

35267-2-IT
NO. 78224-3

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

KITSAP COUNTY,

Appellant,

vs.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS
BOARD, et al.,

Respondents.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR THURSTON COUNTY

APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

This case involves the state Growth Management Act (GMA), Chapter 36.70A RCW. Kitsap County has appealed portions of two Central Puget Sound Growth Hearings Board (CPSGMHB or Hearings Board) decisions, and seeks this Court's reversal of the Thurston County Superior Court decision granting an appeal brought by Respondents Futurewise, et al.¹ Appellant Kitsap County submits this brief in reply to Futurewise's Opening Brief.

II. FACTS

While most of the facts in this case are undisputed, some have been mischaracterized by the Respondents and thus require additional clarification. Respondents claim that the County's Buildable Lands Report (BLR), which covered development during the years 1995 through 1999, identified "significant inconsistencies." The only inconsistency noted by the CPSGMHB was the fact that more building permits were issued for rural lots than urban lots. AR Tab 75 at 54-55.² The Hearing's

¹ *Kitsap County v. CPSGMHB*, Thurston County Superior Court Cause Nos. 04-2-02138-3, 05-2-01564-8, 05-2-01678-4; *Bremerton et al. v. Kitsap County*, CPSGMHB No. 04-3-0009c, Final Decision & Order (FDO) (8/9/2004) (*Bremerton II*), AR Tab 75, and *1000 Friends of Washington v. Kitsap County*, CPSGMHB No. 04-3-0031c, Final Decision & Order (6/28/2005) (*1000 Friends*) Friends AR Tab 46

² There are two administrative records (AR) in this consolidated case. Citations to the administrative record in *Bremerton II* are designated as "AR Tab 75", citations to the administrative record in *1000 Friends* are designated as "Friends AR Tab 1".

Board did not conclude the BLR demonstrated that urban densities were too low. In fact, the County's BLR showed the overall urban densities to be just below 4 dwelling units per acre (dua). Four dua was the "bright line" that the CPSGMHB set for minimum urban densities, later rejected by this court in *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 129, 118 P.3d. 322 (2005). Kitsap County contends that Hearings Board's conclusion that there was an "inconsistency" involving the rural areas is not a factor the statute requires the County to address under RCW 36.70A.215(4).

Respondents also mischaracterize the action Kitsap County took in adopting Resolution 158-2004.³ Friends AR Tab 1. Upon the Hearings Board's conclusion that an "inconsistency" existed, Kitsap County reviewed various zoning and comprehensive plan measures it had implemented under GMA. The County recognized it had adopted many such measures that would promote increased densities in the urban areas. Although these planning measures were not specifically labeled "reasonable measures," they were, in fact, reasonable measures. The Resolution states:

WHEREAS, since the beginning of the time period reviewed in the Buildable Lands Analysis Report (1995), to date, the County

³ Kitsap County erroneously cited to this Resolution as Resolution 154-1998 in its Opening Brief. We apologize for any confusion this may have created. For the convenience of the Court, a copy of Resolution 158-2004 is attached as Appendix A.

has adopted a number of reasonable measures intended to promote growth and density within UGAs. Kitsap County has promulgated new development regulations and various Sub-Area Plans, as well as major revisions to its Comprehensive Plan, which all include provisions to facilitate directing growth into urban growth areas and therefore serve as reasonable measures as defined under the GMA[.]

* * *

NOW THEREFORE, BE IT RESOLVED that Kitsap County Board of Commissioners:

1. Adopts Attachment A, incorporated herein by this reference, as reasonable measures pursuant to RCW 36.70A.215 . . .

Respondents claim that the measures listed in Resolution 158-2004 did not “implement” or “adopt” reasonable measures. Respondents’ Opening Brief at 19. To the contrary, the Resolution identified those reasonable measures that had been adopted since a completely new comprehensive plan and zoning regulations were adopted in 1998.

III. LEGAL ARGUMENT

A. RESPONDENTS MISCHARACTERIZE THE PROPER STANDARDS OF REVIEW AND DEFERENCE TO THE GROWTH HEARINGS BOARD

In their brief, Respondents mischaracterize the applicable standard of review, as well as Kitsap County’s briefing of the standard of review. Respondents imply that there is only a single standard of review, the

substantial evidence test, by which this Court should review the Growth Board's decision.⁴ This assertion is contrary to the law.

In this administrative law case, the Court reviews the decisions made by an administrative body, the CPSGMHB. As such, the Court's review is governed by the Administrative Procedures Act (APA), Chapter 34.05 RCW. The APA provides several differing standards depending upon the error alleged. RCW 34.05.570(3) provides not one, but *nine* differing standards of review, including whether: (1) there was constitutional error, (2) the order was outside the agency's authority; (3) there were procedural errors; (4) there was an erroneous interpretation or application of the law; (5) the order was supported by substantial evidence; (6) the agency decided all the issues; (7) an adjudicator should have been disqualified; (8) the order was consistent with agency rules; and (9) the order was arbitrary and capricious.

Kitsap County presented seven assignments of error in its opening brief. Four of the errors were based upon the Hearings Board's misinterpretation or application of the law, RCW 34.05.570(3)(d). It is well settled that the Court reviews these assignments of error *de novo*, as

⁴ While Respondents argue that the substantial evidence test is the proper standard of review, they conclude that the Court should apply the clearly erroneous standard. Respondent's Opening Brief at 7. Furthermore, they characterize the clearly erroneous standard with descriptive quotations that are unsupported by any legal citations. The Court should disregard, or at least discount, this argument as it is unsupported.

the Supreme Court is the “final arbiter” of the law. *Manke v. Kitsap County*, 113 Wn. App. 615, 622, 53 P.3d 1011 (2002) *rev. denied* 148 Wn.2d 1017 (2003); *King County v. CPSGMHB*, 142 Wn.2d 543, 555, 14 P.3d 133 (2000) (“On questions of statutory interpretation, the Supreme Court is the final arbiter.”); *Redmond v. CPSGMHB*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (“Concerning conclusions of state law this court is the final arbiter, and conclusions of state law entered by an administrative agency or court below are not binding on this court.”)(*quoting Leschi Improvement Council v. Washington State Highway Comm’n*, 84 Wn.2d 271, 286, 525 P.2d 774, 804 P.2d 1 (1974)).

In two assignments of error, Kitsap County objected to the fact that the CPSGMHB acted outside of its statutory authority. As this, too, is a question of law, the Court reviews it *de novo*. *Redmond*, 136 Wn.2d at 46; *Cingular Wireless, LLC v. Thurston County*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006) (citing *HJS Dev., Inc. v. Pierce County*, 148 Wn.2d 451, 468, 61 P.3d 1141 (2003)).

Only one assignment of error, *i.e.*, that the Superior Court erred in reversing the Hearings Board, involves the substantial evidence standard. If the Court decides that the Hearings Board misinterpreted the law concerning reasonable measures, it need not even reach this issue. Nevertheless, this issue was raised by Respondents in their appeal to

Superior Court. Because it was the Respondents who alleged error by the Hearings Board on this issue, the burden remains on them to demonstrate that there is substantial evidence showing that the Board erred. *King County*, 142 Wn.2d at 553.

Respondents claim that the substantial evidence standard of review is the only standard to be applied in this case, alleging support from *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 123 P.3d 102 (2005).⁵ This argument is not apt. The *Ferry County* case addressed a single issue: Whether Ferry County's adoption of its critical areas ordinance was supported by best available science. In that case, Ferry County brought the appeal, asserting that the Eastern Growth Management Hearings Board decision was not supported by substantial evidence. The Supreme Court granted review "on only 'whether substantial evidence supports the Board's finding that the County did not base its species listing on the best available science.'" *Id.* at 831-32 (emphasis added).

Respondents' argument appears to claim that because the *Ferry County* case only dealt with the substantial evidence standard, any and all judicial

⁵ Respondents also claim that Kitsap County "totally ignored the substantial evidence test." Respondents' Brief at 4. It is bewildering how they can make such an allegation if they read the County's brief. Kitsap County not only discussed this standard under the heading "Standard of Review" (County's Opening Brief at 16-17), it also discussed it in context of the single issue that it pertains to. County's Opening Brief at 41 - 52.

review of a GMA decision applies *only* that standard. Such a proposition is absurd.

In addition to the APA standards of review, the GMA itself provides a presumption of validity to County planning processes. RCW 36.70A.320(1). Before the Growth Hearings Board, it is the appellant's burden (Respondents here) to demonstrate noncompliance with the GMA. RCW 36.70A.320(2). Thus, Respondents should have produced evidence before the Growth Hearings Board to rebut the presumption of validity of the County's actions. *Manke*, 113 Wn. App. at 624-26.

