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Case No. 51458-3-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

FUTUREWISE and PILCHUCK AUDUBON SOCIETY,

Petitioners,

v.

SNOHOMISH COUNTY and THE GROWTH MANAGEMENT HEARINGS BOARD,
Respondents.

BRIEF OF RESPONDENT SNOHOMISH COUNTY

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I. INTRODUCTION

Snohomish County (the "County") updated its regulations designating and protecting critical areas. In the wake of the tragic Oso landslide, the County paid particular attention to the category of critical areas known as "landslide hazard areas" (LHAs). The County greatly increased required setbacks from landslide hazards, expanded requirements for geological technical reports, added new requirements for recording notice of landslide hazards on the title of real property, and authorized the planning director to impose even more stringent development standards and mitigation measures on proposed development to protect public health and safety. The County's LHA regulations exceed the requirements of both the Growth Management Act (GMA) and the State Building Code.

Petitioners Futurewise and Pilchuck Audubon Society (collectively, "Futurewise") claim the County's updated regulations do not go far enough, and do not protect citizens from remotely possible worst case disasters. Geologic hazards in Western Washington encompass not only landslides, but earthquakes, volcanic eruptions, and tsunamis. To interpret the GMA in the manner advocated by Futurewise would halt development in Western Washington. The GMA does not dictate that result, and neither should this Court. The Growth Management Hearings

Board ("Board") appropriately determined Futurewise did not meet its burden of proof and this Court should affirm the decision of the Board.

II. STATEMENT OF THE CASE

The Snohomish County Council adopted Amended Ordinance No. 15-034 (the "Ordinance") on September 2, 2015. AR 9-72. The Ordinance is the County's second major amendment of its critical area regulations which are contained in chapters 30.62A (Wetlands and Fish & Wildlife Habitat Conservation Areas), 30.62B (Geologically Hazardous Areas), and 30.62C (Critical Aquifer Recharge Areas) of the Snohomish County Code (SCC).

The Ordinance amended sections of code related to numerous types of critical areas, including wetlands, fish and wildlife habitat conservation areas, special flood hazard areas, geologically hazardous areas (GHAs), and critical aquifer recharges areas (CARAs). Futurewise and the Tulalip Tribes challenged the Ordinance to the Board. The Board concluded Futurewise and the Tulalip Tribes failed to meet their burden on all but one of their numerous issues. The County did not appeal that issue and addressed it in subsequent legislation not at issue in this case.

The Tulalip Tribes did not appeal the Board's decision. Futurewise appealed certain issues to the Thurston County Superior Court: challenges related to the County's LHA and CARA regulations. The

Thurston County Superior Court rejected each of Futurewise's arguments and affirmed the decision of the Board as to the issues and assignments of error presented to it on appeal. Futurewise timely appealed to this Court.

III. ARGUMENT

Futurewise's request for relief requires this Court to overturn over a decade of consistent Board decisions regarding the designation and protection of GHAs. Such a result would trigger the need for all GMA planning jurisdictions to radically revise their GHA regulations, effectively rendering huge swaths of Western Washington undevelopable. That result is not supported by any reasonable interpretation of the GMA. Futurewise's CARA argument fails to establish error by the Board and remand for consideration of new legislation is not warranted. The Board properly found the County's updated regulations comply with the GMA.

A. Standard of Review

Review of Board decisions is governed by the Washington Administrative Procedure Act, chapter 34.05 RCW (APA). Petitioners bear the burden of demonstrating the invalidity of the Board's order. RCW 34.05.570(1)(a). In reviewing Board orders under the APA, courts must defer to county planning actions that are consistent with the goals and requirements of the GMA. This deference supersedes the general deference granted by the APA and courts to administrative bodies.

Quadrant Corp. v. State Growth Management Hearings Bd., 154 Wn.2d 224, 238, 110 P.3d 1132 (2005); RCW 36.70A.3201. This Court reviews the Board's legal conclusions de novo, giving substantial weight to the Board's interpretation of the statute it administers. *City of Redmond v. CPSGMHB*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998). The reviewing court "shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of." RCW 34.05.570(1)(d).

Before the Board, a county's actions are presumed valid, with the burden on the petitioner to demonstrate the actions do not comply with the GMA. RCW 36.70A.320(1) & (2). The Board must find a county's action compliant unless it determines the action is "clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(3). To find an action "clearly erroneous," the Board must have a "firm and definite conviction that a mistake has been committed." *Dep't of Ecology v. Pub. Util. Dist. No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

Here, the Board applied the appropriate standard of review, utilized its expertise in interpreting the statutes it administers, and granted the County the requisite deference in performing its GMA obligations related to critical areas.

B. County LHA Regulations Provide More Protection Than the GMA Requires and Are Among the Strictest in the State

Before addressing each issue raised by Futurewise, the County provides this overview of its LHA regulations as amended in the Ordinance to place Futurewise's challenges to those regulations in context.

Snohomish County adopted its first ordinance designating and protecting critical areas in 1995. The County comprehensively updated its critical areas regulations in 2007. AR 9. That update adopted new regulations for GHAs, including setback requirements from landslide hazards. Although Futurewise challenged that ordinance to the Board, it did not challenge the County's LHA provisions. The Board dismissed Futurewise's challenge.[1]

The County adopted the challenged Ordinance in response to the requirement to review and revise critical areas regulations, if needed, every eight years under RCW 36.70A.130. AR 9. The Ordinance contained substantial revisions to chapter 30.62B SCC, the GHA chapter. The amendments addressed staff review of new or updated "best available science" (BAS), consistent with RCW 36.70A.172, as well as the County's desire to increase public knowledge of landslide hazards in the wake of the Oso landslide.

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[1] *Pilchuck Audubon Soc. v. Snohomish County*, GMHB Case No. 07-3-0033, FDO (April 1, 2008) 2008 WL 1746675 ("*Pilchuck VII*").

The amendments to the LHA provisions accomplish the following: (1) increase protection of critical areas and public safety by increasing setbacks; (2) increase protection of critical areas and public safety by revising the definition of "landslide hazard area" to include the increased setbacks; (3) increase protection of critical areas and public safety by authorizing the planning director to increase the boundaries of an LHA or require mitigation when warranted by site-specific information; (4) increase the ability to collect site-specific information by expanding geotechnical report requirements; and (5) expand public knowledge of landslide hazards through notice and disclosure requirements.

First, the amendments increase protection of critical areas and public safety by substantially increasing setbacks from landslide hazards. Prior to adoption of the Ordinance, development was required to be set back from a landslide hazard at the toe of the slope by the greater of 50 feet or half the height of the slope. Additionally, development was required to be set back from a landslide hazard at the top of the slope by the greater of the slope divided by three, or 50 feet. AR 62 (SCC 30.62B.340). These setbacks were based on standards contained in the International Building Code.[2] The Oso landslide prompted County staff to

[2] IBC § 1808.7.1 and Figure 1808.7.1 (AR 1334).

conduct a literature review and evaluate mapped slides in Snohomish County and the Puget Sound region. AR 23, 1467-68. Staff concluded the existing setbacks would be "insufficient in some circumstances" and should be increased. AR 1468. Based on an analysis of local landslides and conditions, staff determined that increasing the toe of the slope setback to two times the height of the slope and increasing the top of the slope setback to the height of the slope "incorporates typical observed run out from mapped slides in the County and the Puget Sound region." AR 23. These setbacks were incorporated into the Ordinance. AR 70-71 (SCC 30.91L.040). These setbacks are more stringent than setbacks established by surrounding jurisdictions.[3]

Second, the County took these expanded setback areas and made them part of the definition of a landslide hazard area itself, something the prior LHA definition in SCC 30.91L.040 did not do. AR 70-71. This provides increased protection to both the critical area and public safety, as code provisions applicable within "landslide hazard areas" that formerly did not apply to the setback area now do, such as vegetation removal prohibitions, structural foundation standards, requirements to maintain

[3] King County Code 21A.24.200, .280 (setbacks between 15 and 100 feet); Skagit County Code 14.24.430 (buffer of 30 to 50 feet and setback consistent with International Building Code); Kitsap County Code 19.400.435 (setback up to height of the slope plus the greater of one-third the height of the slope or 25 feet).

existing natural slopes, and limitations on stormwater discharges. AR 63 (SCC 30.62B.340(2)).

Third, the amendments increase protection of critical areas and public safety by providing authority to the planning director to increase the boundaries of an LHA or require mitigation when warranted by site-specific information. County staff found the BAS "indicated that each site was to be treated on a case by case basis." AR 1468. Thus, while a setback of two times the height of the slope would capture "typical observed run out from mapped slides in the County and the Puget Sound region," it might not capture run out from all landslides depending on site-specific conditions. AR 23. To address these situations, a new provision was added granting the planning director authority to "expand the boundary of a geologically hazardous area," "impose additional or more stringent standards and requirements," or "impose mitigation requirements to the extent necessary" to protect public safety or mitigate any significant adverse impact from proposed development. AR 64 (SCC 30.62B.390). This new provision acknowledges that a geotechnical report prepared by a licensed engineer or geologist for proposed development might reveal site-specific information justifying larger setbacks. With this flexibility, the County can apply the prescribed setbacks in most cases, but increase them for public safety when site conditions so warrant.

Fourth, the amendments increase the County's ability to collect site-specific information by adding elements to required geotechnical reports. Now, reports must include "a hazard analysis and finding of risks associated with geologic hazards and the potential impacts to public safety, the hazard area and the subject property," "analysis of soil borings when the geology of an area is uncertain," and any other information determined by the planning department to be necessary to evaluate the proposed activity, including "the use of LIDAR, technical reports, studies or documents related to geologic hazards and models for estimating how far landslide materials will travel." AR 57 (SCC 30.62B.140). These new requirements will provide additional site-specific information to help determine, under new SCC 30.62B.390, whether the boundaries of the LHA should be increased or mitigation required to protect public safety or mitigate significant adverse impacts.

