattern of low-density sprawl and, consequently, substantially interferes with the fulfillment of GMA goal (2). The designation of the West Deer Lake RAID, including the applicable portions of the CP, DRs, and zoning maps, does not comply with the Act and is declared invalid.

75. Any Finding of Fact which is more properly a Conclusion of Law shall be deemed a Conclusion of Law.

CONCLUSIONS OF LAW

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

2. The provisions of the CP, DRs and corresponding maps noted in this order are invalid under the provisions of RCW 36.70A.302(b).

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