The Court reviews the Board' decision based upon the record that was before the CPSGMHB. *King County*, 142 Wn.2d at 553. Generally, in an APA review, the burden of demonstrating error remains on the party asserting that error. *Id.* However, RCW 34.05.570(1) states that “[e]xcept to the extent that this chapter *or another statute provides otherwise* . . . the burden of demonstrating invalidity of agency action is on the party asserting invalidity.” GMA is another statute providing otherwise under RCW 36.70A.320(1); .3201.⁶

Respondents also dispute the County's arguments that, in GMA cases, the Courts give deference to the County's planning actions, over and

⁶ In addition to the presumption of validity of County actions and the burden of proof on the challengers, the Legislature also has codified a rule providing considerable deference to local governments' planning processes. *See* RCW 36.70A.320; .3201.

above the deference given to the Hearings Board. In so doing, they ignore the *Quadrant* decision, *Quadrant Corp. v. State Growth Management Hearings Board*, 154 Wn.2d 224, 110 P.3d 1132 (2005). Instead, Respondents misplace reliance on a stray quote from *Ferry County* and a dated decision involving the Shoreline Management Act (SMA, Ch. 90.58 RCW), *Hama Hama Co. v. Shorelines Hearings Board*, 85 Wn.2d 441, 448, 536 P.2d 157 (1975). This Court has firmly concluded that deference in GMA cases differs from that in other administrative law cases. *Quadrant*, 154 Wn.2d at 235-38. The Court of Appeals, Division II, recently discussed the differing standards of review in an SMA case versus a GMA case in *Preserve Our Islands v. Shorelines Hearings Board*, ___ Wn. App. ___, 137 P.3d 31, 2006 WL 1669891 (June 19, 2006). In its review of the decision of the Shorelines Hearings Board, the Court of Appeals provided deference to that Board, noting:

This is unlike review under the Growth Management Act (GMA), which requires the Growth Management Hearings Board defer to the decisions and actions of counties and cities under the GMA.

137 P.3d at 38. And again, it is ultimately up to the Courts to make the proper interpretation of a statute:

Although a court will defer to an agency's interpretation when that will help the court achieve a proper understanding of the statute, it is ultimately for the court to determine the purpose and meaning of statutes, even when the court's interpretation is contrary to that of the agency charged with carrying out the law. Here, in our view, the Board misread

the statute and exceeded its authority. If we were to defer to its ruling, we would perpetuate, not correct, its error. Under these circumstances, we hold that deference is not due.

Clark County Natural Resources Council v. Clark County Citizens United, Inc., 94 Wn. App. 670, 677, 972 P.2d 941 (1999)

Regardless of Respondents' characterization of the deference to be accorded the Hearings Boards, the *Quadrant* also dealt with statutory construction. In that case, as here, the error assigned was whether the CPSGMHB "erroneously interpreted or applied the law." *Quadrant*, 154 Wn.2d at 233. The statutory provision at issue there was the meaning of "characterized by urban growth" under RCW 36.70A.110(1) and RCW 36.70A.030(17). There, as Futurewise does here, Friends of the Law (FOTL) argued that "'substantial weight' should be given to the Board's interpretation of the statute it is charged with administering [.]" *Quadrant*, 154 Wn.2d at 236. This Court disagreed, concluding that the many GMA provisions providing deference to local governments outweighs the deference to be given the CPSGMHB in its interpretation of the statute. *Id.* at 238. In its review, this Court should continue to provide the deference to the County as required under the GMA.

**B. THE GMA ONLY REQUIRES
IMPLEMENTATION OF REASONABLE
MEASURES TO ADDRESS
INCONSISTENCIES IN THE URBAN
AREAS.**

Respondents continue to misinterpret the GMA to justify the Hearings Board's requirement for adoption of reasonable measures to address a purported rural inconsistency. Apparently recognizing the weakness in this argument, Respondents also mischaracterize the findings in the County's BLR to now claim there are inconsistencies concerning the County's urban areas. Neither approach has merit. A plain reading of the statute specifically shows the types of factors reasonable measures must address. The fact that more residential building permits were issued for pre-GMA lots in the rural areas is not among those factors. Moreover, as noted previously, the CPSGMHB did not find an inconsistency regarding the urban areas, nor does the BLR show such an inconsistency.

Respondents claim that the 2002 BLR shows "several" inconsistencies. Their claimed "inconsistencies" include the average residential density in urban and rural lands and the fact that urban areas, *in 1999*, still retained capacity to accommodate growth until *the year 2012*. The latter is hardly an "inconsistency," and the former issues do not indicate GMA noncompliance. While the Hearings Board erroneously found an inconsistency based upon the fact that more residential building

permits were issued for the rural areas than the urban areas, such a phenomenon is hardly surprising, given Kitsap County's local circumstances.

As noted in the BLR itself, and quoted by Respondents at page 32 of their brief, it is a fact that many pre-GMA rural lots existed. When Kitsap County changed its rural zoning to meet the GMA, these lots did not magically disappear. The Department of Community, Trade & Economic Development (DCTED) also noted this historical fact that exists in every county in the state.⁷ While the enactment of the GMA required new plans to take place prospectively, it did not erase pre-existing property lines. It will take time for such lots to be absorbed. Second, since the BLR covered a period of time in which the County was under an order of invalidity, no vesting of new subdivisions could occur, and thus most building probably took place on pre-existing vested lots. RCW 36.70A.305(2).

⁷ AR Tab 54, App. IR 24168 at 1, 7. CTED stated: "It is anticipated that achieved densities will increase over time as pre-GMA vested developments are completed and GMA-compliant subdivisions come to represent the majority of new development."

1. The Statute Only Links the Requirement for Adopting Reasonable Measures to Documented Inconsistencies in the Urban Areas.

RCW 36.70A.215(4) is very clear regarding the trigger for adoption of reasonable measures:

If the evaluation required under subsection (3) of this section demonstrates an inconsistency between what has occurred since the adoption of the county-wide planning policies and the county and city comprehensive plans and development regulations and what was envisioned in those policies and plans and the planning goals and the requirements of this chapter, as the inconsistency relates to the evaluation factors specified in subsection (3) of this section, the county and its cities shall adopt and implement measures that are reasonably likely to increase consistency during the subsequent five-year period.

Respondents argue that because *subsection 2*, RCW 36.70A.215(2)(a) states that a BLR review and evaluation program should encompass rural areas, reasonable measures must also address the rural areas. That is clearly not what the statute says.

The requirement for adopting and implementing reasonable measures is specifically linked to an inconsistency relating to “the evaluation factors specified in *subsection (3)*.” There are three factors specified in *subsection (3)*, the evaluation component of a BLR program. Those evaluation factors are as follows:

- (a) A determination of whether the urban growth areas contain sufficient land to accommodate the

twenty-year population projection in accord with the requirements of RCW 36.70A.110;

- (b) A determination of the actual housing density and lands developed for commercial and industrial uses within the urban growth area since the adoption of the comprehensive plan;
- (c) Based upon the findings in (b), a determination of the amount of land needed in the urban growth areas to accommodate the projected population and employment for the remainder of the twenty-year period.

Respondents do not dispute that the evaluation factors in RCW 36.70A.215(3) relate solely to urban areas. Instead, they make an illogical argument that because RCW 36.70A.215(2) states that the review should “encompass” the rural areas, the reasonable measures requirement also applies to rural areas. The statute clearly and unequivocally links the requirement to adopt and implement reasonable measures to an inconsistency that “*relates to the evaluation factors specified in subsection (3).*” RCW 36.70A.215(4). Had the Legislature intended that reasonable measures must be imposed to address rural areas, it could have easily done so. It did not.

2. The BLR Shows Urban Densities Within the UGAs.

Respondents devote several pages of their brief to claims that the County’s BLR demonstrates additional inconsistencies other than the single “inconsistency” noted by the Hearings Board concerning rural

development. In so doing, however, they do not, and cannot, cite to anywhere in the CPSGMHB's decisions where the Hearings Board found such an inconsistency. This Court reviews the decision of the Hearings Board. *King County*, 142 Wn.2d at 553.

Respondents' attempts to convince the Court that there may have been other grounds for finding an inconsistency is an exercise in futility at this stage of review. At any event, the BLR does not show substantial problems with the growth in Kitsap County. Rather, it shows a predictable pattern of development given the circumstances at the time the development occurred.

In 1998, Kitsap County adopted entirely new zoning designations. Respondents do not dispute that the County's current zoning designations, both urban and rural, fully comply with the GMA. Rather, Respondents argue that because all parcels within those zones did not instantaneously convert to meet the new zoning provisions, there is an "inconsistency." They argue that once the County adopted urban zoning with minimum densities of 5 du/a, all lots within that zone should have immediately conformed to the new requirements.⁸ This is simply not realistic – nor

⁸ Apparently, Respondents expected the County to require owners of urban lots to immediately subdivide that property to meet current zoning– and vice versa for those preexisting lots in rural areas.

could the County have mandated such requirements without violating the vested rights of property owners.

Respondents provide “examples” and again mischaracterize the data. Citing to page 47 of the BLR⁹, they claim that there were 95 new single-family units in the Urban Low (UL) zone, regulating in an average density of 2.64 dua. Respondent’s Opening Brief at 37 – 38. In fact, the table shows there were 251 new units added on 95 acres, resulting in an *average* density of 2.6 dua.¹⁰ As the BLR itself notes, this data includes pre-existing GMA lots that are larger than the minimum density. The BLR notes that compliance with the GMA is more accurately determined by looking at the lots *created* in that time period. At when looking at those lots in the same area, the average platted density is 7.34 dua, much higher than Respondents would have this Court believe. AR Tab 87 at 47. Thus, Respondents’ assertions of this new inconsistency are based on a skewing of the data. The Court should disregard these arguments, particularly since the CPSGMHB did not make a finding of inconsistency based upon these dubious facts.

⁹ AR Tab 87.

¹⁰ Respondents misread the BLR tables, attributing the number of acres in each zone as the number of new units added to each zone. This error is evident in each example cited, so their allegation that “The Report is filled with such gross inconsistencies and unrestrained spawl” (Brief at 38) should be discounted.