Finally, the code amendments expand public knowledge of landslide hazards by adding notice and disclosure requirements. Following the Oso landslide, the County wanted property owners to be aware of the hazards of developing within an LHA and to accept responsibility for their development choices. AR 22. Further, the County wanted the geological analysis prepared for a permit application to be available to prospective purchasers of property. *Id.* The Ordinance added

notice, disclosure and covenant requirements for most development activities or actions requiring a project permit in an LHA. AR 58-59 (SCC 30.62B.160). Among other things, the covenant must include a description of the types of risks identified in the geotechnical report and an abstract of the report. The covenant must be recorded with the Snohomish County Auditor. These requirements guarantee property owners will be aware of potential landslide hazards related to their development, and guarantee that information will be available to the public.

Surprisingly, given the subject matter and recent Oso landslide, there was little public comment on the proposed amendments. Futurewise provided comments, as did the Master Builders Association of King and Snohomish Counties, who alleged the new regulations were too strict. AR 1400. The only agency to comment was the Department of Ecology ("Ecology"), which is tasked with assisting the Department of Commerce ("Commerce") in adopting guidelines to be considered in adopting critical areas regulations. RCW 36.70A.170. Ecology commented as follows:

> The revisions to the Geo-Hazards (§ 30.62B) section of the CAO are a significant improvement over the previous standards. Overall, the proposed changes will greatly improve minimizing development impacts on these areas, while at the same time increasing safety for property owners. The more detailed requirements provide greater clarity for property owners, which should help with the permitting process. We look forward to incorporating the

> updated geo-hazards changes into the Shoreline Master Program (SMP) for the next update cycle.

AR 1549. Ecology's comment is significant because Ecology must approve the County's LHA regulations when applied in shorelines of the state.[4] Shorelines contain LHAs along rivers and marine waters. Ecology can withhold approval of the County's LHA regulations as applied in shorelines of the state if the regulations are not consistent with BAS. Ecology did not criticize the LHA code amendments, it praised them.

The County not only considered public health and safety in updating its LHA regulations, but adopted one of the most protective LHA codes in the state. Futurewise's demand that the County guarantee the protection of life and property in all natural disasters arising from geological hazards is not supported by the law and must be rejected.

C. Issue 1. The Board Appropriately did not Consider Futurewise's Supplemental Evidence

Futurewise requests remand related to its Motion to Supplement the Record with an article and supporting data ("the LaHusen article") published three months after the County adopted the Ordinance.[5] The Board appropriately did not consider the LaHusen article. The Board's rules and RCW 36.70A.290(4) govern evidence before the Board.

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[4] RCW 36.70A.480, 90.58.090.

[5] The Ordinance was adopted on September 2, 2015, and the LaHusen article was published on December 22, 2015. AR 9, 349.

Evidence generated after a jurisdiction adopts challenged legislation is rarely allowed "except when supported by a motion to supplement showing the necessity of such evidence to the board's decision concerning invalidity."[6] The Board did not reach invalidity here because it found the County's GHA regulations GMA compliant. The Board had no need, and no basis under its rules, to consider the LaHusen article. Because Futurewise cannot demonstrate substantial prejudice here, this Court cannot grant relief. RCW 34.05.570(1)(d).

Further, while the Board called its order on the motion a "deferral," it is clear the motion was denied unless the Board took an additional step: "[i]f, after reviewing the record and the argument submitted by the parties in their opening briefs, the Board wishes to consider the LaHusen material for any purpose, the presiding officer will request additional directed briefing by both parties and argument at the hearing on the merits." AR 350. The Board did not request additional briefing or argument, even after a suggestion by Futurewise to do so in its reply brief. AR 1721. This constituted a denial of the motion. This is not inconsistent with RCW 36.70A.290(1). Futurewise cites no authority

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[6] WAC 242-03-565(2). *See Blair v. City of Monroe*, GMHB Case No. 14-3-0006c, Order on Motions (May 23, 2014) at 13, 2014 WL 2624391 at *7 ("While the Board is extremely sensitive to the now-heightened concerns related to unstable slopes, it is nevertheless inappropriate to supplement the record with specific materials that could not have been considered by the City prior to the enactment of the challenged ordinance").

applying that provision to procedural motions.[7] The Board resolved the motion and remand is not warranted.

D. Issues 2 and 3. The County Properly Designated LHAs

In Issue 2, Futurewise challenges a Board statement in a footnote concerning designation of LHAs. In Issue 3, Futurewise challenges a Board statement that uses the word "buffer" in discussion of the County's LHA definition. Both issues appear to relate to the County's designation of LHAs. Accordingly, the County will address these issues, and the County's LHA designation, together.

1. Designation of LHAs

The County is required to "designate" critical areas, including GHAs. RCW 36.70A.170. The GMA defines "geologically hazardous areas" as areas:

> that because of their susceptibility to erosion, sliding, earthquake, or other geological events, are not suited to the siting of commercial, residential, or industrial development consistent with public health or safety concerns.

RCW 36.70A.030(10). The GMA does not define "landslide hazard area."

[7] *Low Income Housing Institute v. City of Lakewood*, 119 Wn.App. 110, 118-119, 77 P.3d 653 (2003) cited by Futurewise, concerned many failures by the Board to address substantive arguments against a comprehensive plan. That is not the situation here, where Futurewise alleges the Board should have supplemented the administrative record with an article that post-dated adoption of the Ordinance.

In designating critical areas, local governments must "consider" the guidelines established under RCW 36.70A.050 by Commerce. RCW 36.70A.170. Commerce defines a "landslide hazard area" under WAC 365-190-030(10) as "areas at risk of mass movement due to a combination of geologic, topographic, and hydrologic factors." This definition is repeated in WAC 365-190-120(6), where LHAs include "areas subject to landslides based on a combination of geologic, topographic, and hydrologic factors," and include "any areas susceptible to landslide because of any combination of bedrock, soil, slope (gradient), slope aspect, structure, hydrology, or other factors." The County's definition of LHAs include these areas. AR 70-71. Futurewise does not dispute this.

The GMA definitions of GHAs and LHAs focus on the "areas at risk of mass movement" and "areas susceptible to landslide." That is, the area from which the earth moves, not the areas to which the earth might move. Nowhere in the statute or guidelines is run out or a similar concept mentioned relative to LHAs. Compare this to the definition of "volcanic hazard areas," which specifically includes territory that could be impacted by a lahar or mudflow. WAC 365-190-120(8)(a). Thus, the plain language of the statute does not require the potential run out of a landslide hazard be included in the designation of an LHA.

Nothing in the GMA prohibits a jurisdiction from adopting a definition stricter than a definition contained in the statute. That is what the County did by amending its LHA definition to include, as part of the LHA, setbacks of twice the height of the slope at the toe and the height of the slope at the top of the slope. AR 71. A review of other Western Washington jurisdictions reveals only Pierce County similarly includes potential run out areas in its "active landslide areas" definition.[8] The GMA neither requires nor prevents the inclusion of potential run out areas in a LHA definition. Futurewise does not cite contrary authority.

2. Issue 2. Footnote 85

Futurewise asks this Court to "reverse" the Board's footnote 85, which states: "[t]here is no disagreement with the fact that the County has designated landslide hazard areas." AR 1818. That statement was made in the Board's discussion of Futurewise's challenge to SCC 30.62A.130, which was part of Board Issue B-1.[9] The Board observed jurisdictions must designate critical areas and appended to that statement footnote 85. Futurewise insists footnote 85 is inaccurate because it did challenge LHA designation under Board Issue C-2.[10]

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[8] *See* Pierce County Code 18E.80.020(C); *compare with* King County Code 21A.06.680; Skagit County Code 14.24.410; Kitsap County Code 19.150.420.
[9] That challenge is now contained in Futurewise's Issue 6 before this Court.
[10] That challenge is now contained in Futurewise's Issue 6 before this Court.

The Board was correct in footnote 85. Futurewise did not contest the County's designation of LHAs; it argued the setback areas the County includes within the definition of LHAs were not sufficient to protect from worst case landslides.[11] Futurewise did not argue below that setbacks must be designated part of an LHA under the GMA. Similarly, Futurewise's briefing on SCC 30.62B.390 emphasized protection of health or welfare, not designation.[12] The Board's finding was correct.

Even if this Court determines footnote 85 is inaccurate because Futurewise did make a designation challenge below, that does not change the outcome of this case. Footnote 85 can be removed and the strength of the Board's decision does not falter because the footnote is dictum in the discussion of Board Issue B-1, an issue that did not challenge the designation requirement in RCW 36.70A.170.[13]

3. Issue 3. Use of "Buffer"

Futurewise asserts the Board erred when it stated the tops and toes of slopes are "buffers." This argument is confusing and places inordinate

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[11] AR 866-868.

[12] AR 868. *See also* Brief of Petitioners Futurewise and Pilchuck Audubon Society ("Futurewise's Brief") at 39-40.

[13] Board Issue B-1 provides: "That SCC 30.62A.010, SCC 30.62A.130, and SCC 30.62A.140 fail to apply the wetland and fish and wildlife habitat conservation regulations to all forms of development that can damage these habitats, fail to require the identification of all critical areas that can harm people and property, fail to protect the functions and values of critical areas, and are not based on best available science." AR 1833, lines 16-20.

emphasis on the Board's use, in quotes, of the word "buffer" rather than on the substance of the Board's statement. Futurewise never identifies why this statement is relevant to any substantive issue identified by it in this appeal. This Court should reject Futurewise's Issue 3.

Citing the County's amended definition of landslide hazard area at SCC 30.91L.040, the Board stated "[l]andslide hazard areas are defined to not only include the potential slide area itself but also 'buffer' areas." AR 1818. This statement is an accurate description by the Board of the County's amended SCC 30.91L.040. The Board used familiar shorthand – the word "buffer" – to describe the area defined as LHA by the County that is not the potential slide area itself.[14] That makes sense because the designation requirement extends only to the potential slide area itself, as demonstrated by the County above. The Board committed no error.

E. Issue 4. The Board Appropriately Concluded There is No GMA Mandate to Protect People and Property From GHAs

Futurewise's Issue 4 is a challenge to the Board's conclusion the GMA does not mandate protection of people and property from GHAs, and that health and safety concerns lie within a county legislative authority's purview. AR 1819-20. The Board did not err in so holding.

[14] In fact, Futurewise used the word "buffer" in its Prehearing Brief before the Board to describe this very same area: "...SCC 30.91L.040 now includes a top slope and bottom slope buffer in the definition of landslide hazards." AR 865, lines 12-13.

