CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

WINDSONG NEIGHBORHOOD ASSOCIATION,	)	**Case No. 03-3-0007**
Petitioners,	)	***(Windsong)***
v.	)	
SNOHOMISH COUNTY,	)	**FINAL DECISION and ORDER**
Respondent.	)	

I. PROCEDURAL BACKGROUND

A. GENERAL

On, February 26, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Windsong Neighborhood Association (**Petitioner** or **Windsong**). The matter was assigned Case No. 03-3-0007. The PFR challenged Snohomish County's adoption of Ordinance Nos. 03-001 and 03-002 for noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**).

On March 18, 2003, the Windsong PFR was consolidated with several other PFRs also challenging Snohomish County's adoption of the same ordinances. The consolidated case was captioned *Hensley VI v. Snohomish County*, CPSGMHB Case No. 03-3-0009c. *See Hensley VI*, Order of Consolidation, Notice of Hearing and Order Granting Motions to Intervene, (Mar. 18, 2003); and Second Order of Consolidation Order Granting Motions to Intervene and Notice of Hearing, (Apr. 3, 2003).[1]

On March 31, 2003 the Board conducted the prehearing conference and the prehearing order was issued on April 3, 2003.[2]

[1] This Second Order is also the Prehearing Order which set forth the Final Schedule and Legal Issues for the consolidated case. Windsong's Legal Issues were set forth at 5-6 of this Order.

[2] The PHO is for the *Hensley VI* case, and is entitled, "Second Order of Consolidation, Notice of Hearing and Order Granting Intervention."

During the last week of May, the Board was contacted telephonically by Windsong and the County inquiring about a whether settlement extension would allow the unconsolidation of the Windsong PFR from the remainder of the case. The Board indicated that if a request for settlement extension was received, and granted, separation of the Windsong PFR from the consolidated case could occur.

On June 10, 2003, the Board received "Stipulation and [Proposed] Order of Postponement (Windsong Neighborhood Association)."

On June 12, 2003, the Board issued an "Order Unconsolidating the Windsong Petition for Review (PFR 03-3-0007) from CPSGMHB Case No. 03-3-0009c (*Hensley VI*) and Granting Settlement Extensions."

On September 22, 2003 the Board received a "Stipulation for Second Settlement Extension and [Proposed] Order Granting Settlement Extension."

On September 23, 2003, the Board issued its "Order Granting Second Settlement Extension." This Order extended the deadlines for filing briefs and hearings.

Subsequently, the settlement negotiations failed to resolve the dispute, and the case proceeded per the schedule set forth in the second settlement extension Order.

B. MOTIONS TO SUPPLEMENT THE RECORD

On March 31, 2003, the Board received "Snohomish County Index to the Record."

On April 21, 2003, the Board received Windsong's "Motion to Supplement the Record and Memorandum in Support," with eight proposed exhibits attached.

On April 28, 2003, the Board received "Snohomish County's Response to Motions to Supplement the Record."

On May 5, 2003, the Board received "Reply Re: Windsong's Motion to Supplement the Record."

On May 19, 2003, the Board issued its "Order on Motions." The Order **admitted** the eight proposed Windsong exhibits as supplemental exhibits.[3]

C. DISPOSITIVE MOTIONS

On April 18, 2003, the Board received "Snohomish County's Motion to Dismiss."

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[3] *See Hensley VI v. Snohomish County*, CPSGMHB Case No. 03-3-0009c, Order on Motions, (May 19, 2003), at 8-9.

On April 28, 2003, the Board received "Petitioner Windsong Neighborhood Association's Response to Snohomish County's Motion to Dismiss."

On May 6, 2003, the Board received "Snohomish County's Reply Memorandum."

The Board did not hold a hearing on the dispositive motions.

On May 19, 2003, the Board issued its "Order on Motions."[4] The Order **granted** the County's motion to dismiss all Petitioners SEPA claims for lack of SEPA standing. Those portions of Windsong's Legal Issues 4 and 5 that assert noncompliance with SEPA were **dismissed**.