Respondents make substantial arguments that Kitsap County should be requiring non-conforming rural lots to aggregate. This Court has repeatedly noted the local discretion that a County has in implementing its plan. *Quadrant*, 154 Wn.2d at 130; *Viking Properties*, 155 Wn.2d at 240. Washington Courts have also recognized strong vested rights property rights. *Quadrant*, 154 Wn.2d at 241 (admonishing the Hearings Board for failing to consider vested rights when determining whether an area was characterized by urban growth); *see also Van Sant v. Everett*, 69 Wn. App. 641, 649, 849 P.2d 1276 (1993) (“Nonconforming uses are vested property rights which are protected.”). Before this Court, Respondents state it is not necessary for a court to determine which land use policies the County should enact to address the rural nonconforming lots. But that is precisely what they asked the CPSGMHB and the Thurston County Superior Court to do. In fact, Judge Wickham’s decision states clearly that the case was remanded “in order for the County to propose additional measures. . . . Those measures could include such things as transfers of development rights, redirection of capital resources, rural cluster developments, and others.” Decision of the Court following Trial held December 2, 2005 at 5. This Court should not allow the reviewing authorities to make local planning GMA decisions.

C. RESPONDENTS DID NOT MEET THEIR BURDEN TO SHOW THAT THE COUNTY'S REASONABLE MEASURES WERE INADEQUATE.

As noted, Kitsap County adopted Resolution 158-2004 that identified a number of reasonable measures it had already adopted and implemented. Respondents challenged this Resolution before the CPSGMHB. Respondents had the burden to show the County's action was clearly erroneous. RCW 36.70A.320(2). They failed to meet this burden, and the CPSGMHB properly upheld the County's action.

The Superior Court, however, reversed the Hearings Board, summarily concluding there was "clear and convincing" evidence that the County's identified reasonable measures were not adequate. Since it was Respondents' assertion that the Hearings Board erred, they continue to carry that burden to convince this Court that the CPSGMHB erred. *See King County*, 142 Wn.2d at 553 ("The burden of demonstrating that the Board erroneously interpreted or applied the law, or that the Board's order is not supported by substantial evidence, remains on the party asserting the error [.]"). In any event, Respondents did not present evidence to meet that burden, either before the CPSGMHB or Superior Court. The Superior Court's remand on this matter should be reversed and the Hearings Board's initial ruling should be reinstated.

Before the Growth Hearings Board and the Superior Court, Respondents provided nothing but conclusory arguments that the reasonable measures did not work.¹¹ CP 174-181. Now, they simply assert that because the identified reasonable measures had been adopted and in place prior to enactment of Resolution 158-2004, they did not “qualify” as reasonable measures. They attempt to shift the burden back to the County to prove that these are adequate reasonable measures.

In their Opening Brief, Respondents dispute the County’s characterization of the reasonable measures, stating that the statute requires that such measures must be reasonably likely to ensure consistency within the next five years. Respondents’ Opening Brief at 42-43. Even if reasonable measures were required, it had only been two years since the BLR was adopted when Respondents challenged them as not effective. Their claim of a lack of effectiveness, when there has not been near sufficient time to measure effects, simply fails. The Hearings Board correctly concluded it would take some time to measure the effectiveness and noted this would be done through the monitoring processes. It was Respondents’ burden to show the County’s action did not comply with the

¹¹ They continue to make such conclusory allegations here, by claiming that the measures “have a demonstrated lack effectiveness” (sic). Respondent’s Brief at 43. However, other than this blanket statement, Respondents provide no evidence that the reasonable measures were not effective, nor that their adoption was not within the County’s discretion.

GMA. They did not meet that burden before the CPSGMHB, and the Superior Court should not have reversed the Hearings Board.

D. THE STATUTE DOES NOT SET A DEADLINE FOR COMPLETING THE TEN-YEAR UGA UPDATE

The CPSGMHB concluded that the statutory deadline for a seven-year comprehensive plan, RCW 36.70A.130(1); (4), also was the deadline for the County's required ten-year UGA review. RCW 36.70A.130(3). In so concluding, the Hearings Board undertook a lengthy analysis of the GMA's legislative history and concluded that since the initial deadline for comprehensive plan completion was July 1, 1994, the deadline for the ten-year update was December 1, 2004. The Central Board erred in its interpretation of the statute.

Recently, the Western Washington Growth Management Hearings Board had the occasion to rule on this same issue. *Wiesen v. Whatcom County*, WWGMHB No. 06-2-008, Order Granting Motion to Dismiss (July 18, 2006).¹² In that case, Whatcom County was challenged as failing to complete its ten-year UGA review by December 1, 2004. Petitioner Wiesen relied on the Central Board's ruling in *1000 Friends*. *Id.* at 5. The Western Board noted that the ten year update is "distinct from the

¹² For the convenience of the Court, a copy of this decision is attached as Appendix B.

obligation to review and revise the County's comprehensive plan and development regulations" under RCW 36.70A.130(1), the seven year update. Moreover, the Western Board correctly notes that there was "No schedule of dates for UGA reviews . . . established in the GMA."¹³ The Western Board acknowledged that a principle precept underlying the CPSGMHB's ruling on this matter was the fact that the ten-year update provision had never been amended (prior to 2005). However, the Western Board interpreted the statute as Kitsap County did. The lack of a firm date associated with the ten year update means that the Legislature intended the ten years to run from the last time a UGA was designated. The Western Board stated:

We agree that RCW 36.70A.130(3) sets no dates for action. Unlike other sections of the GMA, RCW 36.70A.130(3) sets a period of time during which an action must take place but does not set a specific date for compliance. In contrast, see RCW 36.70A.040, 36.70A.060, 36.70A.110, 36.70A.130(4), 36.70A.170, 36.70A.200, 36.70A.210, and 36.70A.367. Instead, RCW 36.70A.130(3) provides that: "Each county that designates urban growth areas under RCW 36.70A.110 shall review, at least every ten years, its designated urban growth area or areas. . . ." The question posed is from what action, or inaction, the ten year period begins to run.

* * *

Here, the statutory language provides that the UGA designations and densities must be reviewed at least every

¹³ Respondents apparently agree with this fact: "RCW 36.70A.130(3) doesn't explicitly state that the ten years begins to run from the July 1, 1994 deadline[.]" Respondent's Opening Brief at 23.

ten years. The operative words in the language are “designates” and “designated.” A county that *designates* UGAs must review those designated urban growth areas. Therefore, it is the designation that is reviewed every ten years and the time for review must run from the time of designation.

We find that the absence of a specified date for UGA review is indicative of legislative intent to allow enough time to assess how well the original designations have served their purpose. Had the Legislature meant to set a firm date rather than a period of time for UGA review, then it would have established a schedule in RCW 36.70A.130(3) as it did in RCW 36.70A.130(4).

Wiesen, FDO at 7-8 (emphasis in original). The Western Board is correct. There is no need to engage in an extensive legislative history analysis as the Central Board did, when the statute is clear on its face.¹⁴ Respondents’ argument on this issue simply re-states that of the CPSGMHB, with an occasional interjection that the Central Board was correct. In contrast, the County’s Opening Brief and the Western Board’s decision provide clear analysis why the Central Board was incorrect.

Respondents claim that since Kitsap County’s 1998 plan covered a planning horizon from 1992 to the year 2012, it was incumbent on completing its ten-year review in 2004. But by this reasoning, the ten-year review should have been completed half way through the twenty-year

¹⁴ Respondents claim that the County “read into the statute non-existent language,” citing to a range of nine pages in the County’s Opening Brief. But they fail to identify the “non-existent language” allegedly read into the statute. On the contrary, the County has always contended it was the Central Board that read in a specific statutory deadline, because the statute does not include any such language.

period, *i.e.*, 2002. But there was no date associated with the 2002 that the Board could hang its hat on to make such a conclusion. The statute required that Kitsap County review, by December 1, 2004, and every seven years thereafter, its comprehensive plan and the population allocation from the most recent ten-year population forecast. RCW 36.70A.130(1); (4). Once the County completes its seven-year review, which entails review and adoption of revised population forecasts, then it can turn to the ten-year UGA update. To require both simultaneously does not make sense from either a literal reading of the statute, or from a practical standpoint. This is simply another distracting argument presented to avoid the plain reading of the statute.

Respondents again take Kitsap County to task for relying on the guidance presented by DCTED on the ten-year update deadline. In this case, however, that was a reasonable interpretation. DCTED is charged with providing technical advice to counties and cities on GMA issues. RCW 36.70A.050; .190. While the Central Board has repeatedly stated that such advice is not binding, instead the County must wait for a Board to rule on a matter and then be penalized for following such guidance. This situation should not be tolerated.

**E. THERE IS NO DISPUTE THAT THE
CPSGMHB ISSUED ADVISORY OPINIONS
IN THE CASES BELOW**

Respondents failed to address Kitsap County's assignments of error that the Hearings Board issued advisory opinions in this case. There can be no dispute that the issue of the ten year update deadline was neither raised nor argued in *Bremerton II*. The CPSGMHB's unnecessary comments on this deadline did nothing but create another avenue for appeals against the County.

When the Respondent fails to brief an issue on appeal, the Appellant is entitled to reversal on a prima facie showing of error. *Aquarian Foundation v. KTVW, Inc.*, 11 Wn. App. 476, 523 P.2d 969 (1974). Here, Kitsap County has shown more than a prima facie case of error. This Court should find that the Board's ruling on the ten-year update in *Bremerton II* constituted an advisory opinion, as did its recommendations for future reasonable measures in *1000 Friends*.