The GMA requires that local governments "adopt development regulations that protect critical areas." RCW 36.70A.060. The GMA was amended in 1995 to clarify this requirement.[15] RCW 36.70A.172(1) provides, in relevant part:

> In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas.

The provision adds two key concepts to the GMA. First, local governments must "include the best available science" (BAS) in developing policies and regulations related to critical areas. Second, to protect critical areas, local governments must protect their "functions and values." Litigants have disputed what these requirements mean in the context of GHAs, including LHAs, seismic hazard areas, and volcanic hazard areas. Litigants also have disputed whether RCW 36.70A.172(1) or any other GMA provision requires protection of people or property from GHAs. The Board consistently has held the GMA does not require critical areas regulations protect people and property from GHAs.

The Board first addressed these questions at length in *Tahoma Audubon Society v. Pierce County*, GMHB No. 05-3-0004c (2005 FDO), 2005 WL 2227915. Tahoma Audubon challenged Pierce County's

[15] Laws of 1995, Ch. 347, § 105.

volcanic hazard regulations for allowing development of covered assemblies to accommodate up to 400 people in lahar[16] inundation zones. The Board was asked to determine whether the BAS requirement, or any other statutory mandate, required the County to adopt land use regulations to protect people. The Board stated:

> The Board finds no direct requirement in the GMA that would allow it to substitute its judgment for that of the Pierce County elected officials on this matter. The GMA *defines* geologically hazardous areas as areas that "are not suited to siting of ... development consistent with public health or safety concerns," but there is *no affirmative mandate* associated with this definition except "protect the functions and values." Petitioners have not persuaded the Board that the requirement to protect the functions and values of critical areas has any meaning with respect to volcanic hazard areas or that the GMA contains any independent life-safety mandate.

Id. at *21 (footnote omitted).

The Board next addressed GHAs in the context of seismic hazards in *Sno-King Environmental Alliance v. Snohomish County*, GMHB No. 06-3-0005 (2006 FDO).[17] In that case, the County changed the "seismic hazard areas" definition and amended its building code setbacks for identified active fault traces. Petitioners argued the County did not protect

[16] A "lahar" is a rapidly flowing mixture of rock debris and water that originates on the slopes of a volcano.
[17] There is no Westlaw citation for this Board decision. It is attached as Appendix A for the Court's convenience.

seismic area functions and values or the public. The Board found no GMA duty to protect the public from hazards:

> Petitioners here have failed to persuade the Board that the requirement to use BAS to protect the functions and values of critical areas has any meaning with respect to known or inferred seismic faults. This is not to say that the use of BAS is not important in "identifying" and "designating" geologically hazardous areas; but rather its significance in "protecting" such critical areas verges on meaningless in the context of seismic areas.
>
> . . .
>
> The County's duty and obligation to protect the public from potential injury or damage that may occur if development is permitted in geologically hazardous areas is not rooted in the challenged GMA critical areas provisions. Rather, providing for the life safety of occupants and the control of damage to structures and buildings is within the province of building codes.

Id. at 15. Building codes, not the GMA, are designed to protect the public from GHAs.

Seismic hazards again were analyzed by the Board in *Seattle Audubon Society v. City of Seattle*, GMHB No. 06-3-0024 (2006 FDO), 2006 WL 3791721. There, the issue was whether Seattle's failure to designate tsunami hazards violated the GMA. The Board stated the GMA required the city to designate critical areas, and that the city must include BAS in doing so. *Id.* at *16. However, the Board did not find the city must use BAS to protect such areas. Instead, quoting *Sno-King* at length, the Board remained firm that people and property must be protected by

building codes, not the GMA. *Id.* Cases decided subsequent to *Tahoma Audubon*, *Sno-King*, and *Seattle Audubon* maintain their holdings.[18]

In response to the authority cited by the Board and the County, Futurewise, rather than addressing those cases, insists, confusingly, that none identify any GMA provision that ***prohibits*** the Board from reviewing regulations that address public health and safety. This confuses the burden. Futurewise must demonstrate the existence of a GMA obligation to protect people and property from GHAs and the County's failure to meet that requirement,[19] something Futurewise does not do. Dismissing the cases cited by the County and Board by suggesting the GMA does not prohibit what Futurewise seeks misses the point. This argument must fail.

In addition, Futurewise's reliance on *Ecology v. City of Kent*,[20] is misplaced. Futurewise cites *City of Kent* for the proposition that a GMA definition has substantive effect in identifying the critical areas to be designated and protected.[21] Futurewise then asserts that, under *City of*

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[18] *See Friends of Pierce County v. Pierce County*, GMHB No. 12-3-0002c (2012 FDO), 98, 2012 WL 3060647, *53 (the GMA definition of GHAs "by itself does not impose an independent duty upon the County to protect life and property"); *Friends of the San Juans v. San Juan County*, GMHB No. 13-2-0012c (2013 FDO), 38, 2013 WL 5212385, *22 ("The GMA does not impose an independent duty to protect life and property."); *Blair v. City of Monroe*, GMHB No. 14-3-0006c (2015 Order Finding Continuing Non-Compliance), 50, 2015 WL 10684571, *29 ("risk to life and property in geologically hazardous areas is a policy decision").

[19] RCW 36.70A.320.

[20] GMHB Case No. 05-3-0034, FDO (April 19, 2006), 2006 WL 1111353.

[21] *Id.* at *21 ("In this case, the enforceable obligation is the duty to designate and protect critical areas, which include wetlands. The definition in the Act has substance since it

Kent, the definition of GHA at RCW 36.70A.030(10) is a mandate to protect people and property ***from*** GHAs. *City of Kent* does not stand for that proposition. In fact, Futurewise fails to cite or address two Board decisions holding specifically that the GHA definition does not impose an independent mandate to protect people and property from GHAs.[22] Futurewise's citation to a Board decision that did not address the GHA definition to support a proposition contrary to Board decisions that did address the GHA definition is unpersuasive.

Further, contrary to Futurewise's contention, the Board did not write out of the GHA definition the phrase "not suited to the siting of commercial, residential, or industrial development consistent with public health and safety concerns." The Board simply disagreed with Futurewise, holding, consistent with a long line of Board cases, that neither the inclusion of that phrase in the GHA definition nor any other GMA critical area provision creates a GMA mandate to protect people and property from GHAs.[23] And the Board clearly considered the public health and safety aspect of the GHA definition when it concluded public health and safety concerns lie within the purview of the County's legislative

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defines what wetlands are critical areas that must be designated and protected – it is not a suggestion").

[22] *Tahoma Audubon*, 2005 WL 2227915 at *21; *Friends of Pierce County*, 2012 WL 3060647 at *53.

[23] AR 1819.

authority and further concluded the County in fact adopted LHA regulations that considered public health and safety as well as restrictions on the use of land.[24] This conclusion by the Board was consistent with the GMA. The County made a policy determination as to the level of risk to life and property acceptable to its citizens.[25] While it is clear Futurewise disagrees with that determination, Futurewise fails to demonstrate the County was obligated under the GMA to act in a different manner.

Finally, overturning the Board decisions cited by the County and the Board would result in drastic consequences in Western Washington, as jurisdictions would have to overhaul their GHA regulations and render a significant amount of territory unbuildable. The SR 530 Landslide Commission Final Report cited by Futurewise states:

> The state of Washington contains some of the most rugged, beautiful, and dynamic landscapes in the United States. However, those same landscapes present hazards from natural disasters, including earthquakes, small and larger landslides, annual flooding, and wild land fires. On February 28, 2001, the Nisqually Earthquake, registering 6.8 on the Richter scale, triggered a number of landslides in King County, toppled and damaged brick masonry buildings in Seattle's Pioneer Square, and caused considerable damage to the Alaskan Way Viaduct. That earthquake triggered many more landslides in Pierce,

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[24] AR 1820. Futurewise argues the Board held that public health and safety are the "exclusive" concern of a local jurisdiction and are unreviewable by the Board. The Board did not say that or do that in its review. Futurewise uses the word "exclusive" and the phrase "unfettered discretion." Notably, the Board did not. Futurewise's Brief at 19, 21.
[25] *See Friends of Pierce County*, 2012 WL 3060647 at *55 (elected officials "bear the burden of weighing risks to lives and property within their jurisdiction").

> Thurston, and Mason counties. A 9.0 earthquake off the Washington coast will cause significant and widespread damage to people, communities, and infrastructure.

AR 920. If RCW 36.70A.030(10), RCW 36.70A.060, and RCW 36.70A.172 are interpreted to require protection of all people and property ***from*** GHAs, the report indicates the impact of that interpretation. The most drastic example of the impact will be the requirement to protect, through GMA critical areas regulations, people and property from the Cascadia subduction zone "big one" mentioned in the 530 Report, ostensibly by prohibiting all development within seismic hazard areas. Additionally, jurisdictions will be required to protect people and property from the Mt. Rainier lahar area addressed in the *Tahoma Audubon* decision, as well as from lahar areas associated with Mt. Baker, Glacier Peak, Mt. St. Helens, and Mt. Adams, again, ostensibly by prohibiting all development within lahars. In interpreting the plain meaning of RCW 36.70A.030(10), RCW 36.70A.060, and RCW 36.70A.172, the Court must reject reading these provisions "in a manner that leads to unlikely, strained, or absurd results." *Burns v. City of Seattle*, 161 Wn.2d 129, 150, 164 P.3d 475 (2007). Futurewise's proposed interpretation leads to an absurd result that the GMA simply does not require. The Court must reject Futurewise's interpretation in favor of the Board's numerous and reasonable decisions, including the one rendered in this case.