D. BRIEFING AND HEARING ON THE MERITS

On November 17, 2003, pursuant to the revised schedule in the Second Settlement Extension, the Board received "Petitioner Windsong Neighborhood Association Prehearing Brief"(**Windsong PHB**), with 11 attached exhibits.

On December 22, 2003, the Board received "Snohomish County's Response Brief," (**County Response**), with 22 attached exhibits.

On January 5, 2004, the Board received "Petitioner Windsong Neighborhood Association's Reply brief" (**Windsong Reply**), with 3 attached exhibits.

On January 8, 2003, the Board held a hearing on the merits in Suite 2295 at the Board's office, 900 4th Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, and Bruce C. Laing were present for the Board. Board Member Joseph W. Tovar was excused due to illness. Petitioner Windsong was represented by Tom Ehrlichman. Respondent Snohomish County was represented by Andrew S. Lane. Also in attendance were Steve Skoney, Gary Swartz, Don Logsdon, Greg Robertson, Ray Eberth and Dennis Derickson. Court reporting services were provided by Scott Kindle of Mills Lessard Inc. The hearing convened at 10:20 a.m. and adjourned at approximately - 12:00 p.m.

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF REVIEW

Petitioner challenges Snohomish County's adoption of Ordinance Nos. 03-001 and 03-002, amending the County's GMA Plan and implementing regulations. Pursuant to RCW 36.70A.320(1), these Snohomish County Ordinances are presumed valid upon adoption.

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[4] *See Hensley VI v. Snohomish County*, CPSGMHB Case No. 03-3-0009c, Order on Motions, (May 19, 2003), at 14-15, and 18-19.

The burden is on Petitioner, Windsong, to demonstrate that the actions taken by Snohomish County are not in compliance with the requirements of the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board "shall find compliance unless it determines that the action taken by [the 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 the Board to find the County's actions clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

Pursuant to RCW 36.70A.3201 the Board will grant deference to the County in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. As the State Supreme Court has stated, "Local discretion is bounded . . . by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearing Board* (***King County***), 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). Division II of the Court of Appeals further clarified, "Consistent with *King County*, and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent with the requirements and goals of the GMA." *Cooper Point Association v. Thurston County*, 108 Wn. App. 429, 31 P.3d 28 (2001).

In affirming the *Cooper Point* court, the Supreme Court stated:

> Although we review questions of law *de novo*, we give substantial weight to the Board's interpretation of the statute it administers. *See Redmond*, 136 Wn.2d at 46. Indeed "[I]t is well settled that deference [to the Board] is appropriate where an administrative agency's construction of statutes is within the agency's field of expertise . . .

Thurston County v. Western Washington Growth Management Hearing Board, Docket No. 71746-0, November 21, 2002, at 7.

III. BOARD JURISDICTION, ABANDONED ISSUES, PRELIMINARY ITEMS AND PREFATORY NOTE

A. BOARD JURISDICTION

The Board finds that the Windsong's PFR was timely filed, pursuant to RCW 36.70A.290(2); Windsong has standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged ordinances, which amend the County's GMA Comprehensive Plan and development regulations, pursuant to RCW 36.70A.280(1)(a).

B. ABANDONED ISSUES

The Board's Rules of Practice and Procedure provide:

> A petitioner . . . shall submit a brief on each legal issue it expects a board to determine. *Failure by such a party to brief an issue shall constitute abandonment of the unbriefed issues*. Briefs shall enumerate and set for the legal issue(s) as specified in the prehearing order if one has been entered.

WAC 242-02-570(1), (emphasis supplied). Additionally, the Board's 4/3/03 PHO in this matter states, "Legal issues, or portions of legal issues, *not briefed in the Prehearing Brief* will be deemed to have been abandoned and cannot be resurrected in Reply Briefs or in oral argument at the Hearing on the Merits." PHO, at 8-9,[5] (emphasis supplied).

