

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 MITCHELL STREICHER,

4
5 Petitioner,

Case No. 08 -2-0015

FINAL DECISION AND ORDER

6 v.

7
8 ISLAND COUNTY,

9 Respondent.

10 And

11
12 DEBORAH HOUSEWORTH, ET AL,

13
14 Intervenors.

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16
17 **I. SYNOPSIS OF DECISION**

18 In this order, the Board finds that Petitioner Streicher has failed to demonstrate that the
19 challenged aspects of the Freeland Non-municipal UGA (NMUGA) violate the Growth
20 Management Act (GMA). The Board finds that Petitioner has failed to show that the
21 Freeland NMUGA is oversized for its projected population target.

22
23 The Board also finds that the Houseworth and Sharpe parcels meet the statutory definition
24 of lands “characterized by urban growth”. The Freeland Hill area, while currently
25 undeveloped, is characterized by urban growth based upon its relationship to an area with
26 urban growth on it and therefore satisfies the GMA’s requirements for inclusion within an
27 urban growth area. In addition, the Board finds that considerations of the presence of steep
28 slopes or the effect on aquifer recharge areas does not demonstrate that the County clearly
29 erred in including these areas in the NMUGA.
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1 The Board also concludes that it was not a violation of the GMA for the County to choose to
2 exclude the Wildwood Park and Harbor Hill areas from the Freeland NMUGA.

3
4 Petitioner has not challenged the consistency of adopting the land use element prior to
5 adoption of other needed plan elements. Because the County has not yet adopted the
6 transportation element of the FSAP, a challenge to the transportation LOS standards is not
7 ripe for review. Similarly, as the County has not yet adopted the capital facilities element of
8 the Freeland Sub Area Plan, it is premature to challenge aspects of financing capital
9 improvements under that plan element.
10

11 **II. PROCEDURAL HISTORY**

12 On April 2, 2008, Mitchell Streicher filed a Petition for Review (PFR) challenging Island
13 County's adoption of Ordinance Nos. C-12-08 and C-129-07.

14
15 On May 20, 2008, intervention was granted to Deborah Houseworth, Salvatore Barba and
16 Wisdomspace, LLC (Houseworth).¹ On June 9, 2008 intervention was granted to Gordon
17 Sharpe.²
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19
20 On July 1, 2008, following a motion by the County, the Board dismissed those portions of
21 Issues 2, 3 and 4 not relating to Freeland Hill and Issues 8 and 9, as these issues related to
22 RCW 36.70A.070(5)(c)(iv). The Board also dismissed Issues 6, 10, 11, and 13 in their
23 entirety. The Hearing on the Merits for this appeal was heard on August 21, 2008 in
24 Coupeville, WA.
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26 **III. PRELIMINARY MATTERS**

27 Petitioner filed a request for the Board to take official notice of Sections 17.02A.050B and
28 17.02A.050E of Island County's Critical Areas ordinance.³ Pursuant to WAC 242-02-660(4),
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31 ¹ Order Granting Intervention to Deborah Houseworth et al.

32 ² Order Granting Intervention to Sharpe.

³ Petitioner's Request for Official Notice, July 8, 2008.

1 the Board may take official notice of matters of law such as “Ordinances, resolutions, and
2 motions enacted by cities, counties, or other municipal subdivisions of the state of
3 Washington.” The County filed no objection to this request, and the Board takes official
4 notice of those sections of the Island County Code.
5

6 Petitioner also filed a request for the Board to take official notice of a map published by the
7 Island County Planning and Community Development Department pertaining to Focus Area
8 1 of the South Holmes Harbor Shellfish Protection District. Petitioner states that the
9 purpose of this map is to show that Freeland Hill is included within the watershed
10 boundary.⁴ Pursuant to WAC 242-02-670(4), “Any party may request, orally or in writing,
11 that official notice be taken of a material fact.” The County has not objected to this request
12 for official notice, and the Board will grant the request.
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15 At the Hearing on the Merits, the Board requested that Island County supplement the record
16 with a copy of its critical areas ordinances. These materials were provided to the Board and
17 all other parties on August 26, 2008.
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19 **IV. BURDEN OF PROOF**

20 For purposes of board review of the comprehensive plans and development regulations
21 adopted by local government, the GMA establishes three major precepts: a presumption of
22 validity; a “clearly erroneous” standard of review; and a requirement of deference to the
23 decisions of local government.
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25 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and
26 amendments to them are presumed valid upon adoption:
27

28 Except as provided in subsection (5) of this section, comprehensive plans and
29 development regulations, and amendments thereto, adopted under this chapter are
30 presumed valid upon adoption.
31 RCW 36.70A.320(1).
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⁴ Petitioner’s Request for Official Notice, July 21, 2008.

1 The statute further provides that the standard of review shall be whether the challenged
2 enactments are clearly erroneous:
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4 The board shall find compliance unless it determines that the action by the state
5 agency, county, or city is clearly erroneous in view of the entire record before the
6 board and in light of the goals and requirements of this chapter.
7 RCW 36.70A.320(3)

8 In order to find the County's action clearly erroneous, the Board must be "left with the firm
9 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
10 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

11
12 Within the framework of state goals and requirements, the boards must grant deference to
13 local government in how they plan for growth:

14 In recognition of the broad range of discretion that may be exercised by
15 counties and cities in how they plan for growth, consistent with the
16 requirements and goals of this chapter, the legislature intends for the boards
17 to grant deference to the counties and cities in how they plan for growth,
18 consistent with the requirements and goals of this chapter. Local
19 comprehensive plans and development regulations require counties and cities
20 to balance priorities and options for action in full consideration of local
21 circumstances. The legislature finds that while this chapter requires local
22 planning to take place within a framework of state goals and requirements,
23 the ultimate burden and responsibility for planning, harmonizing the planning
24 goals of this chapter, and implementing a county's or city's future rests with
25 that community.