F. Issue 5. The Board Correctly Determined Futurewise Abandoned Issue C-1

The Board correctly determined Futurewise inadequately briefed Issue C-1. The Board treats inadequately briefed issues as unbriefed and deems them abandoned.[26] An issue is adequately briefed when a petitioner explains how a local government has failed to comply with the GMA.[27] A GMA challenge must be linked to the statutory provision alleged to be violated, or it must fail. It is not enough to include the statutory provision in an issue statement without linking it to legal argument in the body of the brief.[28]

In its Issue C-1 briefing to the Board, Futurewise failed to cite any GMA provision or WAC guideline alleged to be violated. Futurewise insists its issue statement for Issue C-1 "cited RCW 36.70A.060(2), RCW 36.70A.170, and RCW 36.70A.172(1)." Citation to a GMA provision only in an issue statement is not sufficient to withstand an inadequate briefing challenge.[29] And Futurewise's assertion is misleading because its issue statement for Issue C-1 actually cited nine GMA provisions, unidentified

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[26] *Finis Gerald Tupper v. City of Edmonds*, GMHB No. 03-3-0018 (2004 FDO), 7, 2004 WL 3275211, *5.
[27] *Tulalip Tribes v. Snohomish County*, GMHB No. 96-3-0029 (1997 FDO) n1, at 7, 1997 WL 29145, *4.
[28] *TS Holdings v. Pierce County*, GMHB No. 08-3-0001 (2008 FDO), at 7, 2008 WL 4215868, *5.
[29] *Id.*.

WAC guidelines, and two multi-county planning polices as allegedly violated, none of which were referenced in the body of Futurewise's Issue C-1 briefing.[30] In addition, Futurewise failed to provide the necessary linkage between the allegedly violated (and unidentified) GMA provisions and the allegedly deficient SCC provisions.[31] The Board correctly dismissed Issue C-1 as presented in Futurewise's Board briefing.

Finally, although the Board dismissed Issue C-1, it effectively addressed the concerns raised in Issue C-1 elsewhere in the decision, due to the overlapping nature of Futurewise's issues.[32] Issue B-1 before the Board challenged the applicability of SCC 30.62A.010, 30.62A.130, and 30.62A.140 to development activities, actions requiring project permits and clearing.[33] The Board analyzed Futurewise's arguments and rejected them. Futurewise made the same apparent arguments for SCC 30.62B.010, 30.62B.130, 30.62B.140, 30.62B.160, and 30.62B.340 as part of its Issue C-1 briefing before the Board.[34] Futurewise cannot demonstrate prejudice by the Board's dismissal of Issue C-1 because Futurewise inadequately briefed the issue and the Board ultimately addressed those arguments anyway. Remand is unnecessary.

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[30] AR 863.
[31] AR 863-867.
[32] AR 1817-20; 1826-27.
[33] AR 1817.
[34] AR 863-866.

G. Issue 6. The County Protected LHAs, Considered Public Health and Safety, and Included BAS in its Landslide Hazard Regulations

Futurewise argues the Board erred in concluding the challenged SCC provisions comply with the GMA.[35] Futurewise does not demonstrate error and this Court should affirm the Board's decision.

1. SCC 30.62A.130 & 30.62B.130[36] Comply With the GMA

Futurewise argues SCC 30.62A.130 and 30.62B.130 violate the GMA. SCC 30.62A.130 is part of the County's critical area regulations governing wetlands and fish and wildlife habitat conservation areas. SCC 30.62B.130 is part of the County's critical area regulations governing GHAs. Both provisions are titled "submittal requirements" and govern the requirements for submission of a site development plan. AR 28, 56.

a. Applicability of regulations

Futurewise challenges the applicability of each provision, contending the application only to "development activities, actions requiring a project permit or clearing" fails to protect GHAs because

[35] To the extent Futurewise's arguments under Issue 6 cross-over with or refer back to Issue 4 (whether there exists a GMA mandate to protect people and property from GHAs), the County respectfully refers the Court to its Issue 4 discussion above.
[36] Futurewise challenged SCC 30.62B.130 before the Board as part of Issue C-1, which the Board dismissed as inadequately briefed. AR 1825-1826. If this Court upholds that conclusion, it should decline to address Futurewise's challenge to SCC 30.62B.130.

"discharging storm water onto a landslide hazard" does not fall within that universe of applicability. Futurewise is mistaken.

"Development activities," "actions requiring a project permit," and "clearing" are broadly defined to include all manner of actions, including any construction, development, earth movement, clearing or other site disturbance that requires a permit or approval from the County, which includes, but is not limited to building permits, subdivisions, conditional uses, variances, site plan review, and permits or approvals required by critical area ordinances.[37] The County cannot imagine a scenario where discharging stormwater onto a landslide hazard would not be tied to some other activity requiring a project permit and Futurewise does not supply one, except for a speculative concern, unsupported by legal or record citation, that a homeowner might tamper with downspouts or runoff. Futurewise made this same challenge to the County's scope of applicability language in its 2007 appeal of the County's regulations. The Board found arguments based on "hypothetical scenarios" and "speculative situations" did not overcome the presumption of validity in favor of the County as to the scope of applicability of its regulations.[38] In

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[37] "Development activities" is defined at SCC 30.91D.240 (AR 1248). "Project permit" is defined at SCC 30.91P.350 (AR 1249). "Clearing" is defined at SCC 30.91C.112 (AR 1247).

[38] *Pilchuck VII*, 2008 WL 1746675, *15-*16.

addition, the County's applicability of its regulations is consistent with Ecology's guidance: "[m]easures used to protect wetlands or other critical areas can be initiated when any development permit (e.g., a grading, rezone, building, subdivision, short plat permit, etc.) is required by the local jurisdiction."[39] Futurewise's single, speculative scenario does not support its challenge to the applicability of the County's regulations.

b. Critical areas "within 300 feet of the site"

Futurewise contends that SCC 30.62A.130(1)(g) and SCC 30.62B.130(7) somehow violate the GMA by requiring that site plans for proposed development identify the location of critical areas within 300 feet of the development site.[40] Futurewise's argument demonstrates confusion. It argues that some landslides can run out more than 300 feet. But the two provisions challenged by Futurewise have nothing to do with establishing setbacks from landslide hazards. Those setbacks are determined by the LHA definition in SCC 30.91L.040. The provisions challenged by Futurewise do not establish setbacks; they only require an applicant to identify on a site development plan certain critical areas if they are within 300 feet of a proposed development site. Futurewise has not demonstrated how this requirement does not meet GMA requirements.

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[39] AR 1580 (WETLANDS IN WASHINGTON, VOLUME II: GUIDANCE FOR PROTECTING AND MANAGING WETLANDS, April 2005).
[40] The County extended the requirement from 200 to 300 feet. AR 28, 56.

2. SCC 30.62B.140. 30.62B.160. and 30.62B.340[41] Comply With the GMA

Futurewise argues SCC 30.62B.140 (geotechnical report), 30.62B.160 (permanent identification, development restrictions, and recording), and 30.62B.340 (landslide hazard areas) violate the GMA because they apply to development activities, actions requiring project permits, and clearing. AR 56-59, 62-63. This is the same applicability argument leveled against SCC 30.62A.130 and 30.62B.130, addressed in Section III.G.1.a above, and should be rejected for the same reasons.

Futurewise also argues SCC 30.62B.140 was amended to eliminate the requirement that a geotechnical report be prepared for any development activity, action requiring a project permit, or clearing proposed within a landslide hazard setback. This simply is not true. The amendments merely deleted the words "or its setback" because the setback is now encompassed in the new definition of an LHA itself, as discussed in more detail in Section II.B above and Section III.G.3 below.

Finally, Futurewise challenges SCC 30.62B.160, arguing it does not apply to clearing or vegetation removal. It applies to development activities or actions requiring a project permit. Clearing and vegetation

[41] Futurewise challenged these SCC provisions before the Board as part of Issue C-1, which the Board dismissed as inadequately briefed. AR 1825-1826. If this Court upholds that conclusion, it should decline to address Futurewise's challenges to SCC 30.62B.140, 30.62B.160, and 30.62B.340.

removal are included in the definition of "land disturbing activity," which requires a land disturbing activity permit. AR 1338, 1340. Therefore, clearing and vegetation removal are subject to the requirements of SCC 30.62B.160.

3. SCC 30.91L.040[42] Complies With the GMA

Futurewise contends the expanded setbacks the County incorporated into the definition of landslide hazard area at SCC 30.91L.040 are not supported by best available science (BAS). This assertion is premised on the notion there is a GMA mandate to protect people and property from GHAs and how a jurisdiction must implement that mandate is by designating LHAs to include worst case landslide run out distances or prohibiting development within worst case landslide run out distances. As the County demonstrated in its response to Issue 4, there is no GMA mandate to use critical area regulations to protect people and property from GHAs. As the County demonstrated in its response to Issues 2 and 3, there is no GMA mandate to include landslide run out or setback areas in the designation of LHAs. Futurewise's arguments also are premised on the assertion the County did not "consider" public health and safety in its amendments to its GHA regulations. The record

[42] Futurewise challenged SCC 30.61L.040 before the Board as part of Issue C-1, which the Board dismissed as inadequately briefed. AR 1825-1826. If this Court upholds that conclusion, it should decline to address Futurewise's challenge to SCC 30.91L.040.

demonstrates the opposite. The Ordinance contains three pages of findings describing the LHA amendments and mentions "public health and safety" at least six times. AR 21-23 (Findings K1-K23).

The County did not err when it carefully considered BAS, including the run out of landslides in the Puget Sound region, and determined that incorporation of a setback area into SCC 30.91L.040 of two times the height of the slope at the toe and the height of the slope at the top would capture most, but not all potential landslide run outs. The County made this determination informed by the BAS and consistent with the County's obligations under the GMA. Futurewise's citation to other BAS that notes landslide run outs can be greater than the setbacks adopted by the County does not undermine the County's regulations or overcome the presumption of validity of the County's regulations. Contrary to Futurewise's apparent assertion, the legal test is not whether the County regulated to the most extreme potential landslide event. That is not the GMA standard and Futurewise cites no authority to support such an interpretation of the GMA requirement to protect the functions and values of a critical area. The County developed amended landslide hazard regulations that exceed the standard, set forth in State Building Code (SBC) regulations, for protection of people and property, exceed the

GMA standard for designation of GHAs, and exceed the GMA standard for protection of GHAs.[43]

The protection of people and property from GHAs is addressed in the building codes, not the GMA.[44] The SBC, chapter 19.27 RCW, applies to and is enforced by all Washington State local jurisdictions. The SBC adopts the International Building Code (IBC) in RCW 19.27.031. IBC Section 1808 deals with structure foundations and setbacks from ascending and descending slopes. AR 1333-35. Figure 1808.7.1 establishes a setback from the top of the slope of at least the smaller of the height of the slope divided by 3 or 40 feet. AR 1334. Figure 1808.7.1 establishes a setback from the toe of the slope of at least the smaller of the height of the slope divided by 2 or 15 feet. AR 1334. Prior to adoption of the Ordinance, the County's setbacks were those in the IBC.