Petitioner states, "Each of Windsong's specific issues are addressed in the same order as stated in the Board's prehearing order (footnote omitted). Windsong will not be briefing arguments concerning Goal 10 or Chapter 43.21C RCW (SEPA) based upon the Board's order dismissing the SEPA claims." Windsong PHB, at 10.

Legal Issue 4[6] involved a notice and public participation claim in the context of SEPA, and Legal Issue 5[7] requested invalidity in the GMA and SEPA context. Review of the Windsong PHB indicates that Petitioner briefed the first 3 Legal Issues (1 = Public Participation, 2 = Consistency and 3 = Capital Facilities) and requested invalidity. Consequently, since Windsong only addressed 3 Legal Issues, the Board deems Legal Issues 4 and 5 **abandoned**. The Board addresses the request for invalidity in a separate section of this Order.

The Board notes that in Legal Issue 2, Petitioner referred to CPPs UG-4, TR-4(a) and (e) and CPP OD-2(b),[8] but provided no explanation as to what these CPPs require; nor did

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[5] *See* footnote 2, *supra*, for the full citation to the PHO.

[6] Legal Issue 4, as stated in the PHO, provides:

> Did the County fail to comply with RCW 36.70A.020(10), .035, and .140 and the procedural and substantive requirements of SEPA? [Intended to cover issues from PFR at 2-4]

[7] Legal Issue 5, as stated in the PHO, provides:

> Did Snohomish County's comprehensive plan and zoning redesignation of the property at issue in the Eberth/Fjarlie Docket application and/or the County's violation of the procedural and/or substantive requirements of SEPA substantially interfere with the goals of the Growth Management Act, specifically RCW 36.70A.020(1), (10), (11) and/or (12), thus supporting a determination of invalidity under RCW 36.70A.302?

[8] *See* Windsong PHB, at 12 and 13.

Petitioner provide any argument as to why the County's action was inconsistent with these CPPs. Windsong PHB, at 1-15. Therefore, these portions of Legal Issue 2 are **abandoned**. The Board also notes that Petitioner did not brief compliance with RCW 36.70A.020(1) or .070(6), in Legal Issue 3. Windsong PHB, at 1-15. Consequently, this portion of Legal Issue 3 is **abandoned**.

C. PRELIMINARY MATTERS

In the Windsong PHB, Petitioner asked the Board to take official notice of land use and zoning maps for Pacific Centers, attached to Ordinance Nos. 03-102 and 03-103, adopted by the County on September 10, 2003. Windsong PHB, at 7; Windsong Reply, at 2. Additionally, the County asked the Board to take official notice of the City of Seattle's Comprehensive Plan, including neighborhood plans, and Snohomish County's Mill Creek East UGA Plan. County Response, at 10 and 11. At the HOM, after hearing argument, the Board orally **granted** the requests of Windsong and the County. These four items are issued exhibit numbers, as shown below.

Proposed Exhibit: Documents	**Ruling**
Windsong Items:	
1. Ordinance No. 03-102, Attachment A – land use map.	***Board takes notice* –** HOM Ex No. 1
2. Ordinance No. 03-103, Attachments A & B – rezone map.	***Board takes notice* –** HOM Ex No. 2
Snohomish County Items:	
1. City of Seattle Comprehensive Plan, Attachment "C" to County Response.	***Board takes notice* –** HOM Ex No. 3
2. Mill Creek East UGA Plan, Attachment "D" to County Response, including maps.	***Board takes notice* –** HOM Ex No. 4