26 RCW 36.70A.3201 (in part).

27 In sum, the burden is on the Petitioner to overcome the presumption of validity and
28 demonstrate that any action taken by the County is clearly erroneous in light of the goals
29 and requirements of Ch. 36.70A RCW (the Growth Management Act). RCW 36.70A.320(2).
30 Where not clearly erroneous and thus within the framework of state goals and requirements,
31 the planning choices of local government must be granted deference.
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V. DISCUSSION

Issue No. 1: *Did the amount of land included in the NMUGA comply with RCW 36.70A.110, RCW 36.70A.020 (1) and (2), and RCW 36.70A.115, because it exceeds by far the land needed for the projected population and creates sprawl?*⁵

Petitioner argues, based on the County's Land Capacity Analysis (LCA), the Freeland Non-Municipal Growth Area (NMUGA) is sized to accommodate a population in excess of 4000, far greater than the population target assigned by the County to the area thereby resulting in urban sprawl.⁶ Petitioner evaluates the NMUGA's capacity based on three different scenarios - termed the "787 acre case" the "1061.2 acre case," and the "596 acre case" - which Petitioner gleans for the Freeland Sub-Area Plan.⁷ With these scenarios Petitioner contends the NMUGA's size is in excess of the land required to accommodate the projected population resulting in an oversized, low-density, sprawling UGA in violation of the GMA.

The County contends Petitioner's scenarios are flawed because the scenarios use only one of many factors; the Petitioner has failed to account for existing development; the County's deductions and assumptions are supported by Washington Department of Community Trade and Economic Development's (CTED) guidance documents and current case law; and, therefore, the Freeland UGA is appropriately sized and complies with the Growth Management Act (GMA).⁸ Intervenors deferred all argument on this issue to the County as Petitioner's arguments were not specifically directed at the Houseworth/Sharpe parcels.⁹

⁵ This is the issue statement as set forth in the Board's May 14, 2008 Prehearing Order (PHO). With its Response Brief, the County asserts the Petitioner has modified the statement but sets forth a different issue statement than the Board denotes in its May 14 PHO. Issue 1, as stated in this order, is verbatim the issue set forth in the PHO.

⁶ Petitioner's Hearing Brief at 5-6.

⁷ Id. at 7-12.

⁸ County's Response Brief, at 6-16.

⁹ Intervenor's Prehearing Brief, at 6

1 **Board Discussion**

2 The Board understands that the crux of Petitioner’s argument is that the County has
3 “oversized” the Freeland NMUGA based on these calculations. Petitioner asserts
4 reductions (such as rights-of-way, infrastructure, and market factor) are arbitrary, have been
5 applied differently throughout the County’s analysis, and have no justification. Petitioner
6 further points to the County’s Reasonable Use Exception provisions (RUEX), ICC
7 17.02A.050, and contends that “there is no basis for assuming, as was done in the capacity
8 analysis... that the presence of wetlands would result in reduced capacity” since the RUEX
9 prevents the denial of a reasonable use of a parcel regardless of any critical area regulation
10 to the contrary.¹⁰
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13 The GMA requires Island County to size its UGAs to accommodate the urban growth that is
14 projected to occur in the succeeding twenty-year period¹¹ which, for the Freeland Hill
15 NMUGA, is a total population target of 4,000.¹² Petitioner concurs with the County on three
16 key assumptions: a projected full-time resident population for Freeland of 4,000; an
17 expected household size of 2.34 people per household (2.34 p/h); and a gross NMUGA
18 area of 1,061 acres and, by dividing the projected population of 4,000 by 2.34 p/h results in
19 a need for 1,709 dwelling units.¹³
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21
22 Petitioner first divides the required number of dwelling units by an average residential
23 density of 4 dwelling units per acre (4 du/acre). The basis for using this average density
24 stems from the FSAP itself, as the introductory section of the County’s Buildable Lands
25 Analysis¹⁴ states that prior Growth Board decisions have held UGAs “should maintain an
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29 ¹⁰ Petitioner’s Hearing Brief, at 9-10.

30 ¹¹ RCW 36.70A.110(2)

31 ¹² The Board notes this is a target population total and that the Freeland area currently has an existing
32 population of 2000. Therefore, the total *new population* to be accommodated is 2,000 persons.

¹³ See, FSAP at 4; County’s Response Brief, at 7. Beyond these basic assumptions, the parties disagree.

¹⁴ The Board deems the terms Buildable Lands Analysis and Land Capacity Analysis as the same thing. For
the purpose of this FDO, the Board will denote the County’s analysis as a Land Capacity Analysis or LCA.

1 average density of at least four dwelling units per acre.”¹⁵ From this, Petitioner asserts the
 2 Freeland Hill Sub-Area requires the following acreage to accommodate the needed dwelling
 3 units:¹⁶

Required Dwelling Units	Average Residential Density	Total Acreage Required
1709.4	4.0	427.35

8 The Petitioner then utilizes this calculation to demonstrate the resulting excess acreage for
 9 all scenarios:¹⁷

Scenario	UGA Acreage	Required Acreage	Excess Acreage	Percentage of Excess
12 The “1061.20 Case” ¹⁸	1061.20	427.35	633.85	148.32%
13 The “787 Case” ¹⁹	787	427.35	359.65	84.16%
14 The “596 Case” ²⁰	596	427.35	168.65	39.46%

18 The Petitioner also contends that, based on the required number of dwelling units, all
 19 proposed scenarios would result in low-density development, violating the GMA.

20 Petitioner’s density calculations are as follows:²¹

Scenario	UGA Acreage	Required Dwelling Units	Average Density
23 The “1601.2 Case”	1601.2	1709	1.69 du/acre
24 The “787 Case”	787	1709	2.17 du/acre

28 ¹⁵ Petitioner’s Hearing Brief, at 5 (citing Exhibit 9804-J – FSAP at 52)

29 ¹⁶ Id. at 10-11

30 ¹⁷ Id.

31 ¹⁸ Id. at 7 (citing Freeland Hill Sub-Area Plan, at 53 – Table 2)

32 ¹⁹ Id. (citing Freeland Hill Sub-Area Plan, at 54 – Table 3)

²⁰ Id. at 7-8 (citing Freeland Hill Sub-Area Plan, at 15-A and 15-B – Table 6-B)

²¹ Id.