Following the Oso landslide, County staff reviewed old and new BAS to determine to what extent the IBC setbacks would protect people and property from landslides. Staff reviewed pre-Oso slide reports relevant to the Oso area maintained in the Department of Natural

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[43] Futurewise articulates a new issue within its challenge to SCC 30.91L.040, arguing the "Sleight Memorandum" does not qualify as BAS. Futurewise's Brief at 37-38. This is a new issue first identified on appeal and should not be considered. RCW 34.05.554. Futurewise never made this challenge below. Moreover, the County did not rely on the Sleight Memorandum as BAS; rather, the Sleight Memorandum summarized BAS.
[44] *Sno-King*, GMHB No. 06-3-0005 (2006 FDO), 15 (Appendix A); *Seattle Audubon*, GMHB No. 06-3-0024 (2006 FDO), 19; 2006 WL 3791721, *16.

Resources Geology Library, as well as a number of subsequently-published reports, including the GEER report authored by independent experts and specific to the Oso slide. AR 1467-68. Based on this review, staff determined the IBC setbacks were "insufficient in some circumstances" to protect public health and safety. AR 1468.

The literature review indicated no two potential landslide sites were the same, and the complexity of each slide was a function of many factors, including surrounding land use, surcharge loading, stratigraphy, geology, topography, total rainfall over a period of time, presence of a geologic contact, and subsurface flow regime. *Id.*; AR 23 (Ord. Finding 20). Many of these factors are incorporated into the LHA definition, such as basal undercutting by streams, rivers or waves, and areas with slopes greater that 33% which intersect with geologic contacts or which contain springs or ground water seeps. AR 70-71. Although these factors help identify a landslide hazard, they are not necessarily helpful in predicting the run out of a landslide. Because regulatory "predictability" is Goal 7 of the GMA,[45] County staff attempted to determine a factor that was most predictive of landslide run out on which to base setbacks.

[45] RCW 36.70A.020(7) provides: "Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability."

Staff determined the height of the slope was the most reliable, easy to ascertain, standard to measure potential landslide run out. This conclusion was based on scientific articles and review of previous slides in Snohomish County and the Puget Sound area. A 2013 article evaluating prediction models for horizontal run out distances of landslides triggered by earthquakes concluded that height is a good predictor of run out. AR 1426. Staff considered this indicator and compared it to a historical review of local landslides, concluding that most local landslides fell within twice the height of the slope. AR 23 (Findings 22, 23), 1401.

Futurewise claims an article by Legros indicates that volume, rather than slope height, is a better predictor of landslide runout. Futurewise's Brief at 36. The argument should be disregarded for two reasons. First, volume of a potential landslide is difficult to assess without knowing where a slip will occur. Conversely, height can be easily ascertained, Legros notes the existence of the "strong positive correlation between" slope height and runout distance,[46] twice the height of a slope will capture the vast majority of landslides in Snohomish County, and the planning director has authority to expand a landslide area when site-specific information warrants it. Second, Futurewise's argument that the

[46] AR 983.

BAS it cites is "better" than the County's reasoned analysis of all of the BAS is contrary to the rule of deference to the County's planning decisions under RCW 36.70A.3201 and the reasoned analysis requirement articulated in *Ferry County v. Concerned Friends of Ferry County*, 155 Wn.2d 824, 837, 123 P.3d 102 (2005).[47]

The County's LHA regulations were lauded by Ecology. AR 1549. Futurewise submitted the only comments challenging the adequacy of the regulations. In essence, they argue the County's setbacks must be large enough to account for extreme landslides like the one that occurred at Oso.[48] That is not the standard. The County cannot legislate for all landslide hazards on the basis of one extreme, unpredictable, tragic event. To do so would be contrary to BAS and constitutional protections of

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[47] Similarly, the article cited by Futurewise for the proposition that two times the height will not capture all potential landslide run out distances focuses on landslides in Northern British Columbia. The conditions present in those landslides, including 2,000+ elevations, weak sedimentary rock, and permafrost, are not likely to be found in landslide-prone areas in Snohomish County. Futurewise's Brief at 30, 36, citing AR 1201, 1205-06. That article's conclusions are not applicable here and do not undermine BAS relied on by the County.

[48] Futurewise's assertion that the Oso landslide was not an extreme event but predictable and normal in scope is directly refuted by BAS, in an article titled: "Landslide mobility and hazards: implications of the 2014 Oso disaster." AR 1447-58. That article concluded the impacts of that landslide were severe because its mobility exceeded that of prior historical landslides at the site, and "also exceeded that of comparable landslides elsewhere." AR 1447. It described the mobility of the Oso landslide as "an important scientific problem." AR 1448. The conclusions in this article are corroborated by previous predictions of run out at the Oso site, none of which exceeded 900 feet – the Oso landside ran 5,500 feet across the valley floor. AR 1172-73, 1180. If the County's new regulations had been in place at the time of the Oso landslide, the setback would have been 1,200 feet, which would have encompassed predicted run out.

private property and the property rights goal of the GMA. Goal 6 provides, in part: "The property rights of landowners shall be protected from arbitrary and discriminatory actions." RCW 36.70A.020(6). It would be arbitrary for the County to impose a setback of 9.3 times the height of the slope on every development proposal to account for the Oso landslide,[49] when the vast majority of landslides will not exceed twice the height of the slope. Such unjustified setbacks would subject the County to a constitutional challenge.[50]

Further, the County's updated regulations, including the modified definition of LHA at SCC 30.91L.040, are fully protective of the landslide hazards themselves. LHAs have independent "functions and values" that can be protected, and are protected, by County regulations. A seismic fault will not rupture if a structure is built on it. However, "[d]isturbing or changing drainage patterns, destabilizing slopes, and removing vegetation are common human-induced factors that may initiate landslides." Futurewise's Brief at 31, quoting AR 910. The County's regulations prevent such factors. The regulations prohibit development activities,

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[49] The height of the Oso slope was 600 feet and the runout length was 5,500 feet, yielding a ratio of 1:9.3.

[50] *See, e.g., Citizens' Alliance for Property Rights v. Sims*, 145 Wn. App. 649, 187 P.3d 786 (2008) (critical areas regulations violated constitutional principles articulated in RCW 82.02.020 because they exceeded the scope of potential impacts from proposed development).

actions requiring project permits, or clearing in LHAs, which includes the setback area, unless a number of strict standards are met, including that the activity does not "cause or increase erosion or landslide hazard risk" and a geotechnical report demonstrates that building in an LHA provides "protection commensurate to being located outside of the [LHA]." SCC 30.62B.320 & .340 (AR 60, 62-63). The County's regulations protect the functions and values of LHAs.

4. SCC 30.62B.390 Complies With the GMA

In addition to increasing setbacks from a landslide hazard area well beyond IBC standards and including these setbacks in the "landslide hazard area" definition, beyond GMA requirements, the County adopted SCC 30.62B.390, which allows the PDS director to increase the landslide hazard area size or impose more stringent standards if warranted by site-specific information presented during an application review.[51] The County found that larger setbacks in the "landslide hazard area" definition and the director's ability to expand a landslide hazard area, would capture the vast

[51] Ord. 15-034 at 56; 62-63 (SCC 30.91L.040). This discretion can be exercised only when the director makes findings showing how the decision (1) eliminates or substantially reduces a specific public health, safety or welfare concern or a significant adverse impact, and (2) is based on sound engineering practices.

majority of landslide events in the county.[52] The purpose of SCC 30.62B.390 is to enhance public safety.[53]

Futurewise argues that the County must enlarge setbacks within a landslide hazard area or impose more stringent standards when necessary to protect public health or welfare. However, as noted above, protecting people and property from GHAs is not a GMA requirement, but a matter addressed in building codes. The County exceeded IBC requirements and gave the director discretion to impose additional requirements as warranted by findings demonstrating objective criteria.[54] The GMA does not require more, Futurewise does not meet its burden to prove otherwise, and this issue should be dismissed.

H. Issue 7. The Board Did Not Err Regarding the County's CARA Regulations

Futurewise challenges the County's amendment of SCC 30.62C.140(3)(f)(iv), a critical aquifer recharge area (CARA) regulation. Futurewise does not demonstrate Board error, nor does it establish the substantial prejudice required under RCW 34.05.570(1)(d). Futurewise's request for remand for consideration of recent legislation under RCW

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[52] Ord. 15-034 at 15 (Finding 23).
[53] *Id.* at 14 (Finding 16); Exhibit 3.2.6 at 2 (Holbrook Memo).
[54] Granting the responsible official discretion to alter requirements based on site-specific information is not unusual. *See e.g.*, Skagit County Code 14.24.430(1)(g), King County Code 21A.24.280(B), Kitsap County Code 19.400.435(A)(5).

34.05.554(1)(d)(i) should be rejected because the recent legislation is not controlling law as to the challenged provision and its request is based solely on speculation the County will not comply with state law.

1. SCC 30.62C.140(3)(f)(iv) Complies with the GMA

Futurewise's sole complaint regarding SCC 30.62C.140(3)(f)(iv) is that it omits water availability requirements applicable to the processing of building permit and subdivision applications, relying on *Whatcom County v. Hirst,*[55] and *Kittitas County v. EWGMHB*.[56] The GMA does not require this, as the Board concluded and Futurewise itself acknowledges.