D. PREFATORY NOTE

The challenged action in this case involves two of six acres of land at the northeast intersection of 132nd St. SE and Seattle Hill Road within the SW UGA area of Snohomish County. Ordinance No. 03-001 amends the County's GMA Future Land Use Map (FLUM) to redesignate these six acres of land from Urban Low Density Residential (4-6 DU/Acre) to Urban Medium Density Residential (four acres) and Urban Commercial (two acres). Petitioners challenge the two acres designated Urban Commercial. Ordinance No. 03-002 implements this FLUM amendment by rezoning two acres from R-9,600 to Neighborhood Business and rezoning the remaining four acres from R-9,600 to Low Density Multiple Residential. Again, the Petitioners challenge is focused on the two acres rezoned to Neighborhood Business. The crux of Windsong's challenge is that the County failed to follow its own plan policies and provisions, as well as the GMA, in making these changes.

This Order first addresses the consistency and implementation issue (Legal Issue 2), then the notice and public participation issue (Legal Issue 1), and finally, the capital facilities issue (Legal Issue 3).

IV. LEGAL ISSUES AND DISCUSSION

A. LEGAL ISSUE NO. 2 – [Consistency and Implementation]

The Board's PHO set forth Legal Issue No. 2

> 2. *Does the Eberth/Fjarlie proposal violate RCW 36.70A.040, .070 (preamble), .130(1), ~~and .210~~,[9] because:*
>
> - *The commercial designation of the property is not consistent with the Snohomish County General Policy Plan (GPP, comprehensive plan), including without limitation GPP Policy LU 3.A.2(b), setting a three-acre threshold for neighborhood centers?*
>
> - *The County's approval of the Eberth/Fjarlie proposal was not part of "more detailed land use, transportation, parks, open space, and capital facilities plans to ensure the creation of viable neighborhood areas" in conflict with GPP Goal LU 3, Objective LU 3.A, Policies LU 3.A.1 and 3.A.2, ~~and Countywide Planning Policies UG-4 and OD-2(b)~~?[10]*
>
> - *The proposal does not "ensure that new development within UGAs is provided with adequate infrastructure and services, including sanitary sewers and stormwater control," in conflict with GPP LU Policy 2.C.3, ~~and Countywide Planning Policies TR-4(a), (e), OD-2(b)~~?[11]*

Applicable Law

RCW 36.70A.040(3)(d) provides, in relevant part:

> [T]he county and each city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan. . . .

RCW 36.70A.070(preamble) provides, in relevant part:

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[9] The ~~strike through~~ portion of this issue has been abandoned.

[10] The ~~strike through~~ portion of this issue has been abandoned.

[11] The ~~strike through~~ portion of this issue has been abandoned.

> The plan shall be an internally consistent document and all elements shall be consistent with and shall be consistent with the future land use map.

RCW 36.70A.130(1)(b) provides, in relevant part:

> Any amendment of or revision to a comprehensive land use plan shall conform to this chapter. Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

The relevant Snohomish County General Policy Plan (**GPP**) provisions provide as follows:

> Goal LU 3 – Encourage land use patterns that create connected identifiable neighborhoods in UGAs
>
> Objective LU 3.A – Revitalize or create identifiable, pedestrian-oriented neighborhood areas with focal points, mixed-use centers, and employment areas that are linked with each other.
>
> LU Policy 3.A.1 – More detailed UGA plans shall be developed following the adoption of the General Policy Plan identifying neighborhoods with the following planned characteristics:
>
> a. areas encompassing 200 to 500 acres and a population of 4,000 to 8,000 people;
> b. varied densities and character;
> c. a mix of housing types and architecturally compatible styles yielding an average of at least 6 dwelling units per acre; and
> d. focal points such as parks, meeting halls, churches, libraries, fire stations, schools, and other uses within one quarter mile of neighborhood residents.
>
> LU Policy 3.A.2 – More detailed UGA plans shall be developed identifying Neighborhood Commercial Centers with the following planned characteristics:
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> a. a variety of small-scale commercial uses, public buildings, and mixed-use development within one-half mile or a fifteen minute walking distance for the majority of neighborhood residents;
> b. approximately 3 acres in size; and
> c. served by public transportation.
>
> LU Policy 2.C.3 – Ensure that new development within UGAs is provided with adequate infrastructure and services, including sanitary sewers and stormwater control, except for the provisions of Policy UT 3.B.2 and implementation measure UT 3.C.