The "596 Case"	596	1709	2.86 du/acre
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From the arguments presented by Petitioner, it appears he fundamentally misunderstands the analysis of land supply when sizing a UGA as well as the application of the County's REX provisions within critical areas. As noted above, the GMA requires Island County to size the UGA appropriate for the 20-year *projected* population growth. The Freeland NMUGA contains approximately 1,061 gross acres.²² These acres encompass not only vacant land but also currently developed land and appear to reflect a reduction for critical areas.²³ In order for Island County to determine whether there is enough land to accommodate *projected, new growth* it must first subtract acreage which currently contains structures, something Petitioner's analysis fails to do. Thus, the *net* acreage of the UGA is as follows:²⁴

Acreage for Freeland NMUGA	
Gross Acreage of UGA acres	1,061
Less Existing Residential Development	364
Less Existing Commercial Development	88
Less Existing Public Institution/Golf Course	<u>105</u>
Total Available Developable Acreage acres	504

From here, areas that would be utilized to provide for future public use, including rights-of-way, sewer or water treatment facilities, parks and schools, are to be subtracted and a

²² See Table 2-B, Appendix B of the FSAP.

²³ See Appendix B of the FSAP.

²⁴ County's Response Brief, at 9, Figure 1.

1 reasonable market factor may be applied so as to permit the County to ascertain a *net*
2 *developable* acreage.²⁵

Net Developable Acreage for Freeland NMUGA	
Total Available Acreage	504
acres	
Less Public Uses – 16%	81
Less Right-of-Ways – 18%	91
Less Market Factor – 20%	<u>101</u>
Total Net Available Developable Acreage	231
acres	

15 Once all reductions have been applied, the County has a true net developable acreage and
16 compares this number to its population demand in order to determine if a UGA is
17 appropriately sized based on proposed uses and densities. It is this Net Available
18 Developable Acreage that is the foundation for the future population growth of 2,000
19 persons. As Petitioner did in neglecting to recognize existing development, he likewise fails
20 to recognize that not all land will truly be available for development as it may be required for
21 non-structural purposes (roads/parks) or for public institutional uses (schools), all of which
22 reduce land for residential units.
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25 Thus, it is clear from the Board's review that Petitioner's three scenarios oversimplify the
26 land calculation methodology. First, Petitioner bases his calculations on the *gross* acreage
27 of the Freeland NMUGA, failing to account not only for *existing* development – both
28 commercial and residential – but for development constraints, such as public infrastructure,
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32 ²⁵ Id. at 9-11,13.
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1 that will consume the land without providing additional housing units and environmental
2 constraints, such as critical areas which limit and/or preclude development.

3
4 Second, while Petitioner asserts the County's reductions for right-of-ways, public uses, and
5 a market factor are arbitrary and unjustified, he fails to develop this argument. Simply
6 asserting that a reduction is arbitrary and unjustified does not satisfy the GMA's burden of
7 proof that a petitioner must meet to overcome the presumption of validity accorded the
8 County's action. Petitioner has failed to demonstrate the County's use of these reductions
9 is clearly erroneous and violates the GMA.²⁶

10
11 As for the reduction of developable lands based on critical areas and the County's
12 reasonable use provisions of the Critical Areas Ordinance (CAO), ICC 17.02A.010B, the
13 Board notes that while that section provides the CAO will not make any parcel or lot
14 unusable, ICC17.02A.040A.10 provides that "No new Lot shall be created that is wholly
15 comprised of wetlands or that would require alteration of a regulated wetland or its Buffer to
16 provide buildable area unless a conservation easement encompassing the Lot is
17 established and recorded." ICC 17.02A.040A.5 provides that the County will review
18 development proposals on lots that contain or are affected by a critical area or critical area
19 buffer using criteria that require avoidance of the critical area or buffer, reduction in scale of
20 the project, restoration, and compensation/mitigation. In light of these provisions, which
21 would apply to development or redevelopment of land containing critical areas in the
22 NMUGA, and could reduce the amount of land available for development in the vicinity of
23 critical areas, it is not reasonable to assume, as Petitioner has, that all land is available for
24 development, with no reduction for lands containing critical areas or critical area buffers.

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28 **Conclusion:** Petitioner has failed to carry his burden of proof that the County's action in
29 sizing the Freeland NMUGA as it did with the adoption of the challenged actions resulted in
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²⁶ See CTED's 2000 *Buildable Lands Program Guidelines*; RCW 36.70A.110(2).

1 a NMUGA oversized for its projected population target in violation of RCW 36.70A.110,
2 36.70A.115, 36.70A.020(1), and 36.70A.020(2).

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4 **Issues 2 and 3 are related and will be discussed together.**

5 **Issue No. 2:** *Did the inclusion of Freeland Hill, (parcel numbers R22911-230-1750, R22911-*
6 *165-1720) comply with RCW 36.70A.110?*

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8 **Issue No. 3:** *Did the inclusion in the NMUGA of the parcels enumerated in “2” above*
9 *comply with RCW 36.70A.020(1) and (2)?*

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11 In addition to his argument that the Freeland NMUGA is oversized based on the need for
12 land to accommodate the projected future population, Petitioner also argues against
13 inclusion of the Houseworth and Sharpe parcels on the basis that their inclusion violates
14 RCW 36.70A.110 and promotes sprawl, contrary to RCW 36.70A.020 (1) and (2).²⁷
15 Petitioner notes that prior to their inclusion in the Freeland NMUGA, parcels R22911-230-
16 1750 (the “Sharpe parcel”) and R22911-165-1720 (the “Houseworth parcel”) (collectively
17 “Freeland Hill”) were zoned rural and undeveloped, with nothing on them but trees and
18 natural growth.²⁸

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21 The County did not address Issues 2 and 3, leaving this portion of the briefing to Intervenors
22 Houseworth and Sharpe. Houseworth argues that Petitioner may not challenge the inclusion
23 of particular parcels in the NMUGA, and even if the Board ruled that the NMUGA is
24 oversized, the determination of what parcels to remove to reduce the size of the NMUGA
25 would be for the County to decide.²⁹ With regard to Petitioner’s argument that the inclusion
26 of these two parcels at a density of 3 du/acre constitutes sprawl, Houseworth argues that
27 Petitioner has not challenged the validity of the Low Density (LD) zoning designation in the
28 FSAP; that he lacks standing on this issue because he never asserted that the density of
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31 ²⁷ Petitioner’s Hearing Brief at 13.