IV. CONCLUSION

For all the reasons set forth in Kitsap County's Opening and Reply Briefs, this Court should reverse the CPSGMHB decisions regarding the interpretation and application of RCW 36.70A.215; reverse the CPSGMHB decisions regarding the ten-year UGA update deadline under

RCW 36.70A.130(3); reverse the Superior Court decision that Kitsap County's identified reasonable measures in Resolution 158-2004 were not adequate; reverse the CPSGMHB decisions in *Bremerton II* and *1000 Friends* that were advisory in nature, and remand the matters to the CPSGMHB for further proceedings consistent with this Court's order.

RESPECTFULLY SUBMITTED this 8th day of August, 2006.

RUSSELL D. HAUGE
Kitsap County Prosecuting Attorney



SHELLEY E. KNEIP

WSBA No. 22711

Deputy Prosecuting Attorney

Attorney for Petitioner/Appellant Kitsap County

PROOF OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that the following is true and correct:

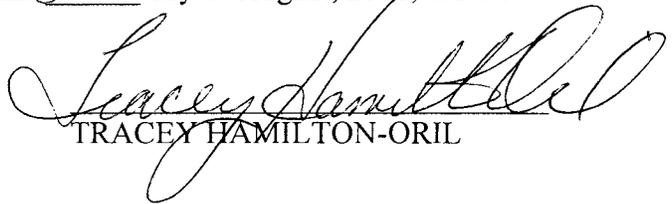
That I am a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to the above-entitled action and competent to be a witness therein;

That on the 8th day of August, placed in the United States Mail postage prepaid envelope containing the Appellant's Reply Brief to the Clerk of the Court, Washington State Supreme Court, Temple of Justice, Olympia, Washington, 98504.

Further, that on the 8th day of August placed in the United States Mail, postage prepaid, a copy of the Appellant's Reply Brief to the following:

John Zilavy Futurewise 1617 Boylston Avenue, Suite 200 Seattle, WA 98122	Elaine Spencer Graham & Dunn PC Pier 70 2801 Alaskan Way, Suite 300 Seattle, WA 98121-1128
Martha P. Lantz Washington State Attorney General's Office P.O. Box 40110 Olympia, WA 98504-0100	Mark Bubenik P.O. Box 498 Suquamish, WA 98392
Jerry Harless P.O. Box 8572 Port Orchard, WA 98366	David Bricklin Bricklin Newman Dold 1001 Fourth Avenue, Suite 3303 Seattle, WA 98154
Simi Jain 1700 D Street Bellingham, WA 98225-3101	

Respectfully submitted this 8th day of August, 2006, at Port Orchard, Washington.


TRACEY HAMILTON-ORIL

ATTACHMENT A

RESOLUTION NO. 158 -2004

**Providing an Addendum to the Buildable Lands
Analysis Report for Reasonable Measures**

WHEREAS, the Growth Management Act (GMA), RCW 36.70A.215, requires that Counties planning under the Act prepare a review and evaluation program to determine whether a county is achieving urban growth pursuant to GMA requirements (the "Buildable Lands Report") and to identify reasonable measures that may be taken to comply with the requirements of GMA; and

WHEREAS, in compliance with the GMA requirements, Kitsap County prepared its first Buildable Lands Analysis Report (BLR) in August 2002 that analyzed development data and identified a process for the County and its cities to monitor development trends and thereby ensure that the Urban Growth Areas (UGAs) are being developed at urban densities; and

WHEREAS, the BLR reviewed a period of time in which the County was found by the Central Puget Sound Growth Management Hearings Board (CPSGMHB) that it was not in compliance with the GMA, and is therefore of limited value in assessing how County comprehensive plans, regulations and county-wide planning policies were functioning; and

WHEREAS, the BLR did not include a list of reasonable measures, and the County intended on supplementing the BLR with such a list during the 2004 comprehensive plan review process; and

WHEREAS, on August 9, 2004, the CPSGMHB issued a decision in *City of Bremerton, Suquamish Tribe, et al. v. Kitsap County*, CPSGMHB No. 04-3-0009c, in which the Hearings Board noted that Kitsap County had not identified a list of reasonable measures and that reasonable measures should be implemented no later than December 1, 2004; and

WHEREAS, since the beginning of the time period reviewed in the Buildable Lands Analysis Report (1995), to date, the County has adopted a number of reasonable measures intended to promote growth and density within UGAs. Kitsap County has promulgated new development regulations and various Sub-Area Plans, as well as major revisions to its Comprehensive Plan, which all include provisions to facilitate directing growth into urban growth areas and therefore serve as reasonable measures as defined under the GMA; and

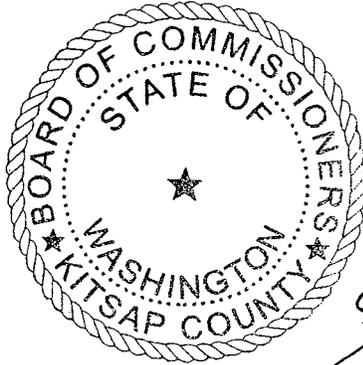
WHEREAS, as Kitsap County continues to plan under GMA, it will work to identify additional means to direct growth to the urban growth areas other than expanding UGAs, and the County will adopt and implement such measures it deems appropriate through the public processes in place, including sub-area advisory committees, the planning commission process, the annual comprehensive plan review process, the development regulation docketing process; and other public hearings and processes the Board of County Commissioner holds.

NOW, THEREFORE, BE IT RESOLVED that Kitsap County Board of Commissioners:

1. Adopts Attachment A, incorporated herein by this reference, as reasonable measures pursuant to RCW 36.70A.215. This list will be added as an Addendum to the Kitsap County Buildable Lands Analysis 1995-1999, dated August 2002.

2. In addition to those reasonable measures that the County has already adopted and implemented, identified in Attachment A hereto, Kitsap County staff should begin the process of identifying additional reasonable measures the Board of County Commissioners should consider adopting and implementing. Once identified, such proposed additional reasonable measures should go through a process for public input, including review by the Kitsap County Planning Commission and recommendations from that Commission prior to formal adoption and/or implementation.

DATED this 25th day of ~~September~~ ^{October} 2004.



KITSAP COUNTY BOARD OF COMMISSIONERS

Patty Lent
 Patty Lent, Chair

Chris Endresen
 Chris Endresen, Commissioner

ATTEST:

Opal Robertson
 Opal Robertson
 Clerk of the Board

Jan Angel
 Jan Angel, Commissioner

Attachment "A"
Kitsap County
Reasonable Measures

<p>1. Encourage Accessory Dwelling Units (ADUs) in Single-family zones</p>	<p>KCC 17.318 Poulsbo Urban Transition Area KCC 17.325.020.G Urban Restricted KCC 17.330.020.G Urban Low Residential KCC 17.335.020.A.7 Urban Cluster Residential KCC 17.340.020.G Urban Medium Residential KCC 17.354 Urban Centers Design Criteria</p>	<p><u>Kingston Sub Area Plan</u>¹: Section 5.4 - Policy 2.5; Goal 3</p>	<p>KCC 17.320.020.7 limits ADUs outside the Urban Growth Boundaries (UGB), by requiring a Conditional Use Permit. ADUs are permitted outright inside the UGB.</p>
<p>2. Allow Clustered Residential Development</p>	<p>KCC 17.335 Urban Cluster Residential KCC 17.354 Urban Centers Design Criteria</p>	<p><u>SK ULID#6</u>: Section 4.4 - Policies 1.3, 1.4 <u>Kingston Sub Area Plan</u>¹: Section 5.4 - Policy 5.1</p>	
<p>3. Allow Duplexes</p>	<p>KCC 17.318 Poulsbo Urban Transition Area KCC 17.325.020.F Urban Restricted KCC 17.330.020.F Urban Low Residential KCC 17.335.020.A.2 Urban Cluster Residential KCC 17.340.020.B Urban Medium Residential KCC 17.350.020.A.5 Urban High Residential KCC 17.353.020.A.2 Urban Center/Urban Village Center KCC 17.354 Urban Centers Design Criteria</p>	<p><u>Kingston Sub Area Plan</u>¹: Section 4.3 - Project 3.1.1</p>	<p>KCC 17.320.020.5 limits duplexes outside of UGB, with double the minimum lot area required.</p>
<p>4. Allow Town houses and Condominiums in Single-family zones</p>	<p>KCC 17.318 Poulsbo Urban Transition Area KCC 17.325.030.I Urban Restricted KCC 17.330.030.I Urban Low Residential KCC 17.335.020.A.3.4 Urban Cluster Residential KCC 17.340.010.B Urban Medium Residential KCC 17.350.020.A.5 Urban High Residential KCC 17.351 Multi-family Development Design Criteria KCC 17.353.020.4,5 Urban Center/Urban Village Center KCC 17.354 Urban Centers Design Criteria</p>	<p><u>SK ULID#6</u>: 4.4 Goals and Policies 2.4, 4.1, 4.2, 4.3 <u>Kingston Sub Area Plan</u>¹: Section 5.4 - Policy 5.1</p>	

¹ Kingston Sub-Area Plan dated December 8, 2003. Development regulation amendments to county code not yet adopted pursuant to this sub-area plan.