Supp. Ex. 15; GPP, at LU-11, 13 and 14.

Discussion

Position of the parties:

Windsong argues that the FLUM amendment and rezoning are in direct conflict with the County's existing Plan policies requiring subarea and neighborhood planning [referring to LU 3.A.2]. Windsong PHB, at 11. Petitioner asserts that LU 3.A.2 requires "a planning process to identify neighborhood commercial centers, of approximately 3 acres in size, as part of a more detailed UGA plan." *Id*., at 12. Windsong continues that only a 2-acre portion of the amendment area was designated as Neighborhood Commercial, thereby violating the minimum size requirement set forth by this Plan policy. *Id*.

Additionally, Windsong contends that since more detailed planning was not done, the County failed to do a more "considered analysis of infrastructure needs for small commercial centers, including analysis of stormwater capital facilities needs." Thereby violating the provisions of LU 2.C.3. *Id*.

Also Windsong asserts that the amendments contained in Ordinance Nos. 03-001 and 03-002 "did not involve the preparation of a more detailed UGA plan [referring primarily to Policy LU 3.A.2]. . . Instead, the County's action approved a strip commercial center, and then the following year approved another across the street." *Id*.

The County counters that Windsong misunderstands the County's Plan Policies, arguing that "Each of Petitioner's three consistency issues presumes that a UGA plan must be prepared before any property is zoned Neighborhood Business. Although the County's comprehensive plan promotes subarea planning in certain conditions, a UGA plan is not a prerequisite for all Neighborhood Business zoning and a UGA plan is not required for the Eberth/Fjarlie proposal." County Response, at 6. The County argues that Plan Policy LU 3.A.1 explains when a UGA plan should be prepared and what the UGA plan should address. If a UGA plan is required by LU 3.A.1, then, the County asserts, policies LU 3.A.2 through LU 3.A.7 identify what is to be addressed in that plan. *Id*., at 6-7.

The County contends that, to date, and pursuant to LU 3.A.1, the County has identified three areas within the unincorporated UGA that are appropriate for UGA plans. These areas include the areas surrounding the cities of: Lake Stevens, Snohomish and Mill Creek. The properties at issue in this case, are nearest the Mill Creek UGA plan area. *Id*, at 10-11. The County continues:

> The Mill Creek East UGA Plan states: "One of the County's objectives [in preparing the UGA plan] is to work with the City of Mill Creek to develop a plan that is compatible with the City's future vision to facilitate eventual annexation of portions of the area into the City." (Footnote omitted) The City of Mill Creek and Snohomish County jointly planned the boundaries of the Mill Creek UGA plan. Petitioner's neighborhood and the Eberth/Farlie properties were not included within the boundary and no

> UGA plan includes this area, and [Windsong] presents no argument that these properties possess the characteristics contained in LU 3.A.1 that would suggest the need for developing a UGA plan.

Id., at 11. Consequently, since the area in question is not within a UGA plan area, by not meeting the provisions of LU 3.A.1, the remaining Plan policies [LU 3.A.2 through LU 3.A.7] do not apply to the subject property. *Id.*, at 7-9. The County explains:

> In other words, when a UGA plan is required and areas within the UGA plan are appropriate for Neighborhood Commercial Centers, those centers will be identified in the UGA plan. That is not the case here. Not only is a UGA plan not required for the Eberth/Fjarlie properties, it is not an identified Neighborhood Commercial Center. Merely designating properties Urban Commercial and zoning them Neighborhood Business does not create a Neighborhood Commercial Center. LU 3.A.2 simply does not apply to the Eberth/Fjarlie properties.

Id., at 8.