32 ²⁸ Id.

²⁹ Houseworth Hearing Brief at 7-8.

1 the parcels in question should be increased and that the required remedy, if any, would be
2 to increase density of these parcels.³⁰ Intervenor Sharpe likewise notes that Petitioner has
3 presented no argument why only the Houseworth/Sharpe parcels violate the NMUGA, or
4 why these parcels, consisting of 20 acres out of 1100 acres in the NMUGA, should be
5 removed and all other property remain. As Intervenor Houseworth also pointed out,
6 assuming that Petitioner was correct that the NMUGA is oversized, the remedy would be to
7 remand the matter to the County to establish new boundaries.³¹
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9
10 The Board notes that Petitioner presented neither argument nor evidence to demonstrate
11 how the inclusion of the Houseworth and Sharpe parcels violate RCW 36.70A.110.
12 Petitioner's only discussion of this statute as applied to these parcels is made in the context
13 of Issue 4, which is discussed below. As the Board finds in that discussion, the Houseworth
14 and Sharpe parcels meet RCW 36.70A.030(18)'s statutory definition of "characterized by
15 urban growth" which RCW 36.70A.110(1) permits to be included within a UGA based upon
16 their proximity to urban growth on adjacent parcels. As also noted in that discussion, the
17 currently undeveloped nature of these parcels does not limit their inclusion in the Freeland
18 NMUGA.
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21 With regard to Petitioner's allegation that the inclusion of these two parcels constitutes
22 sprawl, the Board has found elsewhere in this order that the Petitioner has not
23 demonstrated that the County included too much land in the NMUGA. Even if the Board
24 had determined that Petitioner had carried his burden in this regard, this would not
25 demonstrate that it was clear error for the County to include these two particular 10 acre
26 parcels. In reviewing the County's NMUGA boundary, the Board's role is to determine if the
27 County violated the GMA, not whether the Board or Petitioner would have made some other
28 choice. The GMA recognizes the broad range of discretion that may be exercised by local
29 government, and that the ultimate burden and responsibility for planning and harmonizing
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³⁰ Id. at 10.

³¹ Sharpe Hearing Brief at 5.
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1 the planning goals of the GMA rests with the local community. RCW 36.70A.3201. As this
2 Board has stated in the past, the Board's role is not to require preferred solutions but to
3 determine if the County's choices comply with the Act.³²

4
5 Finally, although Petitioner bases a portion of his RCW 36.70A.020(2) sprawl argument on
6 the presence of Low Density zoning applicable to these two parcels, these parcels are only
7 two of many parcels shown in the FSAP proposed for Low Density zoning.³³ Petitioner did
8 not challenge the proposed zoning of the FSAP in his Petition for Review and the Board will
9 not address an issue not raised in the PFR.³⁴

10
11 **Conclusion:** Petitioner has failed to demonstrate that the County's inclusion of parcels
12 R22911-230-1750 and R22911-165-1720 violated RCW 36.70A.110, RCW 36.70A.020 (1)
13 or (2).

14
15 **Issue No. 4:** *Did the County's inclusion of Freeland Hill (parcels R2292-230-1750, R22911-*
16 *165-1720) as part of the Freeland NMUGA comply with the requirements of RCW*
17 *36.70A.110(1) and (3) because the hill is not characterized by urban growth?*

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20 Petitioner argues that the noted Freeland Hill parcels should not have been included in the
21 NMUGA because they are not characterized by urban growth. As argued with respect to
22 Issues 2 and 3, Petitioner notes that these parcels are currently undeveloped, and have
23 nothing on them but trees and natural growth.³⁵

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30 ³² Island County Citizens' Growth Management Coalition et al. v. Island County, WWGMHB, No. 98-2-0023c,
Order on Motions for Reconsideration and Clarification (7/8/99).

31 ³³ FSAP at 57.

32 ³⁴ RCW 36.70A.290(1) provides, in relevant part, "The board shall not issue advisory opinions on issues not
presented to the board in the statement of the issues".

³⁵ Petitioner's Hearing Brief at 13.

1 Intervenor Sharpe argues that its parcel is adjacent to property with urban development on it
2 and thus meets the statutory definition of “characterized by urban growth”.³⁶

3
4 Petitioner asserts that this is a violation of RCW 36.70A.110(1)’s requirement that an urban
5 growth area located outside of a city is permitted only “if such territory already is
6 characterized by urban growth”. However, that same subsection also provides that a UGA
7 may include territory that is “adjacent to territory already characterized by urban growth”.
8 RCW 36.70A.110(3) provides that “urban growth should be located first in areas already
9 characterized by urban growth.” RCW 36.70A.030(18) defines “characterized by urban
10 growth” as: “land having urban growth located on it, or to land located in relationship to an
11 area with urban growth on it as to be appropriate for urban growth.”
12

13
14 The record in this case demonstrates that the parcels in question meet the statutory
15 definition of “characterized by urban growth” based upon their proximity to urban growth.

16 The Houseworth parcel is adjacent to the library, medical offices, and other professional
17 services. It shares its borders with commercial and high density development as well as an
18 assisted living complex. The parcel is in walking distance from the post office, banks,
19 restaurants, and a grocery store.³⁷ The Sharpe parcel adjoins existing development on the
20 West, and adjoins the Houseworth parcel on the South.³⁸ Thus, because of these parcel’s
21 relationship and proximity to areas of urban growth, both of these parcels are “characterized
22 by urban growth” and qualify for inclusion within an NMUGA.
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25 **Conclusion:** Petitioner has not demonstrated that the County failed to comply with the
26 requirements of RCW 36.70A.110(1)and (3). The Freeland Hill area, while currently
27 undeveloped, is characterized by urban growth based upon its relationship to an area with
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31 ³⁶ Sharpe Hearing Brief at 7-8.