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Attachment "A"
Kitsap County
Reasonable Measures

<p>5. Encourage Development of Urban Centers and Urban Villages</p>	<p>KCC 17.318 Poulsbo Urban Transition Area KCC 17.335 Urban Cluster Residential KCC 17.350 Urban High Residential KCC 17.351 Multi-family Development Design Criteria KCC 17.353.020 Urban Center/Urban Village and Town Center KCC 17.354 Urban Centers Design Criteria KCC 17.365.010 KCC 17.370.020</p>	<p><u>SK ULID#6:</u> 4.4 Goals and Policies 1.2, 1.4, 2.1, 2.2, 2.3, 2.4, 2.5, 3.1, 4.2, 4.6 <u>Kingston Sub Area Plan</u>¹: Section 5.4 – Goal 17; Policy 17.1</p>	
<p>6. Encourage Mixed Use Development</p>	<p>KCC 17.318 Poulsbo Urban Transition Area KCC 17.335 Urban Cluster Residential KCC 17.350 Urban High Residential KCC 17.353.020 Urban Center/Urban Village and Town Center KCC 17.354 Urban Centers Design Criteria</p>	<p><u>SK ULID#6:</u> 4.4 Goals and Policies 1.2, 1.4, 2.2, 2.4, 4.6, 6.3, 6.4 <u>Kingston Sub Area Plan</u>¹: Section 5.4 – Goal 16; Policy 16.1</p>	
<p>7. Create Annexation Plans</p>	<p>KCC 17.315.090 Urban Reserve Zone KCC 17.318 Poulsbo Urban Transition Area KCC 17.415.09500</p>	<p><u>SK ULID#6:</u> 4.4 Goals and Policies 1.1 <u>S.K.I.A.</u> Section 1.5 Urban Joint Planning Areas 7.0 Water, 7.3.2 Policy 4</p>	
<p>8. Affordable and Manufactured Housing Development/zoning</p>	<p>KCC Title 17 allows for Manufactured Homes throughout the County as a permitted use. KCC 17.318 Poulsbo Urban Transition Area</p>	<p><u>Kingston Sub Area Plan</u>¹: Section 4.3 - Goal 3; Section 5.4 – Goal 1; Policy 1.1, 2.2; Goal 3</p>	
<p>9. Urban Amenities</p>	<p>KCC 17.318 Poulsbo Urban Transition Area KCC 17.325.020.C Urban Restricted KCC 17.330.020.C Urban Low Residential KCC 17.335.020.K.2 Urban Cluster Residential KCC 17.340.020.C Urban Medium Residential KCC 17.354 Urban Centers Design Criteria KCC 17.415.090 B KCC 415.095 B</p>	<p><u>SK ULID#6</u> Section 2 – Policy 2.1, 2.3, 2.5, 2.6, 2.7, 3.1, 3.4, and 3.5 Section 7 – Policy 1.5, 1.9 <u>SKIA</u> Section 8.0 – 8.3.3.2 Implementation Requirements <u>Kingston Sub Area Plan</u>¹ Section 5 – Goal 4, 6, 9, 12</p>	<p>KCC 17.320.020.7 limits uses such as parks and playgrounds outside the UGB, by way of a Site Plan Review or Conditional Use Permit. These uses are permitted outright inside the UGB.</p>
<p>10. Targeted Capital Facilities Investments</p>	<p>KCC 20.04</p>	<p><u>SK ULID#6:</u> 4.4 Goals and Policies 1.5 7.3 Goal and Policies 1.1, 1.2, 1.3</p>	

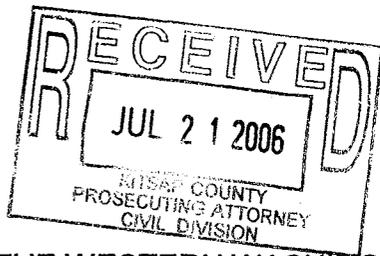
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Attachment "A"
Kitsap County
Reasonable Measures

11. Master Planning for Large Parcel Development	KCC 17.365.025 Business Center KCC 17.415.600-800 [SKIA Master Plan Process] KCC 17.428 Master Planning Requirements for the South Kitsap UGA/ULID#6 Sub-Area	<u>SK ULID#6:</u> 4.4 Goals and Policies 1.3 5.2 Goals and Policies 1.2 SKIA: 3.6 Land Use; 3.6.4 Master Plan	
12. Interim Development Standards	KCC 17.315 Urban Reserve KCC 17.318.010 Poulsbo Urban Transition Area KCC 17.330.060.C	<u>SK ULID#6:</u> 4.4 Goals and Policies 1.7	
13. Encourage Transportation-Efficient Land Use	KCC 16.48.210 Standards KCC 17.410.040 B.5 Site Plan Review KC 17.335.010 Urban Cluster Residential KCC 17.351.010 & 040 Multi-Family Development KCC 17.354.050, 060, & 200 Urban Center Design Criteria	<u>SK ULID#6:</u> 4.4 Goals and Policies 2.5, 2.6 <u>Kingston Sub Area Plan</u> ; Section 5.4 – Policy 12.1	
14. Density Bonuses in the UGA	KCC 17.318.010 Poulsbo Urban Transition Area (18.21.030.E Poulsbo)	<u>Kingston Sub Area Plan</u> ; Section 5.4 – Goal 2; Policy 2.2	Through master planning or conditional use, KCC 17.318.010 encourages greater housing densities in desired areas.
15. Increase in Allowable Residential Densities	KCC 17.318.010 Poulsbo Urban Transition Area (18.21.030.E Poulsbo)	<u>Kingston Sub Area Plan</u> ; Section 5.4 – Goal 2; Policy 2.4	KCC 17.318.010 increases land holding capacity, provides for more housing options, and more efficient use of land resources. In addition, it reduces sprawl development.
16. Urban Growth Management Agreements	KCC 17.318.010 Poulsbo Urban Transition Area	<u>SK ULID#6:</u> Section 3.1, 4.4; Policies UGA-7, 8, 9, 10, 11, 12, 13 <u>SKIA:</u> Section 1, 1.6.1	
17. Critical Services Near Homes, Jobs, and Transit	KCC 17.335.020 Urban Cluster KCC 17.350.020 Urban High KCC 17.353.020 Urban Center	<u>Kingston Sub Area Plan</u> ; Section 5.4 – Policy 1.1, Goal 6	
18. Transit-Oriented Development	KCC 17.415.200 Master planning	<u>SK ULID#6:</u> 4.4 Goals and Policies 3.4	Kitsap County is currently undertaking development regulations for a Transit-Oriented Development.

#27360

ATTACHMENT B



DAVID McEACHRAN
Prosecuting Attorney

JUL 19 2006

Whatcom County
Bellingham, WA

BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Robert Wiesen,

Petitioner,

v.

Whatcom County,

Respondent.

Case No. 06-2-0008

**ORDER GRANTING MOTION TO
DISMISS**

I. Synopsis of Decision

THIS Matter comes before the Board upon dispositive motions. Motions were filed by Petitioner – Petitioner’s Motion for Summary Judgment and Supporting Memorandum, June 13, 2006 – and Whatcom County – Respondent’s Dispositive Motion, June 13, 2006. Both sides agree that this case can be decided on motions because the only question to be decided is whether Whatcom County has failed to timely to review its designated urban growth areas under either the requirements of RCW 36.70A.130(3) or the County’s own planning enactments. We find that the ten year period established for review of urban growth areas in RCW 36.70A.130(3) runs from the date of actual adoption of those urban growth area designations. We also find that the County’s planning documents do not create an enforceable obligation to conduct the RCW 36.70A.130(3) review at an earlier time than is set by that statutory provision. The County has initiated its review of the Bellingham UGA and is working with the City of Bellingham, but this review is not completed. For these reasons, we dismiss the petition for review in this case as premature.

II. Procedural Background

The petition for review in this case was filed on April 19, 2006. At the same time, Petitioner filed a petition for review in *Wiesen v. City of Bellingham*, WWGMHB Case No. 06-2-0009. At a prehearing conference held May 16, 2006, the two cases were coordinated for hearing. All parties agreed that the issues in these cases could be resolved on motions.

1 On June 12, 2006, Whatcom County filed Respondent's Dispositive Motion. On June 13,
2 2006, Petitioner filed a Motion for Summary Judgment. Petitioner's Motion for Summary
3 Judgment and Supporting Memorandum. The County filed its response to Petitioner's
4 motion on June 26, 2006. Respondent's Response to Petitioner's Motion for Summary
5 Judgment. Petitioner then filed his response to the County's motion on June 27, 2006.
6 Petitioner's Response to Respondent Whatcom County's Dispositive Motion.
7

8
9 The City of Bellingham filed a motion to dismiss in the *Wiesen v. City of Bellingham*,
10 WWGMHB Case No. 06-2-0009 on June 13, 2006. On July 5, 2006, Petitioner notified the
11 Board that he concurred in the dismissal of the Bellingham case. On July 7, 2006, the
12 Board advised the parties to this case that, unless it received an objection, we would decide
13 the instant case on the briefs submitted. There was no objection filed with the Board. The
14 Board finds that the arguments were thoroughly presented through the briefs and therefore
15 oral argument was not necessary.
16

17
18 **III. Issues Presented in Petition for Review**

- 19 1. Did the County violate RCW 36.70A.130(3), 36.07A.110, 36.70A.020(1) and (2),
20 36.70A.040, 36.70A070, and 36.70A.140 by failing to perform the review of its urban
21 growth areas (UGAs) and the densities permitted within both the incorporated and
22 unincorporated portions of each UGA, as required under RCW 36.70A.130(3), within the
23 timeframe established in the statute?
- 24 2. Did the County violate RCW 36.70A.130(3), 36.07A.110, 36.70A.020(1) and (2),
25 36.70A.040, 36.70A070, and 36.70A.140 by failing to take action to adopt any revisions
26 to its comprehensive plan resulting from its review of its urban growth areas and the
27 densities permitted within both the incorporated and unincorporated portions of each
28 UGA within the timeframe established in the statute?
- 29 3. Did the County violate RCW 36.70A130, 36.70A110, 36.70A020(1) and (2), 36.70A.040,
30 36.70A.070, 36.70A140, the Urban Fringe Subarea Plan, the Countywide Planning
31 Policies (CPPs), the County's Comprehensive Plan and the Interlocal Agreement by
32 failing to complete review of the Bellingham UGA within the timeframe established in the
Urban Fringe Subarea Plan?