First, the cases cited by Futurewise do not support its assertion that a critical area regulation must include statutory building permit and subdivision requirements. *Hirst* interpreted RCW 19.27.097, which governs building permit applications, and RCW 58.17.110, which governs subdivision applications, to require a local jurisdiction to determine legal availability of water when a permit-exempt well is proposed to support a building permit or subdivision application.[57] *Hirst* did not address critical area regulations or CARAs. Rather, *Hirst* concluded, "[i]n order to comply with the GMA, counties must receive sufficient evidence of an adequate water supply from applicants for building permits or

[55] 186 Wn.2d 648, 381 P.3d 1 (2016).
[56] 172 Wn.2d 144, 256 P.3d 1193 (2011).
[57] *Hirst*, 186 Wn.2d at 674.

subdivisions before the county may authorize development"[58] *Kittitas* addressed a challenge to subdivision regulations and concluded a jurisdiction that allows developments to avoid the RCW 90.44.050 gallon per day limit on the domestic use of a permit-exempt well failed to assure adequate provisions for potable water, as required under RCW 58.17.110.[59] *Kittitas* did not address critical area regulations or CARAs.

Second, Futurewise's argument ignores the structure of the County's regulations. SCC 30.62C.140(3)(f)(iv) establishes elements to be included in a hydrogeologic report required for certain activities and uses within CARAs. AR 67-68. CARA regulations do not apply countywide, but only in areas characterized by the presence of sole source aquifers, Group A wellhead protection areas, and areas of sensitivity to groundwater contamination. SCC 30.62C.220. Futurewise's contention is that SCC 30.62C.140(3)(f)(iv) must include water availability provisions governing the processing of building permit and subdivision applications because ***sometimes*** CARA regulations are applied in the processing of building permit or subdivision applications, depending on a project's location. This argument misses the point. The County sometimes applies

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[58] *Hirst*, 186 Wn.2d at 674.
[59] *Kittitas*, 172 Wn.2d at 180

its shoreline regulations[60] or its forest practices regulations,[61] as relevant, in processing a building permit or subdivision application, depending on the project's location. Under Futurewise's reasoning, the County would be required to include water availability provisions in every separate regulation that might be triggered in the processing of a building permit or subdivision application.[62] No authority cited by Futurewise stands for such a proposition. The Board agreed with the County, concluding Futurewise's position "makes little sense" given the purpose and applicability of determinations of water availability and the narrower purpose and applicability of SCC 30.62C.140(3)(f)(iv).[63]

Third, Futurewise significantly undermines its own argument when it states "Snohomish County is required to include water availability requirements in its critical areas regulations ***or other development regulations***."[64] If the regulatory language Futurewise seeks would be, as Futurewise suggests, appropriately housed in "other development

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[60] Chapters 30.44 and 30.67 SCC.
[61] Chapter 30.43F SCC.
[62] The County's subdivision and building codes are located in different chapters of County code, chapters 30.41A, 30.41B, 30.41C, and 30.52A SCC, none of which are before this Court on appeal.
[63] AR 1824.
[64] Futurewise's Brief at 48 (emphasis added). *See also* AR 863 ("The County has failed to incorporate these requirements into SCC 30.62C.140(3)(f)(iv) ***or elsewhere in its development regulations***") (emphasis added); CP 187 ("So including these requirements in the CARA regulations ***or another development regulation*** is required") (emphasis added). A challenge by way of a passing reference to the County's "other development regulations" is not properly before this Court.

regulations" the Board could not have erred in reaching the conclusion it did. Futurewise fails to establish any prejudice, let alone substantial prejudice, from the Board's decision on this issue.

Finally, Futurewise provides no evidence or argument that SCC 30.62C.140(3)(f)(iv) as amended in the Ordinance fails to protect CARAs. SCC 30.62C.140 includes requirements for: (i) information on nearby surface and ground waters; (ii) discussion of effects of the proposed activity on groundwater quality and quantity; (iii) provisions to monitor groundwater quality and quantity; (iv) analysis of alternatives to avoid impacts, if predicted, and mitigation, if unavoidable; and (v) "[a]ny other information necessary to determine compliance with this chapter." Futurewise does not challenge these requirements or explain how these would prevent the County from acquiring the information needed to make water availability determinations for building permits and subdivisions.

The Board correctly concluded that neither the GMA nor cited case law mandate the inclusion of statutory requirements applicable to the processing of building permits and subdivisions in a subsection of a critical area regulation. Substantial weight should be given to the Board's interpretation of the statute it administers[65] and deference should be given

[65] *City of Redmond v. CPSGMHB*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).

to the County's determination of how to structure its development regulations.[66]

2. SCC 30.62C.130 Complies with the GMA

Futurewise provides a two sentence challenge to SCC 30.62C.130, which addresses submittal requirements for a site development plan. It argues the scope of applicability of SCC 30.62C.130 "violates the GMA for the same reasons as SCC 30.62A.130, SCC 30.62B.130, SCC 30.62B.140, and SCC 30.62B.340."[67] Futurewise did not preserve this challenge to SCC 30.62C.130 for appeal. Futurewise's assignment of error for Issue 7 contends the Board erred in its conclusion regarding "the hydrogeologic report section" of chapter 30.62C SCC.[68] SCC 30.62C.130 is not the hydrogeologic report section – SCC 30.62C.140(3)(f)(iv) is.[69] Futurewise's briefing before the Thurston County Superior Court did not mention SCC 30.62C.130.[70] In any event, this applicability challenge to SCC 30.62C.130 is the same one Futurewise leveled against SCC 30.62A.130, 30.62B.130, 30.62B.140, and 30.62B.340 and it fails for the same reasons articulated in Sections III.G.1.a and III.G.2, above.

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[66] RCW 36.70A.3201.
[67] Futurewise's Brief at 42.
[68] Futurewise's Brief at 4-5; CP 165.
[69] AR 66-67.
[70] CP 187; CP 178-187.

3. Remand Under RCW 34.05.554(1)(d) Is Inappropriate and Will Not Serve the Interests of Justice

Futurewise argues the interests of justice would be served by remand to the Board to review the County's 2015 amendment to a subsection of a CARA regulation against 2018 legislation that revises standards for water availability determinations for building permit and subdivision applications. This argument is not well-taken and this Court should decline Futurewise's request.

RCW 34.05.554(1)(d)(i) provides that issues not raised before an agency may be raised on appeal if the interests of justice would be served by resolution of an issue arising from a change in controlling law that occurred after the agency action. Futurewise does not meet that standard.

First, the new legislation is not "controlling law" as to Futurewise's Issue 7 and the elements of a hydrogeologic report in a critical area regulation. Laws of 2018, chapter 1 ("ESSB 6091"), effective January 19, 2018, was adopted by the legislature to address the significant water resource challenges resulting from the *Hirst* decision. ESSB 6091 does the following: (1) it amends RCW 19.27.097 and RCW 58.17.110 to clarify evidence of adequate water supply for building permit and subdivision applications;[71] (2) it adds a new section each to chapters

[71] For some water resource inventory areas (WRIAs), evidence of adequate water supply requires compliance with an existing instream flow rule adopted by Ecology. *See, e.g.*,

36.70A and 36.70 RCW to specify that, when making decisions under RCW 19.27.097 and RCW 58.17.110, development regulations must ensure the proposed water use is consistent with RCW 90.44.050 and applicable rules adopted by Ecology under chapters 90.22 and 90.54 RCW, and further specifies, for compliance with the surface and groundwater resource requirements of chapter 36.70A RCW, a jurisdiction may rely on or refer to instream flow rules adopted by Ecology; (3) it requires for certain WRIAs the creation of committees to update existing watershed plans or create new ones; (4) it directs Ecology to initiate two pilot projects to measure groundwater use in certain areas; (5) it requires reporting to the legislature; (6) it addresses budget issues necessary to implementation; (7) it creates a joint legislative task force on mitigation with specified pilot projects; and (8) it amends chapter 90.03 RCW to reference the pilot projects. Nothing in ESSB 6091 is controlling law on Futurewise's Issue 7. Nowhere in its arguments related to ESSB 6091 does Futurewise identify or explain how those arguments have any relevance to SCC 30.62C.140(3)(f)(iv). ESSB 6091 does not address

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RCW 19.27.097(1)(b) and chapter 173-505 WAC (Stillaguamish WRIA). For other WRIAs, whose instream flow rules do not address permit-exempt wells, adequate water supply for building permit or subdivision approval requires compliance with new requirements set forth in Sections 202 or 203 of ESSB 6091. *See, e.g.*, RCW 19.27.097(1)(d) and Section 203 of ESSB 6091 (Snohomish WRIA).

critical areas or CARAs in a directive manner. Nothing in ESSB 6091 compels a different result or analysis than already addressed by the Board.

Second, Futurewise insists the interests of justice would be served by remand because it will not be able to "appeal the County's failure to adopt the development regulations required by Laws of 2018, ch. 1, § 102 until" the County's statutory update deadline has passed in 2023.[72] There are a number of significant problems with this line of reasoning. First, ESSB 6091 is not retroactive legislation.[73] It does not apply to County development regulations amended prior to January 19, 2018. Remand to assess the County's amendment of SCC 30.62C.140(3)(f)(iv) against the requirements of ESSB 6091 would be substantively pointless and procedurally flawed. Second, Futurewise's argument is nothing more than a request to this Court to ignore the statutory deadlines established by the legislature for the County's update to its comprehensive plan and development regulations to address new requirements. RCW 36.70A.130(5)(a). Third, Futurewise's position is based entirely on the improper assertion the County will not comply with state law. Futurewise speculates it is "unlikely" the County will adopt "the development

[72] Futurewise's Brief at 44.
[73] ESSB 6091, § 307.

regulations required by Laws of 2018, ch. 1, § 102 anytime soon."[74] Speculation that a jurisdiction will not comply with a law is not an appropriate basis for review under RCW 34.05.554(1)(d)(i) and is contrary to the standards of review applicable in GMA cases. Finally, Futurewise assumes, with no evidence, that the County is not currently complying with ESSB 6091 and then speculates, again with no evidence, that "a significant amount of development could vest" because of that. The County's development regulations provide: "[n]othing in this title shall be construed to excuse compliance with other applicable federal, state, or local laws or regulations." SCC 30.10.040. ESSB 6091 has been state law since January 19, 2018. The County complies with state law. Futurewise's unsupported speculation to the contrary is not an appropriate basis to remand under RCW 34.05.554(1)(d)(i).