32 ³⁷ Index of the Record at 9632, page 5.

³⁸ See, Exhibit 9804D, attached to Petitioner’s Hearing Brief.

1 urban growth on it and therefore satisfies the GMA's requirements for inclusion within an
2 urban growth area.

3
4 ***Issue No. 5: Did the exclusion of the platted and developed sections called Wildwood Park***
5 ***and Harbor Hill Division, both contiguous to the Freeland NMUGA, violate RCW***
6 ***36.70A.020(1), RCW 36.70A.070(5)(a), (5)(c)(i) and (5)(c)(iii) and RCW 36.70A.110(1)and***
7 ***(3)?***

8
9 Petitioner alleges that exclusion of the platted and developed sections of the Wildwood Park
10 and Harbor Hill areas from the Freeland NMUGA was erroneous. Petitioner notes that
11 these areas are contiguous to the NMUGA and are characterized by small parcel sizes
12 (0.77 acres/parcel and 0.9 acre/parcel in the case of the two sections of Harbor Hill, and
13 0.34 acres/parcel in the case of Wildwood Park).³⁹ Petitioner further argues that when
14 higher rural densities are allowed, the GMA requires that these densities be located either in
15 a limited area of more intense rural development ("LAMIRD") or in an urban growth area.
16

17
18 As the County correctly notes, it included both of these areas in the Freeland area RAID
19 (formerly the County's Rural Areas of Intense Development, now referred to as a LAMIRD)
20 in 2000. In the Board's March 22, 2000 Compliance Order Re: Clinton and Freeland, the
21 Board found the inclusion of all land south of Highway 525 (which includes the Wildwood
22 Park and Harbor Hill areas) noncompliant with the GMA.⁴⁰ The County responded to the
23 Board's decision by enacting County Ordinance C-50-00 which eliminated from the Freeland
24 RAID all the areas found to be noncompliant.⁴¹ The Board's role in this appeal is to
25 determine if the NMUGA is properly sized and compliant with the GMA, not to review a past
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29 ³⁹ Petitioner's Hearing Brief at 19.

30 ⁴⁰ *Island County Citizens' Growth Management Coalition, et al., v. Island County*; Compliance Order RE:
Clinton and Freeland; WWGMHB No. 98-2-0023c (March 22, 2000).

31 ⁴¹ *Island County Citizens' Growth Management Coalition, et al., v. Island County*; Compliance Order on FDO
Remand Issues 5, 7, 9, 13, and 17; WWGMHB No. 98-2-0023 (October 12, 2000). With this Compliance
32 Order, the Board determined that removal of the non-compliant lands and modification of the boundary, the
Freeland RAID complied with the GMA.

1 Board order that concluded that this area did not meet the criteria for inclusion. Petitioner
2 has not demonstrated that it was a violation of the GMA for the County to choose to not
3 include the Wildwood Park and Harbor Hill areas within the Freeland NMUGA. Here, aside
4 from noting that Harbor Hill and Wildwood Park are characterized by parcels averaging 0.34
5 to 0.9 acres/parcel Petitioner has offered no argument as to why the GMA would require
6 these areas to be included in the Freeland NMUGA.
7

8 **Conclusion:** Petitioner has not demonstrated that it was a violation of the GMA for the
9 County to choose to not include the Wildwood Park and Harbor Hill areas within the
10 Freeland NMUGA.
11

12 **Issue No. 6:** *This issue was dismissed*
13

14 **Issue No. 7:** *Does page 75 of the FSAP comply with RCW 36.70A.070(6)(a) (iii) (B), (C),*
15 *and (E) because the data used is from 1998, which is prior to the adopted Land Use plan?*
16

17 Petitioner questions whether page 75 of the Freeland Sub Area Plan complies with RCW
18 36.70A.070(6)(a)(iii)(B), (C), and (E) because the transportation Level of Service (LOS)
19 standards presented there are based on 1998 data.⁴² In response, the County argues that
20 this issue is not yet ripe for review because the Planning Department is currently developing
21 the proposed transportation chapter of the FSAP, and it is scheduled for adoption in May of
22 2009.⁴³
23
24

25 The Board agrees that this issue is not ripe for review. The ripeness doctrine exists "to
26 prevent the courts, through avoidance of premature adjudication, from entangling
27 themselves in abstract disagreements over administrative policies, and also to protect the
28 agencies from judicial interference until an administrative decision has been formalized and
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32 ⁴² Petitioner's Hearing Brief at 22-23.

⁴³ Island County's Response Brief at 17.

1 its effects felt in a concrete way by the challenging parties."⁴⁴ Page 75 of the FSAP, where
2 the transportation LOS standards are found, is a portion of the transportation element of the
3 plan, but that portion has not yet been adopted. It is clear from the record that the subject of
4 the ordinances under challenge was the adoption of the land use element of the FSAP.

5 Ordinance C-129-07 states in the penultimate recital that:

6 WHEREAS, it will take several years to construct the infrastructure needed
7 to support levels of density and intensity established in the Plan, to prepare
8 and adopt the other supporting policy elements needed to implement the
9 land use element, and to prepare and adopt development regulations that
10 would govern the allowed uses and intensities established in the Plan;

11 In Ordinance C-12-08, which adopted Findings of Fact for the FSAP, the County found that
12 "The Board of Island County Commissioners adopted the land use chapter of the Sub Area
13 Plan. The land use chapter constitutes only one chapter of a comprehensive plan." The
14 ordinance contained a schedule laying out the anticipated date of adoption of the other
15 comprehensive plan elements, noting that on May 1, 2009, "The Planning Department will
16 forward to the Island County Planning Commission recommended changes to the following
17 chapters of the Island County Comprehensive Plan: Housing, Capital Facilities, Utilities,
18 Transportation, Economic Development, Parks and Recreation." This language gives
19 support to the County's position that the presence of a transportation chapter in the FSAP
20 was merely a "place holder" to provide an overview of what will likely be included within the
21 transportation chapter.⁴⁵ Therefore, it would be premature for the Board to consider a
22 challenge to an aspect of the as-yet unadopted transportation element.
23
24

25 During oral argument Petitioner questioned the rationality of the County's adoption the land
26 use element prior to the transportation element. In finding for the County on this issue, the
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31 ⁴⁴ Asarco v. Department of Ecology, 145 Wn.2d 750; 43 P.3d 471 (2002), relying on Abbott Labs. v. Gardner,
32 387 U.S. 136, 148-49, 87 S. Ct. 1507, 18 L. Ed. 2d 681 (1967).