- 1 4. Does the failure to conduct the reviews and adopt any required revisions within the
2 required timeframes as described in paragraphs 1-3 above, substantially interfere with
3 the goals and requirements of the GMA?
4

5 **IV. Issues Presented in Dispositive Motions**

- 6 A. Does RCW 36.70A.130(3) require Whatcom County to review its urban growth
7 areas designations no later than 2004?
8
9 B. Is Whatcom County required by the Urban Fringe Subarea Plan, the Countywide
10 Planning Policies (CPPs), the County's Comprehensive Plan and an Interlocal
11 Agreement to conduct the review mandated by RCW 36.70A.130(3) within five
12 years of the adoption of the County comprehensive plan in 1997?

13 **V. Burden of Proof**

14 For purposes of board review of the comprehensive plans and development regulations
15 adopted by local government, the GMA establishes three major precepts: a presumption of
16 validity; a "clearly erroneous" standard of review; and a requirement of deference to the
17 decisions of local government.
18

19 Pursuant to RCW 36.70A.320(1), comprehensive plans, development regulations and
20 amendments to them are presumed valid upon adoption:
21

22 Except as provided in subsection (5) of this section, comprehensive plans and
23 development regulations, and amendments thereto, adopted under this chapter are
24 presumed valid upon adoption.

25 RCW 36.70A.320(1).
26

27 The statute further provides that the standard of review shall be whether the challenged
28 enactments are clearly erroneous:

29 The board shall find compliance unless it determines that the action by the state
30 agency, county, or city is clearly erroneous in view of the entire record before the
31 board and in light of the goals and requirements of this chapter.

32 RCW 36.70A.320(3).

1 In order to find the County's action clearly erroneous, the Board must be "left with the firm
2 and definite conviction that a mistake has been made." *Department of Ecology v. PUD1*,
3 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

4
5 Within the framework of state goals and requirements, the boards must grant deference to
6 local government in how they plan for growth:
7

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

18 RCW 36.70A.3201 (in part).

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

24 VI. DISCUSSION OF ISSUES

25 A. *Does RCW 36.70A.130(3) require Whatcom County to review its urban growth* 26 *areas designations no later than 2004?* 27

28 **Positions of the Parties**

29 Petitioner argues that RCW 36.70A.130(3) requires the County to complete the review and
30 update of its urban growth areas (UGAs) within 10 years of the original deadline by which
31 the Growth Management Act (GMA) required the County to establish its UGAs. Petitioner's
32

1 Motion for Summary Judgment and Supporting Memorandum at 7. In support of this
2 position, Petitioner refers the Board to the 2005 decision of the Central Puget Sound Growth
3 Management Hearings Board (Central Board). Ibid at 7-8, citing *1000 Friends of*
4 *Washington, et al. and Jerry Harless, pro se v. Kitsap County ("Harless")*, CPSGMHB Case
5 No. 04-3-00031c (Final Decision and Order, June 28, 2005). Since Whatcom County was
6 required to adopt its comprehensive plan, including its urban growth area designations, by
7 June 1, 1994, Petitioner argues, the required review must have been completed no later
8 than 2004. Petitioner's Motion for Summary Judgment and Supporting Memorandum at 7.

10
11 Whatcom County, on the other hand, argues that RCW 36.70A.130(3) does not require a
12 review and update of the County's UGAs until 10 years after adoption of the County's
13 comprehensive plan. Respondent's Memorandum in Support of Dispositive Motion at 2. In
14 support of its position, the County cites to the advice given in the Washington State
15 Department of Community, Trade and Economic Development (CTED) Technical Bulletin
16 1.3. Ibid. Since the County's comprehensive plan was adopted in 1997, the County argues,
17 the review of its UGAs is not due until 2007.

19 20 **Board Discussion**

21 The obligation to review urban growth areas is found at RCW 36.70A.130(3):

22
23 Each county that designates urban growth areas under RCW 36.70A.110 shall
24 review, at least every ten years, its designated urban growth area or areas, and the
25 densities permitted within both the incorporated and unincorporated portions of each
26 urban growth area. In conjunction with this review by the county, each city located
27 within an urban growth area shall review the densities permitted within its boundaries,
28 and the extent to which the urban growth occurring within the county has located
29 within each city and the unincorporated portions of the urban growth areas. The
30 county comprehensive plan designating urban growth areas, and the densities
31 permitted in the urban growth areas by the comprehensive plans of the county and
32 each city located within the urban growth areas, shall be revised to accommodate the
urban growth projected to occur in the county for the succeeding twenty-year period.
The review required by this subsection may be combined with the review and
evaluation required by RCW 36.70A.215.

RCW 36.70A.130(3)

1 This obligation is distinct from the obligation to review and revise the County's
2 comprehensive plan and development regulations established in RCW 36.70A.130(1) – the
3 “Update” requirement of the GMA. The Update of the comprehensive plan and
4 development regulations must include consideration of critical areas ordinances and “an
5 analysis of the population allocated to a city or county from the most recent ten-year
6 population forecast by the office of financial management”. The deadline for the Update
7 follows a schedule set for each county and the cities within them in RCW 36.70A.130(4).
8 Whatcom County completed its Update in a timely manner.
9

10
11 The question presented here is whether the County has failed to timely complete its review
12 of its UGAs. No schedule of dates for UGA reviews is established in the GMA. Petitioner
13 argues that the ten year UGA review period was intended to run from the date set for
14 adoption of UGA designations in RCW 36.70A.040(3) so that the UGA reviews would be
15 synchronized with the Washington State Office of Financial Management (OFM) population
16 forecasts. Petitioner’s Response to Respondent Whatcom County’s Dispositive Motion and
17 Supporting Memorandum at 2-3. The County, on the other hand, argues that the ten year
18 review period runs from the date of actual adoption of the UGA designations. Respondent’s
19 Memorandum in Support of Dispositive Motions at 1-2.
20
21

22
23 As our sister board has stated, since its adoption, the GMA has been amended to alter and
24 extend the deadlines for completing the Update requirement. *1000 Friends of Washington,*
25 *et al. and Jerry Harless, pro se v. Kitsap County (“Harless”),* CPSGMHB Case No. 04-3-
26 00031c (Final Decision and Order, June 28, 2005). As recently as the 2006 Regular
27 Session of the Legislature, the deadlines established in RCW 36.70A.130(4) were altered
28 yet again. ESSB 6427. At the same time, the ten-year UGA review requirement has not
29 been amended. From this fact, the Central Board determines that the RCW 36.70A.130(3)
30 UGA review requirement runs from the date that jurisdictions were originally expected to
31 adopt their comprehensive plans. *Harless* at 35-6. The Central Board finds that allowing
32 “tardy” jurisdictions to “reset the clock” undermines planning coordination between cities and

1 counties. In addition, the Central Board finds that a consistent ten-year review schedule
2 comports with the timing of the OFM population projections and the buildable lands review
3 and evaluation program. Ibid at 35.
4

5 The County argues that the statute is clear on its face and does not require the
6 interpretation in which the Central Board engaged. "The statute provides no deadline, no
7 starting date, nor is there any cross-reference to any other date in the statute that provides
8 a deadline or starting date." Respondent's Response to Motion for Summary Judgment at 5.
9 The County goes on to say: "The GMA provisions are to be strictly construed, and the
10 Board should not expand the language of the statute by reading in a deadline that does not
11 exist." Ibid.
12
13

14 We agree that RCW 36.70A.130(3) sets no dates for action. Unlike other sections of the
15 GMA, RCW 36.70A.130(3) sets a period of time during which an action must take place but
16 does not set a specific date for compliance. In contrast, see RCW 36.70A.040, 36.70A.060,
17 36.70A.110, 36.70A.130(4) and (6), 36.70A.170, 36.70A.200, 36.70A.210, 36.70A.215 and
18 36.70A.367. Instead, RCW 36.70A.130(3) provides that: "Each county that designates
19 urban growth areas under RCW 36.70A.110 shall review, at least every ten years, its
20 designated urban growth area or areas..." The question posed is from what action, or
21 inaction, the ten year period begins to run.
22
23

24 In analyzing a statutory provision, the first principle is to give effect to the intent of the
25 legislature. *Sheehan v. Transit Authority*, 155 Wn.2d 740, 747, 2005 Wash. LEXIS 917
26 (2005). Where the language of the statute is clear, there is no basis for statutory
27 construction. *State v. Wilson*, 125 Wn.2d 212, 217, 883 P.2d 320 (1994).
28
29

30 Here, the statutory language provides that the UGA designations and densities must be
31 reviewed at least every ten years. The operative words in the language are "designates"
32 and "designated". A county that *designates* UGAs must review those *designated* urban

1 growth areas. Therefore, it is the designation that is reviewed every ten years and the time
2 for review must run from the time of designation.