Finally, Futurewise does not successfully distinguish *Olympic Stewardship*.[75] As in *Olympic Stewardship*, the administrative record here has not been developed as to the question of what the County has done since the adoption of ESSB 6091.[76] Futurewise provides no reason,

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[74] Futurewise's Brief at 45. Futurewise's position is internally inconsistent. Futurewise complains the County has, by statute, until 2023 to adopt development regulations to implement ESSB 6091 and that is just too long to wait so the Court should remand. Futurewise also complains the County is unlikely to adopt those development regulations "anytime soon" and so the Court should remand to compel the County to adopt development regulations well before the statutory obligation to do so.
[75] 166 Wn.App. 172, 274 P.3d 1040, *review denied*, 174 Wn.2d 1007 (2012).
[76] *Id.*, at 200.

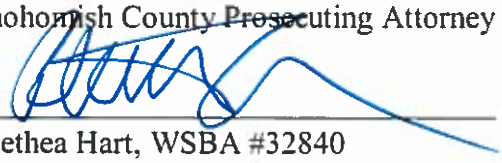
beyond speculation or complaints the GMA gives the County too long to amend development regulations, for why it would be unjust for Futurewise to address its concerns at a different time or in a different action.[77] And although the court in *Olympic Stewardship* did note the existence of a published decision addressing the new law in that case, the court also noted the published case did not address the issue presented there.[78] *Olympic Stewardship* supports denial of Futurewise's remand request.

IV. CONCLUSION

Snohomish County requests the Court affirm the Board's February 17, 2017, Final Decision and Order.

Respectfully submitted this 30th day of May, 2018.

MARK K. ROE
Snohomish County Prosecuting Attorney



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[77] *Id.*, at 201.
[78] *Id.*, at 200.

DECLARATION OF SERVICE

I, Cindy Ryden, hereby declare that I am an employee of the Civil Division of the Snohomish County Prosecuting Attorney, and that on the 30th day of May, 2018, I caused to be delivered Brief of Respondent Snohomish County on the following person by the method indicated:

Tim Trohimovich Futurewise 816 Second Avenue, Suite 200 Seattle, WA 98104 *Attorney for Petitioners Futurewise and Pilchuck Audubon Society*	☒ ***E-service:*** ***tim@futurewise.org*** ☐ Facsimile: ☐ Express Mail ☐ U.S. Mail ☐ Hand Delivery ☐ Messenger Service
Dionne Padilla-Huddleston Office of the Attorney General 800 Fifth Avenue, Suite 2000 Seattle, WA 98104-3188 *Attorney for Respondent Growth Management Hearings Board*	☒ ***E-service:*** ***dionnep@atg.wa.gov*** ***lalseaef@atg.gov*** ☐ Facsimile: ☐ Express Mail ☐ U.S. Mail ☐ Hand Delivery ☐ Messenger Service

I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 30th day of May, 2018 at Everett, Washington.

Cindy Ryden, Legal Assistant

APPENDIX A

CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

SNO-KING ENVIRONMENTAL ALLIANCE, EMMA DIXON and GERALD FARRIS.	)	**Case No. 06-3-0005**
	)	***(Sno-King)***
Petitioner,	)	
v.	)	
SNOHOMISH COUNTY,	)	**FINAL DECISION and ORDER**[1]
Respondent	)	
KING COUNTY,	)	
Intervenor.	)	

SYNOPSIS

In October 2005, Snohomish County adopted three ordinances: Ordinance 05-121 relating to Odor Order Prevention Standards for certain facilities; Ordinance 05-122 relating to Construction Standards in Seismic Hazard Areas; and Ordinance 05-126 revising the procedures for siting for Essential Public Facilities. Each of these Ordinances was enacted by the County as an Emergency Ordinance. Ordinances 05-121 and 05-122 were adopted pursuant to RCW 36.70A.390 and Ordinance 05-126 was adopted pursuant to SCC 30.73.090. Petitioners challenged these enactments as not consistent with the Growth Management Act (GMA), RCW 36.70A, on the basis of notice, public participation, best available science, and consistency.

The Board found that the County's actions in adopting these Ordinances did not violate the applicable public participation provisions of the GMA [Legal Issue No. 1]. The Board concluded that the Petitioners failed to carry their burden of proof on their challenge to Ordinance 05-122 pertaining to best available science as it relates to seismic hazard areas [Legal Issue No. 2]. The Board determined that the Petitioners could not raise the issue of consistency with Comprehensive Plan provisions because they

[1] Although this FDO mentions the Brightwater Wastewater Treatment Facility as context for the challenged actions; this FDO is not to be interpreted as a Board opinion related to that project.

did not provide evidence to support GMA participation standing on that issue [Legal Issue No. 3]. The Board entered an order dismissing the petition.

I. BACKGROUND

The genesis of this appeal is a dispute regarding Snohomish County's regulations pertaining to wastewater treatment facilities – essential public facilities. The catalyst for the action was, and is, the Brightwater Wastewater Treatment Facility, proposed by King County but sited in Snohomish County. The siting and regulation of this essential public facility has spawned five prior and separate appeals to this Board.[2]

The last appeal (*King County IV*) involved Snohomish County's adoption of new Odor and Seismic Hazard regulations (Emergency Ordinance Nos. 05-029 and 05-030, respectively). However that matter was dismissed when King and Snohomish Counties resolved their dispute and executed a settlement agreement. The settlement agreement, in turn, led to a stipulation for dismissal from the parties, which the Board granted.[3] Petitioners here, Sno-King Environmental Alliance, were interveners on behalf of Snohomish County in the *King County IV* matter.

The precipitating action in the present appeal is Snohomish County's adoption, or ***re-adoption***,[4] of the Odor and Seismic Ordinances (Emergency Ordinance Nos. 05-121 and 05-122 respectively); as well as the adoption of an Ordinance amending Snohomish County's essential public facility regulations (Emergency Ordinance No. 05-126 – the **EPF Ordinance**) and an Ordinance authorizing the County to execute a site specific

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[2] 1) *King County v. City of Edmonds [Unocal – Intervenor]* (***King Co.***), CPSGMHB Case No. 02-3-0011, Order of Dismissal, (Sep. 12, 2002); 2) *King County v. Snohomish County [Cities of Renton and Intervenors; Puget Sound Water Quality Defense Fund – Amicus]* (***King County I***), CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 13, 2003), and Order Finding Continuing Noncompliance and Continuing Invalidity and Notice of Second Compliance Hearing, (May 26, 2004), and Order on Court Remand of CPSGMHB Case No. 03-3-0011, (Jul. 29, 2005), and Order Finding Compliance, (Mar. 27, 2006); 3) *King County and City of Renton v. Snohomish County* (***King County II***), CPSGMHB Case No. 03-3-0025, Order of Dismissal, (May 26, 2004) – *See King County I*, and Order Revising Order of Dismissal, (Feb. 1, 2005); 4) *King County v. Snohomish County* (***King County III***), CPSGMHB Case No. 04-3-0012, Order of Dismissal, (May 26, 2004) – *See King County I*; 5) *King County and City of Renton v. Snohomish County [Sno-King Environmental Alliance – Intervenor]* (***King County IV***), CPSGMHB Case No. 05-3-0033, Order of Dismissal, (Jan. 23, 2006).

[3] The settlement agreement also laid the groundwork for revisions to Snohomish County's essential public facility regulations and ultimately led to the Board's entering a Finding of Compliance in the *King County I* matter.

[4] The initial Odor and Seismic Emergency Ordinances (05-029 and 05-030) that were challenged in *King County IV* were slated to expire on October 18, 2005. On October 17, 2005, Snohomish County, essentially readopted the same provisions for an additional six month period. The Board further notes that the present Ordinances [05-121 and 05-122] have also "expired" and been "re-adopted" again by the County in the form of Ordinance Nos. 06-024 and 06-025. On June 19, 2006, Sno-King Environmental Alliance and Corinne Hensley filed a new PFR challenging these Ordinances – *See Sno-King II v. Snohomish County*, CPSGMHB Case No. 06-3-0025.

development agreement regarding the Brightwater facility with King County (Ordinance No. 05-127 – the **DA Ordinance**).

On February 6, 2006, the Board received a timely petition for review from Sno-King Environmental Alliance, Emma Dixon and Gerald Farris. The Board entered a Notice of Hearing setting a prehearing conference in March. Following the prehearing conference, Petitioners clarified their Legal Issues. The Board subsequently issued the Prehearing Order setting the final schedule and Legal Issues to be decided. Also in March, King County was granted status as an Intervenor.

During April and May the Index of the Record was amended by the County and the addition of several supplemental exhibits proposed by Petitioners was authorized by the Board. Also during the Board's motions practice, the County moved to dismiss various issues and challenges to certain ordinances. The Board **granted** in part and **denied** in part Snohomish County's motions. The Board's May 25, 2006 Order on Motions established the record and the remaining Legal Issues to be decided. Petitioners' challenge to Ordinance No. 05-127 (the DA Ordinance) was **dismissed** for lack of subject matter jurisdiction. The other three Emergency Ordinances – 05-121, 05-122 and 05-126, are still before the Board.

In June, the Board timely received the prehearing briefs of the parties. The Briefing received will be hereafter referenced as follows:

- Petitioners Sno-King Environmental Alliance, Emma Dixon and Gerald Farris's Prehearing Brief - **Sno-King PHB**;
- Respondent Snohomish County's Prehearing Response Brief – **Snohomish Response**;
- Respondent Snohomish County also filed a Motion to Supplement the Record – **Snohomish Motion – Supp.**;
- Intervenor King County's Prehearing Response Brief – **King Response**;
- Petitioners Prehearing Reply Brief – **Sno-King Reply**.

On July 6, 2006, the Board held the Hearing on the Merits (HOM) at the Board's offices at Suite 2470, 900 Fourth Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, Margaret A. Pageler and Bruce C. Laing[5] were present for the Board. Corinne Hensley appeared for Petitioners Sno-King Environmental Alliance, and Emma Dixon appeared *pro se*. Petitioner Gerald Farris did not appear. Respondent Snohomish County was represented by John R. Moffat, Lisa Anderson and Shawn Aronow. Intervener King County was represented by Verna P. Bromley. Court reporting services were provided by Eva Jankowitz of Byers and Anderson. Board Law Clerk, Julie Taylor and Board Externs Brian Payne and Kris Hollingshead were also present. The hearing convened at 10:00 a.m. and adjourned at approximately 12:15 p.m.