⁴⁵ Island County's Response Brief at 19.

1 Board is not condoning⁴⁶ the County's adoption strategy. The issue of whether it was
2 appropriate for the County to adopt the land use element of the FSAP and designate an
3 NMUGA prior to adoption of other elements of the sub area plan is simply not before us in
4 this appeal. Instead, Petitioner has challenged the transportation element itself. As noted
5 above, until that element has been adopted, it is not ripe for review.
6

7 **Conclusion:** The ordinances under appeal adopted the land use element of the FSAP.
8 Because the County has not yet adopted the transportation element of the FSAP, a
9 challenge to the transportation LOS standards is not ripe for review.
10

11 **Issues 8 and 9 are related and will be discussed together.**

12 **Issue No. 8:** *Does the inclusion of parcels R22911-230-1750 and R22911-165-1720 in the*
13 *NMUGA comply with RCW 36.70A.070(1) because the inclusion of Freeland Hill in the*
14 *NMUGA with its stated zoning will seriously degrade the existing high charge aquifer on*
15 *Freeland Hill?*
16

17
18 **Issue No. 9:** *Does the inclusion of parcels R22911-230-1750 and R22911-165-1720, with*
19 *their zoning, in the NMUGA, comply with RCW 36.70A.070(1) because of the existence of*
20 *steep slopes on Freeland hill and critical drainage area at the foot of Freeland Hill?*
21

22 Petitioner argues that it was error to include parcels R22911-230-1750 and R22911-165-
23 1720 in the NMUGA because when these parcels are developed many trees will be
24 removed and impervious surfaces will increase, resulting in the degradation of the aquifer
25 recharging characteristics of the hill. Petitioner alleges that, combined with the steep
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31 ⁴⁶ See Stephen F. Ludwig v. San Juan County, WWGMHB Case No. 05-2-0019c (Final Decision and Order/
32 Compliance Order (Lopez Village), April 19, 2006 and Final Decision and Order (Eastsound) June, 20, 2006),
ICAN v. Jefferson County, Case No. 03-2-0010(Final Decision and Order, August 22, 2003 and Compliance
Order, May 30, 2006).

1 slopes, this will exacerbate the critical drainage area located down slope of these
2 properties.⁴⁷

3
4 In response, Intervenors Sharpe⁴⁸ and Houseworth⁴⁹ point out that the FSAP map of aquifer
5 recharge areas, upon which Petitioner relies, shows that almost all of the NMUGA is in
6 either a high or medium aquifer recharge area.

7
8 Petitioner has not demonstrated any factual basis as to why these particular parcels differ
9 from others in the NMUGA in their effect on the aquifer and thus why it was clear error for
10 the County to include these parcels.

11
12 At oral argument Petitioner suggested that he focused on these parcels because he was
13 familiar with them, and that the GMA does not require a petitioner to make a broader
14 argument challenging the concept of the establishment of a NMUGA over aquifer recharge
15 areas or on steep slopes. The Board disagrees. The relief Petitioner seeks is “Removal
16 from the NMUGA of Freeland Hill (parcels R22911-165-1720 and R22911-230-1750)”, thus
17 he is requesting the Board to find that the County committed clear error in including these
18 particular parcels in the NMUGA. Removing these parcels would not cure the violation of
19 the GMA that Petitioner alleges exists.

20
21
22 As Intervenors point out, RCW 36.70A.070(1) does not prohibit the inclusion of critical
23 areas, such as aquifers or steep slopes, within a NMUGA. The GMA, in relevant part,
24 requires that “The land use element shall provide for the protection of the quality and
25 quantity of ground water used for public water supplies.” Pages 39 through 50 of the FSAP
26 address the County’s approach to critical areas in the FSAP including the protection of
27 wetlands, aquifer recharge areas, fish and wildlife habitat conservation areas, frequently
28 flooded areas, geologically hazardous areas, shorelines, and critical drainage areas. It is not
29
30

31 ⁴⁷ Petitioner’s Hearing Brief at 18.

32 ⁴⁸ Sharpe’s Hearing Brief at 8.

⁴⁹ Houseworth Hearing Brief at 14.

1 disputed that the County has adopted critical area regulations that address development
2 within aquifer recharge areas and on steep slopes. Petitioner has not presented any
3 evidence or argument that these regulations are so inadequate that it was error to establish
4 an NMUGA in this area.

5
6 Petitioner cites RCW 36.70A.060 and RCW 36.70A.550 in his brief.⁵⁰ It is not clear from
7 these citations whether or not he is alleging a violation of these statutes. To the extent that
8 he is, these arguments cannot be considered as such a violation was not alleged in the
9 Petition for Review nor are they contained within the issue statement in the Prehearing
10 Order.⁵¹

11
12 **Conclusion:** Petitioner has not demonstrated that it was clearly erroneous and a violation of
13 RCW 36.70A.070(1) for the County to have included parcels R22911-230-1750 and
14 R22911-165-1720 in the NMUGA.

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16
17 **Issue No. 10:** *This Issue was dismissed.*

18
19 **Issue No. 11:** *This Issue was dismissed.*

20
21 **Issue No. 12:** *Does the FSAP comply with RCW 36.70A.070(3) because, since the original*
22 *Island County Freeland Comprehensive Sewer Plan (Final) February 2005, money for*
23 *sewers has not been forthcoming?*

24
25 Petitioner challenges whether the FSAP complies with RCW 36.70A.070(3) because “the
26 high cost of the sewers and the inability to get enough firm commitments for supporting
27 funds make it questionable that a formation of a ULID will be put to the people, and passed,
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31 ⁵⁰ Petitioner’s Hearing Brief at 17.