The County notes that although Policy LU 3.A.2 does not strictly apply to the Eberth/Fjarlie property, the Planning staff considered it in making its recommendation and concluded that it was consistent with this policy and LU 2.B.4 which provides "New strip commercial development shall be discouraged." *Id*., at 8-9.

Regarding Policy LU 2.C.3, the County contends that within the Mill Creek East UGA Plan the County adopted a growth phasing overlay which is suggested by Policy LU 2.C.1;[12] and existing development regulations accomplish the requirements of Policy LU 2.C.3. County Response, at 12.

In reply Windsong acknowledges, "[T]he county has discretion to determine the boundaries of each planning area," and "[T]he County does have discretion to conduct its planning at the *pace* it desires. . ." Windsong Reply, at 9. However, Petitioner asserts the County "does not have discretion to opt out of this universal requirement for UGA neighborhood planning in developing areas." [Petitioner interprets the LU 3.A. Policies to require more detailed planning throughout the entire unincorporated UGA.] *Id*. Further, Windsong contends that absent this more detailed planning the County cannot approve commercial development in the unincorporated UGA. *Id*.

Petitioners also lament the alleged change in County policy (apparently not to do more detailed study for the entire unincorporated UGA), since the County declined to consider the change to commercial Plan and zoning designations for this area because of the need

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[12] Policy LU 2.C.1 provides: "Where needed, growth phasing areas shall be identified within UGA plan to encourage compact urban development and efficient, adequate service provision." County Response, at 12; *citing* GPP, at LU-11.

for more detailed planning, prior to the adoption of the challenged Ordinances. To support this assertion, Petitioner cites to staff reports accompanying a proposed change, on the same property, in 2001 and 2002 (Supp. Exs. 29 and 64(e)). Windsong Reply, at 11-14.

Board discussion:

It is undisputed that the two commercial acres at issue in this case are in an unincorporated area of the County designated as being within a UGA. Further, Petitioner does not assert that any provision of the GMA *requires* more detailed subarea planning within an unincorporated UGA. Any such assertion would be in error since RCW 36.70A.080(2) *allows* subarea planning as an option, so long as the subarea plan is consistent with the comprehensive plan. If there is no "subarea" planning, the provisions of the County's GPP and implementing regulations apply and govern development throughout the County.

Instead of identifying an explicit UGA requirement of the GMA, Windsong's case relies upon on of the consistent implementation requirements of the GMA, and cites to the adopted Snohomish County Comprehensive Plan as the basis for its challenge. Consequently, the threshold question for the Board on this issue is whether additional detailed UGA planning is required (for the area in question) prior to any change in Plan designation or rezoning that permits commercial development. The key to answering this question is Policy LU 3.A.1.

LU 3.A.1 states: "More detailed UGA plans shall be developed following the adoption of the General Policy Plan identifying neighborhoods with the following planned characteristics. . ." On its face, this policy commits the County to conduct more detailed planning within the unincorporated UGA. However, as Petitioner acknowledges, this policy reserves discretion to the County in deciding the timing of *when*, and the boundaries of *where*, such planning should occur. The Policy indicates that more detailed UGA planning is to occur *only after* adoption of the GPP, or amendments thereto, *that identified neighborhoods appropriate for such planning.* Petitioner fails to show that the Fjarlie/Eberth properties have been identified in the County's GPP as a part of a neighborhood that requires such planning.

The County notes that it adopted its GPP in 1995, and then asserts that since that time it has amended the GPP on three occasions to carry out the more detailed planning required by this policy. This more detailed UGA planning has been done in conjunction with the cities of Mill Creek, Snoqualmie and Lake Stevens. The County then asserts that the Fjarlie/Eberth properties were not, and are not, identified as being within the boundaries of the Mill Creek East UGA Plan;[13] and are therefore not subject to the more detailed planning requirements of Policies LU 3.A.1 through 3.A.7. The Board agrees.