3
4 We find that the absence of a specified date for UGA review is indicative of legislative intent
5 to allow enough time to assess how well the original designations have served their
6 purpose. Had the Legislature meant to set a firm date rather than a period of time for UGA
7 review, then it would have established a schedule in RCW 36.70A.130(3) as it did in RCW
8 36.70A.130(4).
9

10
11 We further note that this reading of the statute makes sense within the statutory scheme as
12 a whole. See *State v. McGary*, 122 Wn.App. 308, 314, 93 P.3d 941, 2004 Wash. App.
13 LEXIS 1341 (2004). The purpose of the UGA review is to determine whether the urban
14 growth areas and the densities within them are appropriately accommodating urban growth.
15 The statute clearly contemplates that the jurisdiction will have a period of up to ten years to
16 measure and evaluate the relative success of the UGA boundaries and densities it has
17 chosen. To conduct that review without a sufficient period of time for evaluation would not
18 allow a meaningful review. Under the analysis proposed by Petitioner, a jurisdiction that,
19 for example, adopted its comprehensive plan in 2002, would have to conduct a review of its
20 urban growth areas immediately thereafter. Such a review would not have a meaningful
21 function since there would be no basis for reviewing the relative success of the original
22 urban growth boundaries and densities.
23
24

25
26 We also note that coordination with the OFM population projections is expressly addressed
27 in RCW 36.70A.130(1). It requires "an analysis of the population allocated to a city or
28 county from the most recent ten-year population forecast by the office of financial
29 management" for the Update. This analysis in the Update forms the basis for the 10-year
30 UGA review and is tied to a specific date. See RCW 36.70A.130(4).
31
32

1 Although we cannot say that the County could not have conducted a meaningful review of
2 its UGA boundaries and densities in 2004, the statute allows the County a ten year period to
3 review its UGAs. In fact, it expressly contemplates that the UGA review might be combined
4 with the Update, but does not require it: "The review and evaluation required by this
5 subsection may be combined with the review required by subsection (3) of this section."
6 RCW 36.70A.130(1). The County acted within its discretion in choosing to utilize the longer
7 period (although it may be no more than ten years) to complete its UGA review.
8

9
10 **Conclusion:** RCW 36.70A.130(3) allows the County up to ten years from the date of
11 designation of its UGAs to complete its review of UGA boundaries and densities. The
12 County has not failed to comply with RCW 36.70A.130(3) since the ten year period for UGA
13 review of the designations adopted in the 1997 comprehensive plan has not yet elapsed.
14

15
16 **B. Is Whatcom County required by the Urban Fringe Subarea Plan, the**
17 **Countywide Planning Policies (CPPs), the County's Comprehensive Plan and**
18 **an Interlocal Agreement to conduct the review mandated by RCW 36.70A.130(3)**
19 **within five years of the adoption of the County comprehensive plan in 1997?**

20 **Positions of the Parties**

21 Petitioner argues that the County committed to a "more expeditious review of the
22 [Bellingham] City's UGA than is required by the GMA but has failed to abide by that review
23 schedule". Petitioner's Motion for Summary Judgment at 11. Petitioner offers the Urban
24 Fringe Subarea Plan, incorporated into the comprehensive plan and countywide planning
25 policies, as evidence of the more expedited schedule. Ibid. This subarea plan review
26 schedule, Petitioner asserts, is also reflected in an Interlocal Agreement between the City of
27 Bellingham and Whatcom County to manage growth in the UGAs. Ibid at 12.
28

29
30 Whatcom County argues that the Board does not have jurisdiction to "address violations of
31 the County's comprehensive plan, its subarea plan, its countywide planning policies or an
32 interlocal agreement unless those violations are also violations of the GMA". Respondent's

1 Memorandum in Support of Dispositive Motions at 3. Because the alleged violations do not
2 involve an allegation that the County has failed to comply with the requirements of the GMA,
3 the County argues this Board lacks jurisdiction to hear the challenge. Ibid.

4
5 **Board Discussion**

6 The jurisdiction of the growth management hearings boards is primarily set forth in following
7 section of the GMA:
8

9 A growth management hearings board shall hear and determine only those petitions
10 alleging either:

- 11 (a) That a state agency, county, or city planning under this chapter is not in
12 compliance with the requirements of this chapter, chapter 90.58 RCW as it
13 relates to the adoption of shoreline master programs or amendments thereto,
14 or chapter 43.21C RCW as it relates to plans, development regulations, or
15 amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW; or
16 (b) That the twenty-year growth management planning population projections
17 adopted by the office of financial management pursuant to RCW 43.62.035
18 should be adjusted.

19 RCW 36.70A.280(1)

20 The County argues that the Board does not have jurisdiction over violations of the Subarea
21 Plan, the Comprehensive Plan, the Countywide Planning Policies and the Interlocal
22 Agreement between Bellingham and Whatcom County when those planning documents set
23 requirements that exceed the requirements of the GMA. Respondent's Motion in Support of
24 Dispositive Motion at 3.

25 However, Petitioner argues that the Board has jurisdiction to review the Subarea Plan and
26 other policies since the County has "chosen to discharge its GMA planning responsibilities"
27 through its Subarea Plan. Petitioner's Motion for Summary Judgment at 14. Petitioner
28 cites that portion of the Central Board's decision in *COPAC-Preston Mill v. King County*,
29 CPSGMHB Case No. 96-3-0013c (Final Decision and Order, August 21, 1996) that states:
30 "when a local government includes a self-imposed duty in its plan, such as a deadline, the
31 consistency requirements of RCW 36.70A.070 and .120 oblige it to meet this duty."
32

Petitioner argues that the adoption of such earlier deadlines reflect a determination by the

1 County that "local circumstances require more prompt action than is otherwise required to
2 satisfy the goals and requirements of the Act..." Petitioner's Response to Respondent
3 Whatcom County's Dispositive Motion and Supporting Memorandum at 10. Essentially,
4 then, Petitioner is arguing that the County's Comprehensive Plan, Countywide Planning
5 Policies, the Subarea Plan and the Interlocal Agreement with the City of Bellingham form
6 part of its GMA requirements.
7

8
9 The County argues that the Interlocal Agreement between the County and the City of
10 Bellingham is not enforceable by Mr. Wiesen. Response to Motion for Summary Judgment
11 at 11. We agree that an interlocal agreement does not ordinarily create rights that members
12 of the public can enforce, which is one reason why it is usually non-compliant with the GMA
13 to enter into an interlocal agreement in lieu of adopting development regulations. See
14 *Sedro-Woolley et al. v. Skagit County*, WWGMHB Case No. 03-2-0013c (Compliance
15 Hearing Order, June 18, 2004), but see *Servais et al. v. City of Bellingham, et al.*,
16 WWGMHB Case No. 00-2-0020 (Final Decision and Order, October 26, 2000) for an
17 exception. Further, we note that the Interlocal Agreement expressly states that it should not
18 be read to alter any requirements of State law:
19

20 This agreement in no way modifies or supersedes existing State law and statutes.
21 Interlocal Agreement at 10 (Section 13, Relationship to Existing Laws and Studies)
22

23 On the other hand, the Urban Fringe Subarea Plan was incorporated into the County's
24 Comprehensive Plan (CP 2-22 -2-23) as provided in the Countywide Planning Policies (CPP
25 F-11). Thus, to the extent that the Subarea Plan sets new deadlines for action, those
26 deadlines are part of the Comprehensive Plan. Any review of the County's UGAs would
27 have to be consistent with the Comprehensive Plan, both to maintain the Comprehensive
28 Plan as an internally consistent document (RCW 36.70A.070) and to assure that all
29 planning activities are done in conformity with the Comprehensive Plan (RCW 36.70A.120).
30

31
32 In this case, the County has not yet taken an inconsistent action but, if the deadline for its
self-imposed review period has passed, its failure to act within the specified time period

1 means that any future UGA review would be inconsistent with its comprehensive plan.¹ We
2 therefore find that the Board has jurisdiction to determine whether the County has failed to
3 comply with the GMA by failing to comply with the deadlines established in its
4 comprehensive plan (through the Urban Fringe Subarea Plan).

5
6 While moving to dismiss this issue on jurisdictional grounds, the County also asserts that it
7 has been working with the City of Bellingham since early 2003 on the UGA review "and that
8 process is close to being completed." Ibid at 11. Further, the County notes that the
9 agreement to undertake a five-year review only provides that the City and County "should"
10 undertake a five-year review. Ibid. The County offers Resolution No. 2003-015 to show that
11 the County has initiated formal review of several items including the Bellingham UGA.
12 Docket #2003-A, Exhibit A to Resolution No. 2003-015.