32 ⁵¹ RCW 36.70A.290(1) provides, in relevant part, “The board shall not issue advisory opinions on issues not presented to the board in the statement of the issues”.

1 in the near future.”⁵² In response, the County argues that this challenge to the capital
2 facilities element is premature because the County has not yet adopted a capital facilities
3 chapter to the FSAP.⁵³

4
5 The requirement to adopt a plan to finance capital facilities is contained in RCW
6 36.70A.070(3) which provides:

7 (3) **A capital facilities plan element** consisting of: (a) An inventory of
8 existing capital facilities owned by public entities, showing the locations and
9 capacities of the capital facilities; (b) a forecast of the future needs for such
10 capital facilities; (c) the proposed locations and capacities of expanded or
11 new capital facilities; **(d) at least a six-year plan that will finance such**
12 **capital facilities within projected funding capacities and clearly**
13 **identifies sources of public money for such purposes;** and (e) a
14 requirement to reassess the land use element if probable funding falls short of
15 meeting existing needs and to ensure that the land use element, capital
16 facilities plan element, and financing plan within the capital facilities plan
17 element are coordinated and consistent. Park and recreation facilities shall be
18 included in the capital facilities plan element. **(emphasis added)**

19 As the Board noted above, in our discussion of the challenge to transportation level of
20 service standards, what is before us in this appeal is the land use element of the FSAP.

21 The challenged ordinances do not purport to adopt the capital facilities element of the plan.

22 The County notes that the land use chapter was adopted prior to the other required
23 chapters of the FSAP because the land use chapter “is the essential first step that is needed
24 to allow development of further plans such as the transportation chapter or the capital
25 facilities chapter.”⁵⁴ Whether the adoption of the land use element ahead of the other
26 supporting elements needed for the designation of NMUGA is appropriate⁵⁵ is not material,
27 as Petitioner has not challenged the sequencing of the County’s adoption of the plan

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29 _____
30 ⁵² Petitioner’s Hearing Brief at 25.

31 ⁵³ Island County’s Response Brief at 21.

32 ⁵⁴ Island County’s Response Brief at 21-22.

⁵⁵ See footnote 46. The adoption of a capital facilities plan is a critical element needed for the designation of a UGA. To the County’s credit, it has adopted development regulations that will not permit urban development in the UGA until the appropriate capital facilities are developed according to Ordinance C-129-07.

1 elements. Instead, he has challenged an aspect of a plan element – in this case the capital
2 facilities element – that has not yet been adopted and is therefore not before us. The time
3 to challenge the capital facilities element will come following its adoption, but until that time
4 the Board has no authority to review its sufficiency.

5
6 **Conclusion:** The County has not yet adopted the capital facilities element of the Freeland
7 Sub Area Plan, therefore it is premature to challenge aspects of financing capital
8 improvements under that plan element.
9

10 **Issue No. 13:** *This Issue was dismissed.*

11
12 **Issue No. 14:** *Do the challenged adoptions substantially interfere with the fulfillment of the*
13 *goals of the GMA and should they be found invalid?*
14

15 Petitioner questions whether portions of the Freeland Sub Area Plan and NMUGA should be
16 invalidated because they substantially interfere with the fulfillment of the goals of the GMA.⁵⁶
17 In response, the County argues that the designation of Freeland as an NMUGA and
18 adoption of the FSAP land use chapter fully comply with the GMA.⁵⁷
19

20
21 A finding of invalidity may be entered when a board makes a finding of noncompliance and
22 further includes a “determination, supported by findings of fact and conclusions of law that
23 the continued validity of part or parts of the plan or regulation would substantially interfere
24 with the fulfillment of the goals of this chapter.” RCW 36.70A.302(1) (in pertinent part).
25

26 In this case, the Board has not found that Petitioner has not demonstrated that any of the
27 challenged portions of the Freeland NMUGA are noncompliant with the GMA and thus there
28 is no basis for a finding of invalidity.
29
30

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32 ⁵⁶ Petitioner’s Hearing Brief at 24 et seq.

⁵⁷ Island County’s Response Brief at 23.

1 **Conclusion:** The Board has found Petitioner has not demonstrated that the challenged
2 portions of the Freeland NMUGA violate the GMA, and thus there is no basis for a
3 determination of invalidity.
4