[13] The Board notes that UGA planning for the Mill Creek area has been ongoing since the mid-1990's; and that the "boundaries" of the original UGA plan area were extended at least once to include more area - the

Until such time as the County exercises its discretion and identifies an area as a neighborhood meeting the criteria of LU 3.A.1, and amends its GPP to indicate the area is within a specific UGA Plan area, more detailed UGA planning is not required by the County's Planning Policies. Further, this policy *does not prohibit* the County from approving commercial development in the unincorporated UGA until more detailed UGA planning is done – so long as such change is consistent with, and implements the GPP.

Petitioner cites to staff reports in 2001[14] and 2002[15] that recommended rejection of the change to the Fjarlie/Eberth properties during the annual review cycle; however, inconsistency with Policy LU 3.A.1 is not indicated as a basis for rejection, as Petitioner implies.

Likewise, Petitioner's argument that this amended designation and rezone does not comply with, nor implement, Policy LU 2.C.3 is misplaced. This Policy is directed at *new development* within the UGA. As the County properly notes, any new development must comply with the County's development regulations, including those governing infrastructure and services.

Petitioner has simply failed to meet the burden of proof in demonstrating that the County's action was inconsistent with, and did not implement its plan. Petitioner's challenge on this issue is **dismissed with prejudice**.

Conclusions

Petitioner has failed to carry the burden of proof in demonstrating that the County's action regarding the two acre commercial redesignation and rezone was inconsistent with, and did not implement its plan. Petitioner's challenge on this issue is **dismissed with prejudice.**

B. LEGAL ISSUE NO. 1 – [Notice and Public Participation]

The Board's PHO set forth Legal Issue No. 1

1. *Did Snohomish County violate RCW 36.70A.020(11), .035, and .140 by failing to provide adequate notice and early and continuous public participation to neighbors of the Eberth/Fjarlie proposal?*

Mill Creek East UGA Plan, which was adopted by Ordinance No. 02-011, in May of 2002. *See* HOM Ex. 4. The Fjarlie/Eberth properties lie just beyond the eastern boundary of this UGA Plan. *Id*.

[14] Ex. 29, 2001 Docket – Staff Recommendation: Initial Review of Docketing Proposals.

[15] Ex. 64(e), 2002 Docket – Staff Recommendation: Initial Review of Docketing Proposals.

Discussion

The challenged action brought to the Board involves the County's adoption of Ordinance Nos. 03-001 and 03-002. It is undisputed that the County provided adequate notice and conducted public hearings on the proposed ordinances. It is also undisputed that Windsong participated in the public process leading to the adoption of the challenged ordinances.

However, the nub of Windsong's concern on this issue is that, although the County provided notice and public participation regarding these ordinances, it was required to follow the planning process set forth in LU Policy 3.A.2. Windsong PHB, at 10; Windsong Reply, at 10. The County asserts that additional public process is not required since Policy LU 3.A.2 does not apply. County Response, at 4. Therefore, the resolution of this issue is contingent upon the Board's decision regarding the applicability of LU Policy 3.A.1 to the challenged action.

As determined by the Board in Legal Issue 2, discussed *supra*, the County was not compelled or required by its Plan, specifically LU Policy 3.A.1, to undertake more detailed "UGA" planning for this area. Consequently, the public process anticipated by the County's Plan Policy for UGA plans does not apply. Therefore, the Board concludes that the County's notice and public participation process for the adoption or Ordinance Nos. 03-001 and 03-002 comply with the notice and public participation requirements of the Act; and since no further public participation was required, Legal Issue 1 is **dismissed with prejudice**.

Conclusion

The County's notice and public participation procedures for the adoption of Ordinance Nos. 03-001 and 03-002, pertaining to the Eberth/Fjarlie proposal, complied with the requirements of RCW 36.70A.020(11), .035 and .140; no further public participation was required. Windsong's challenge on Legal Issue 1 is **dismissed with prejudice**.