13
14
15 In examining the Comprehensive Plan, Subarea Plan and Countywide Planning Policies, we
16 do not find any language indicating a mandatory new date for accomplishment of the UGA
17 review required by RCW 36.70A.130(3). Petitioner claims that a five-year review period was
18 established, requiring the County to conduct a UGA review in 2002. However, none of the
19 documents offered by Petitioner confirm his point. Exhibit 3 (identified only as a County
20 planning document) references the Five Year Period Review. It states:

21
22
23 In order to assure sufficient flexibility in Bellingham's Northern Urban Growth Area,
24 and to respond to land supply and demand changes, the City and Whatcom County
25 should review certain areas identified in this plan on a priority basis...
26 Four areas have been identified for consideration during Bellingham's Five-Year
27 Periodic Review...

28 Exhibit 3 at 108 (VIII. FIVE YEAR PERIODIC REVIEW)

29 The second page of Exhibit 3 again discusses the five year review:

30 ¹ When a local jurisdiction fails to take action as directed by the GMA, a petitioner may challenge the failure to
31 act. *Skagit Surveyors v. Friends of Skagit County*, 135 Wn. 2d 542, 558-9, 958 P.2d 962, 1998 Wash. LEXIS
32 473 (1998) ("The language of this statutory section [RCW 36.70A.280(1)] authorizes a hearings board to
determine whether actions or failures to act on the part of a county comply with the requirements of the Growth
Management Act.")

1 The plan envisions two general types of plan amendments. The first type is a review
2 conducted every five years. This Periodic Review should re-examine the land use
3 plan, including a re-evaluation of goals, updates of land-related elements, the
4 reaffirmation of land use policies, proposals, and neighborhood planning areas within
5 Bellingham's Urban Growth Area; land supply and demand analysis and
6 consideration of urban development needs. It is the responsibility of both the
7 Bellingham and Whatcom County Planning Commissions and Planning staff as well
8 as the people of the subarea to initiate and participate in such a review.

9 Exhibit 3 at 109 (IX. COMPREHENSIVE PLAN AMENDMENTS)

10 As the County argues, Section VIII of Exhibit 3 states only that the City and the County
11 "should" review certain areas on a priority basis. Section IX of Exhibit 3 describes a periodic
12 review that "should" examine the land use plan. Given the purpose of the periodic review
13 and the fact that it is to be initiated by planning commissions, planning staff and "the people
14 of the subarea", the statement that a five year review "should" occur does not rise to the
15 level of a new, mandatory deadline for action. Under these circumstances, the use of the
16 word "should" is directory, rather than mandatory.

17
18 Further, the County did initiate the periodic review in 2002. Docket #2003-A, Exhibit A to
19 Resolution No. 2003-015. The language of the Subarea Plan and Comprehensive Plan
20 does not expressly address whether the review should be initiated or completed in five
21 years. Accordingly, we find that the County has not failed to comply with a self-imposed
22 deadline for earlier UGA review.

23
24
25 **Conclusion:** We find that the Board has jurisdiction over Issue 3 but we determine that the
26 Urban Fringe Subarea Plan and the County's comprehensive plan did not create a new,
27 mandatory deadline for completion of UGA review. Therefore, the County has not failed to
28 comply with deadlines established in its own planning policies for GMA action.

31 VII. Findings of Fact

- 32 1. Whatcom County is a county located west of the crest of the Cascade Mountains that
is required to plan pursuant to RCW 36.70A.040.

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2. Robert Wiesen is a landowner and resident of Whatcom County.
3. The petition for review was filed in this case on April 19, 2006 and challenges the County's failure to perform the review of urban growth areas (UGAs) required by RCW 36.70A.130(3).
4. Petitioner raised his claims that the County failed to timely perform the review of urban growth areas (UGAs) required by RCW 36.70A.130(3) to the County in written comments and public hearings.
5. Whatcom County adopted its Comprehensive Plan, including its final designation of UGAs, in 1997.
6. Whatcom County completed the Update of its Comprehensive Plan required by RCW 36.70A.130(1), (2) and (4) in 2005.
7. Whatcom County has not completed the review of its UGAs required by RCW 36.70A.130(3).
8. Whatcom County intends to complete the review of its UGAs by 2007.
9. The Interlocal Agreement between Whatcom County and the City of Bellingham Concerning Annexation and Development Within the City of Bellingham states:

This agreement in no way modifies or supersedes existing State law and statutes.
10. The Urban Fringe Subarea Plan was incorporated into the County's comprehensive plan (CP 2-22 -2-23) as provided in the Countywide Planning Policies (CPP F-11).
11. The County has not yet taken an inconsistent action but, if the deadline for its self-imposed review period has passed, its failure to act within its specified time period means that any future UGA review would be inconsistent with its comprehensive plan.
12. The Comprehensive Plan, Subarea Plan and Countywide Planning Policies do not contain any language indicating a mandatory new date for accomplishment of the UGA review required by RCW 36.70A.130(3).

- 1 13. The Subarea Plan states only that the City and the County "should" review certain
2 areas on a priority basis and "should" examine the land use plan during a five year
3 periodic review.
4 14. The County initiated a periodic review of the Bellingham UGA in 2003. Docket
5 #2003-A, Exhibit A to Resolution No. 2003-015.
6
7 15. Any Finding of Fact hereafter determined to be a Conclusion of Law is hereby
8 adopted as such.
9

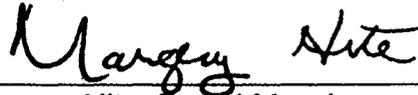
10 **VIII. Conclusions of Law**

- 11 A. The Board has jurisdiction over the parties to this petition for review.
12 B. Petitioner has standing to bring the claims raised in his petition for review.
13 C. The Board has jurisdiction over Issues 1 and 2, alleging a failure to act as required by
14 RCW 36.70A.130(3).
15 D. The time for Whatcom County's completion of the UGA review required by RCW
16 36.70A.130(3) has not yet elapsed.
17
18 E. The Board has jurisdiction over Issue 3 to determine whether the County has failed to
19 comply with the GMA by failing to comply with any deadlines established in its
20 Comprehensive Plan, Countywide Planning Policies and Urban Fringe Subarea Plan.
21 F. The Interlocal Agreement between Whatcom County and the City of Bellingham
22 Concerning Annexation and Development Within the City of Bellingham did not alter
23 the deadline for UGA review found in RCW 36.70A.130(3).
24
25 G. The County Comprehensive Plan, Countywide Planning Policies and Urban Fringe
26 Subarea Plan did not create a new, mandatory deadline for completion of the
27 Bellingham UGA review. Therefore, the County has not failed to comply with
28 deadlines established in its own planning policies for GMA action.
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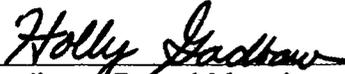
1 IX. ORDER

2 Based on the foregoing, the Board finds that the petition for review filed herein is premature
3 and **DISMISSES** this case.

4
5 DATED this 18th day of July 2006.

6 

7 _____
8 Margery Hite, Board Member

9 

10 _____
11 Holly Gadbow, Board Member

12 

13 _____
14 Gayle Rothrock, Board Member

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

16 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the date
17 of mailing of this Order to file a petition for reconsideration. The original and three
18 copies of a motion for reconsideration, together with any argument in support
19 thereof, should be filed with the Board by mailing, faxing, or otherwise delivering the
20 original and three copies of the motion for reconsideration directly to the Board, with
21 a copy to all other parties of record. Filing means actual receipt of the document at
22 the Board office. RCW 34.05.010(6), WAC 242-02-240, and WAC 242-02-330. The filing
23 of a motion for reconsideration is not a prerequisite for filing a petition for judicial
24 review.

25 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
26 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
27 judicial review may be instituted by filing a petition in superior court according to the
28 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
29 Enforcement. The petition for judicial review of this Order shall be filed with the
30 appropriate court and served on the Board, the Office of the Attorney General, and all
31 parties within thirty days after service of the final order, as provided in RCW
32 34.05.542. Service on the Board may be accomplished in person or by mail, but
service on the Board means actual receipt of the document at the Board office within
thirty days after service of the final order. A petition for judicial review may not be
served on the Board by fax or by electronic mail.

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

1 **WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD**

2 Case No. 06-2-0008

3 Robert Wiesen v. Whatcom County

4 **DECLARATION OF SERVICE**

5 I, PAULETTE YORKE, under penalty of perjury under the laws of the State of Washington,
6 declare as follows:

7
8
9 I am the Executive Assistant for the Western Washington Growth Management Hearings
10 Board. On the date indicated below a copy of a ORDER GRANTING MOTION TO
11 DISMISS in the above-entitled case was sent to the following through the United States
12 postal mail service:

13
14 Karen N. Frakes
15 Deputy Prosecuting Attorney
16 311 Grand Avenue Suite 201
Bellingham, WA 98225

Robert Wiesen
3314 Douglas Road
Ferndale, Washington 98248

17
18 Laurie Caskey-Schreiber
19 Chairperson of the Whatcom County Council
20 Courthouse Suite 105
311 Grand Avenue
Bellingham, WA 98225

Shirley Forslof
Whatcom County Auditor
311 Grand Avenue, Suite 103
Bellingham, WA 98225

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Dana Brown-Davis
Clerk of the Whatcom County Council
311 Grand Avenue, Suite 105
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Mark Asmundson, Mayor
City of Bellingham
210 Lottie Street, 2nd Floor
Bellingham, WA 98225

Alan Marriner
City Attorney
210 Lottie Street, 2nd Floor
Bellingham, WA 98225

David S. Mann
Gendler & Mann, LLP
1424 Fourth Avenue, Suite 1015
Seattle, WA 98101

DATED this 18th day of July 2006.



Paulette Yorke, Executive Assistant