5 VI. FINDINGS OF FACT

- 6 1. Island County is a county located west of the crest of the Cascade Mountains that is
7 required to plan pursuant to RCW 36.76A.040.
- 8 2. On December 10, 2007 the County adopted Ordinance C-129-07, designating
9 Freeland as a Non-Municipal Urban Growth Area and adopting the Freeland Sub
10 Area Plan and incorporating the Freeland Sub Area Plan into the Island County
11 Comprehensive Plan.
- 12 3. On February 11, 2008 the County adopted Ordinance C-12-08, adopting Findings of
13 Fact for the Freeland Sub Area Plan and designation of Freeland as a Non-Municipal
14 Urban Growth Area.
- 15 4. Notice of publication of Ordinance C-129-07 was published on February 16, 2008.
- 16 5. Petitioner participated orally and in writing on the issues the Board has evaluated in
17 this order.
- 18 6. On April 2, 2008 Petitioner filed a timely appeal.
- 19 7. The Hearing on the Merits on the Petition for Review was held on August 21, 2008 in
20 Coupeville, Washington.
- 21 8. The OFM projected population for the Freeland Sub Area is 4,000.
- 22 9. The expected household size in this area is 2.34 people per household.
- 23 10. The gross area of the UGA is 1,061 acres.
- 24 11. The County's approach, as used in its Buildable Lands Analysis calculated that there
25 were 364 acres of currently developed residential lands.
- 26 12. Eighty-eight acres of commercial land is already developed and there are 105 acres
27 of "public/institutional/golf uses".
- 28 13. The total available vacant acreage in the Freeland NMUGA is 504 acres.
29
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- 1 14. The record reflects that the County uses a deduction for rights of way (18%), public
2 purpose uses (16%), and market factor (20%).
- 3 15. The reasonableness of those deductions were not challenged in this appeal.
- 4 16. Applying those reductions, results in 231 net available vacant acres.
- 5 17. The County's Critical Areas Ordinance provides that the County will review
6 development proposals on lots that contain or are affected by a critical area or critical
7 area buffer using criteria that require avoidance of the critical area or buffer, reduction
8 in scale of the project, restoration, and compensation/mitigation.
- 9
- 10 18. The Houseworth and Sharpe parcels are only two of many parcels shown in the
11 FSAP as proposed for Low Density zoning.
- 12 19. Petitioner did not challenge the proposed zoning of the FSAP in his Petition for
13 Review.
- 14 20. The Houseworth and Sharpe parcels meet the statutory definition of "characterized
15 by urban growth" based upon their proximity to urban growth.
- 16
- 17 21. The Houseworth parcel is adjacent to the library, medical and other professional
18 services. It shares its borders with commercial and high density development as well
19 as an assisted living complex. It is in walking distance from the post office, banks,
20 restaurants and grocery store.
- 21 22. The Sharpe parcel adjoins existing development on the West, and adjoins the
22 Houseworth parcel on the South.
- 23
- 24 23. The Wildwood Park and Harbor Hill areas from the Freeland NUGA are contiguous to
25 the NMUGA and are characterized by small parcel sizes (0.77 acres/parcel in the
26 case of Harbor Hill, and 0.34 acres/parcel in the case of Wildwood Park).
- 27 24. The County included the Harbor Hill and Wildwood Park areas in the Freeland area
28 RAID (for Rural Areas of Intense Development, now referred to as a LAMIRD) in
29 2000.
- 30
- 31
- 32

- 1 25. In the Board's March 22, 2000 Compliance Order Re: Clinton and Freeland, the
2 Board found the inclusion of all land south of Highway 525 (which includes the
3 Wildwood Park and Harbor Hill areas) not in compliance with the GMA.
4 26. County Ordinance C-50-00 eliminated from the Freeland RAID all the areas found to
5 be noncompliant in the March 22, 2000, compliance order and the Board therefore
6 found that the Freeland RAID boundaries, as modified, comply with the Act.
7 27. Page 75 of the FSAP includes data from 1998, which is prior to the adopted Land
8 Use plan.
9 28. Page 75 of the FSAP, where the transportation LOS standards are found, is a
10 portion of the transportation element of the plan but that portion has not yet been
11 adopted.
12 29. The FSAP map of aquifer recharge area shows that almost all of the NMUGA is in
13 either a high or medium aquifer recharge area. Petitioner has not demonstrated any
14 factual basis as to why these particular parcels differ from others in the NMUGA in
15 their effect on the aquifer.
16 30. The County has adopted critical area regulations that address development in aquifer
17 recharge areas and on steep slopes.
18 31. The challenged ordinances do not adopt the capital facilities element of the plan.
19 32. The land use chapter was adopted prior to the other required chapters of the FSAP.
20 33. Any Finding of Fact later determined to be a Conclusion of Law is adopted as such.
21
22
23

24 VII. CONCLUSIONS OF LAW

- 25 A. The Board has jurisdiction over the parties to this action.
26 B. The Board has jurisdiction over the subject matter of this action
27 C. Except as already addressed in a prior Board order amending or dismissing certain
28 issues, Petitioner has standing to raise the issues in this case.
29 D. Petitioners have not demonstrated that, based on the OFM population forecast, and
30 an assumed 2.34 person per household occupancy rate, that the NMUGA was clearly
31
32

1 oversized. Petitioner has failed to demonstrate that the County's inclusion of parcels
2 R22911-230-1750 and R22911-165-1720 violated RCW 36.70A.110, RCW
3 36.70A.020(1) or (2).

4 E. Petitioner had not demonstrated that the County has failed to comply with the
5 requirements of RCW 36.70A.110(1) and (3) because the Freeland Hill area is not
6 characterized by urban growth. The Freeland Hill area, while currently undeveloped,
7 is characterized by urban growth based upon its relationship to an area with urban
8 growth on it.

9 F. The Houseworth and Sharpe parcels qualify for inclusion within an NMUGA.

10 G. Because the County has not yet adopted the transportation element of the FSAP, a
11 challenge to the transportation LOS standards is not ripe for review.

12 H. RCW 36.70A.070(1) does not prohibit the inclusion of properties that overly an
13 aquifer or that contain steep slopes within an NMUGA.

14 I. Petitioner has not demonstrated that it was clearly erroneous and a violation of RCW
15 36.70A.070(1) for the County to have included parcels R22911-230-1750 and
16 R22911-165-1720 in the NMUGA.

17 J. The County has not yet adopted the capital facilities element of the Freeland FSAP;
18 therefore it is premature to challenge aspects of financing capital improvements
19 under that plan element.

20 K. Petitioner has not demonstrated that the challenged portions of the Freeland NMUGA
21 are not compliant with the GMA, so there is no basis for a determination of invalidity.

22 L. Any Conclusion of Law later determined to be a Finding of Fact is adopted as such.

23 VIII. ORDER

24 Based on the foregoing, the Board finds Petitioner has not demonstrated that the
25 challenged portions of Ordinance Nos. C-129-07 and C-12-08 are not in compliance with
26 the GMA.

1 DATED this 29th day of September, 2008.
2
3

4 _____
5 James McNamara, Board Member
6

7 _____
8 William Roehl, Board Member
9

10 _____
11 Holly Gadbaw, Board Member
12

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

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

23 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
24 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
25 judicial review may be instituted by filing a petition in superior court according to the
26 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
27 Enforcement. The petition for judicial review of this Order shall be filed with the
28 appropriate court and served on the Board, the Office of the Attorney General, and all
29 parties within thirty days after service of the final order, as provided in RCW
30 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
31 but service on the Board means actual receipt of the document at the Board office
32 within thirty days after service of the final order.

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