C. LEGAL ISSUE NO. 3 – [Capital Facilities]

The Board's PHO set forth Legal Issue No. 3

> 3. *Did Snohomish County's approval of the Eberth/Fjarlie proposal, in its entirety, violate RCW 36.70A.~~020(1)~~,[16] .020(12), .070(3), ~~and .070(6),~~[17] because the GPP capital facilities plan element was not updated to adequately plan for the new land use designations?*

[16] The ~~strike through~~ portion of this issue is abandoned.

[17] The ~~strike through~~ portion of this issue is abandoned.

Applicable Law

RCW 36.70A.020 contains the Goals of the GMA. The relevant Goal involved in this Legal Issue is:

> (12) 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 levels of services below locally established minimum standards.

RCW 36.70A.070(3) sets forth the required components of the capital facilities element of the comprehensive plan. No particular provision is referenced by Petitioner.

Discussion

Windsong's brief argument on this issue also assumes more detailed planning is required by the County's GPP. Windsong PHB, at 13. The Board has concluded, *supra*, that this assumption is in error.

However, Petitioner does call upon a "Drainage Needs Report"[18] as evidence that "the County had significant infrastructure deficiencies that should have been analyzed as part of a site-selection process for neighborhood commercial centers along 132nd St. SE." *Id*. Windsong also references letters to the County Council noting "significant infrastructure needs at Seattle Hill Road" that support the notion that a "more deliberative area-based process, to ensure adequate capital facilities [was required]" *Id*., at 14.

In response, the County asserts that,

> [The County's] adopted minimum level of service for drainage is established in the County's drainage code, (citation omitted). In other words, if a development satisfies the drainage code requirements, then drainage will be adequate at the time development is available for occupancy or use without decreasing current levels of service below the County's established minimum standard. [Therefore, the County contends its action is guided by, and complies with Goal 12.]

County Response, at 15.

The County also argues that Petitioner offered no discernable argument relating to the County's compliance with RCW 36.70A.070(3). The County goes on to note that its capital facility plan contains all the required components of RCW 36.70A.070(3), and

[18] Attached to the Windsong PHB is "Marshland Tributaries and Sunnyside Creek Drainage Needs Report" prepared by the Public Works Surface Water Management Division of the County, dated December 2002. No exhibit number is referenced. [Perhaps Supp. Ex. 31?]

Petitioner has failed to show otherwise. Finally, the County states, "The fact that the County has identified drainage needs in the vicinity of the Fjarlie/Eberth properties does not equate to a violation of the requirements of [RCW 36.70A.070(3)]. *Id*., at 16.

The Board agrees with the County. Petitioner has failed to demonstrate how the County's action was not guided by, and does not comply with Goal 12. The County's drainage code, among other development regulations not at issue here, is intended to implement RCW 36.70A.020(12), and Petitioner has failed to show otherwise. Likewise, Petitioner has not demonstrated noncompliance with the capital facility planning provisions of RCW 36.70A.070(3). Again, Petitioner has failed to meet the burden of proof and this issue is **dismissed with prejudice**.

Conclusion

Petitioner has failed to meet the burden of proof and this issue is **dismissed with prejudice**.

V. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

- Petitioner has **failed to carry the burden of proof** in demonstrating that the County's action regarding the two acre commercial redesignation and rezone did not comply with the goals and requirements of the GMA or that the action was inconsistent with, and did not implement the County's Comprehensive Plan. Therefore, Petitioner's challenge, as contained in CPSGMHB Case No. 03-3-0007, is **dismissed with prejudice**.

- The *Windsong Neighborhood Association v. Snohomish County* case is **closed**.

So ORDERED this 5th day of February 2004.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

Joseph W. Tovar, AICP[19]
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

[19] Board Member Tovar read and reviewed the briefing and exhibits submitted by the parties and participated it the Board's discussion and deliberations.