[5] Board member Bruce C. Laing's term was slated to expire on June 30, 2006. However, Governor Gregoire extended Mr. Laing's term until a new Board member can be seated.

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

Upon receipt of a petition challenging a local jurisdiction's GMA actions, the legislature directed the Boards to hear and determine whether the challenged actions were in compliance with the requirements and goals of the Act. *See* RCW 36.70A.280. The legislature directed that the Boards "after full consideration of the petition, shall determine whether there is compliance with the requirements of [the GMA]." RCW 36.70A.320(3); *see also*, RCW 36.70A.300(1).

Petitioners challenge Snohomish County's adoption of amendments to their development regulations pertaining to essential public facilities, as adopted by Emergency Ordinance Nos. 05-121 (**Odor**), 05-122 (**Seismic**) and 05-126 (**EPF**). Pursuant to RCW 36.70A.320(1), Snohomish County's Emergency Ordinance Nos. 05-121, 05-122 and 05-126 are presumed valid upon adoption.

The burden is on Petitioners to demonstrate that the actions taken by Snohomish County are not in compliance with the goals and 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 actions taken by [Snohomish County] are 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 Snohomish 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).

The GMA affirms that local jurisdictions have discretion in adapting the requirements of the GMA to local circumstances and that the Board shall grant deference to local decisions that comply with the goals and requirements of the Act. RCW 36.70A.3201. Pursuant to RCW 36.70A.3201, the Board will grant deference to Snohomish County in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. The State Supreme Court's most recent delineation of this required deference states: "We hold that deference to county planning actions that are consistent with the goals and requirements of the GMA . . . cedes only when it is shown that a county's planning action is in fact a 'clearly erroneous' application of the GMA." *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224, 248, 110 P.3d 1132 (2005).

The *Quadrant* decision is in accord with prior rulings that "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). As the Court of Appeals explained, "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, 444, 31 P.3d 28 (2001); *affirmed Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn2d 1, 15, 57 P.3rd 1156 (2002); *Quadrant*, 154 Wn.2d 224, 240 (2005).

The scope of the Board's review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to those issues presented in a timely petition for review.

III. BOARD JURISDICTION, PREFATORY NOTE and PRELIMINARY MATTERS

A. BOARD JURISDICTION

The Board finds that the PFR filed by Sno-King Environmental Alliance was timely, pursuant to RCW 36.70A.290(2); these Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the remaining challenged ordinances, which amend the County's development regulations, pursuant to RCW 36.70A.280(1)(a).

B. PREFATORY NOTE

The Actions Challenged:

Petitioners challenge three separate emergency ordinances adopted by Snohomish County apparently in response to the Settlement Agreement with King County to resolve litigation regarding the "Brightwater" wastewater treatment facility. The challenged Emergency Ordinances are: 05-121 [Odor Ordinance]; 05-122 [Seismic Ordinance]; and 05-126 [Essential Public Facility or EPF Process Ordinance]. Each amends portions of the Snohomish County Code (SCC).

Emergency Ordinance No. 05-121 – Odor: Petitioners challenge the County's Public Participation process and Consistency with GMA Plan provisions – Legal Issues 1 and 3.

This Ordinance adopts a new section in the Snohomish County Code – 30.28.092 – pertaining to Odor Prevention standards for certain facilities. It applies to applications for new wastewater treatment facilities, portals, pump stations, and outfalls that have the potential to generate odor emissions, *or any other use*, except agricultural uses, that have potential to generate emissions of hydrogen sulfide or ammonia. SCC 30.28.092(1). Odor emission standards are set for hydrogen sulfide at no more than .08 parts per billion (ppb) and no more than 2800 ppb for ammonia as detected at the property boundary, *or beyond*. SCC 30.28.092(2). The Ordinance also provides for design and operational standards, provisions for transporting materials that may emit odor, and a requirement for development of an odor monitoring and response plan.

Emergency Ordinance No. 05-122 – Seismic: Petitioners challenge whether the County used best available science and otherwise complied with the GMA's critical areas provisions for geologically hazardous areas – Legal Issue 2.

This Ordinance changes the definition of Seismic Hazard Areas, deleting "mapped seismic zones 3 and 4 in the Uniform Building Code" and adding "areas that have been determined by the building official to have known or inferred faults or ground rupture potential, liquefaction potential, or seismically induced slope instability." SCC 30.91S.120. [Licensed professionals must provide relevant geological reports to make this determination.]

The Ordinance also establishes a 50' setback from the closest edge of an identified active fault trace. SCC 30.51.010(1). The setback applies to seismic use groups II and III and seismic design categories E and F as defined in the International Building Code, adopted by Chapter 19.27 RCW [State Uniform Building Code]. *Id.* Additionally, the building official may require additional studies, tests or site investigations to determine the specific location of an active fault trace. SCC 30.51.020.

Emergency Ordinance No. 05-126 – EPF: Petitioners challenge the County's public participation process and consistency with GMA Plan provisions – Legal Issues 1 and 3.

This Ordinance authorizes the County Council to approve development agreements for the siting of essential public facilities. SCC 30.75.020(1). Decision criteria are set forth, but may be exempted or modified if they would preclude the siting, development or expansion of an essential public facility. SCC 30.75.100 and .130.

C. PRELIMINARY MATTERS

Oral Rulings at the HOM:

The Board entertained brief argument from the parties regarding Snohomish County's Motion to Supplement the Record. The Presiding Officer orally **granted** the County's Motion. The "August 3, 2004 King County Hearing Examiner's Decision Denying Appeal, Subject to Condition for the Brightwater Final Environmental Impact Statement Appeals of Adequacy" is **admitted** to the Record as Hearing on the Merits Exhibit 1 – **HOM Ex. 1**.

Additionally, the Board took **official notice** of Emergency Ordinance No. 06-024 [re-adopting the challenged Odor Ordinance] and Emergency Ordinance No. 06-025 [re-adopting the challenged Seismic Ordinance]. The Board determined that the substantive provisions of Ordinance No. 05-121 and Ordinance No. 06-024 were identical; and that the substantive provisions of Ordinance No. 05-122 and Ordinance No. 06-025 were identical. The two challenged Ordinances were slated to expire on April 17, 2006 but were extended through the adoption of the two new Ordinances – Emergency Ordinance Nos. 06-024 and 06-025.

The Board **denied** Petitioners motion to strike all references to the Brightwater wastewater treatment facility from the County's brief and exhibits. The primary reason for allowing reference to Brightwater was due to the discovery of a potential active fault that occurred during in the review of this project.

The Board entertained argument on Snohomish County's Motion to Dismiss Legal Issue 3 for lack of standing of Petitioner and in the alternative, to limit the consistency challenge to Plan provisions in place at the time of the adoption of the challenged ordinances. The Board took these issues **under advisement** and indicated it would rule on these questions in this FDO. *See* Legal Issue 3, *infra*.

IV. LEGAL ISSUES AND DISCUSSION

A. LEGAL ISSUE NO. 1 – PUBLIC PARTICIPATION

Legal Issue No. 1, as stated in the PFR and PHO, was modified by the Board's 5 25 06 Order on Motions. Legal Issue No. 1 is now stated as follows:

1. *The Ordinances 05-121, 05-122, 05-126 all thwart GMA's public participation process. The County has violated planning goal RCW 36.70A.020(11) by not providing adequate citizen participation in their planning process and not ensuring that all jurisdictions and communities were adequately involved in this planning process. The County has provided over the years public participation for its development regulations and comprehensive plan as required by RCW 36.70A.140. However, in the case of these three ordinances, the County's process was null and void or avoided completely as Petitioners will show, thus violating RCW 36.70A.140. See PFR, at 2-3; PHO, at 7; and Order on Motions (OoM), Appendix A, at 17, and Appendix B, at 19.*

   *[The Board characterizes **Issue One** as: Did Snohomish County (the **County**) fail to comply with the public participation provisions of RCW 36.70A.020(11) and .140, when it adopted Ordinance Nos. 05-121 (Odor), 05-122 (Seismic), and 05-126 (Essential Public Facility Procedures -EPF)?]*

Applicable Law

Goal 11 requires the County to "Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts." RCW 36.70A.020(11).

RCW 36.70A.140 requires the County to establish and disseminate a public participation program that identifies procedures for "early and continuous public participation in the development and amendment of [plans and] development regulations implementing such plans." Additionally, .140 requires "broad dissemination of proposals and alternatives,

opportunity for written comments, public meetings after effective notice, provisions for open discussion, communication programs, information services, and consideration of and response to public comments."

Discussion

It is important to note that the Board has **dismissed** Petitioners' challenge to the adequacy of the County's notice provisions regarding the three challenged ordinances. The Board concluded that,

> The evidence provided by the County clearly demonstrates that the published notice for all ordinances and mailed notice for [the Odor and Seismic Ordinances] were "reasonably calculated to provide notice to property owners and other affected and interested individuals . . . and organizations of proposed amendments to . . . development regulations."' (Citations omitted). Therefore, the County's motion related to the notice challenge [compliance with RCW 36.70A.035] in Legal Issue 1 is **granted**. Reference to RCW 36.70A.035 will be **stricken** from the Issue.

Sno-King, et al., v. Snohomish County, CPSGMHB Case No. 06-3-0005, Order on Motions, (May 25, 2006), at 14.

Therefore, what remains of this issue is just the public participation challenge as it relates to Emergency Ordinance Nos. 05-121, 05-122 and 05-126.

Position of the Parties:

Petitioners acknowledge that the County has adopted a public participation program that outlines procedures for public participation in adopting and amending its Plan and implementing regulations [*i.e.* 30.74.010 SCC]. However, Petitioners contend that the County did not follow those procedures in acting on the three challenged ordinances. Sno-King PHB, at 4-8. Instead, Petitioners complain that the County erroneously adopted these measures via "Emergency Ordinances" which circumvent the County's public participation procedures. *Id.* at 8-11. Further, Petitioners assert that no emergency existed, or is justified, to support these ordinances and that the County seems to be undergoing an "ongoing emergency" related to these ordinances. *Id.* at 11-13. Finally, Petitioners contend that the "ongoing emergency" in Snohomish County creates conflict with the public, and although there has been ample time to allow for public participation, including review by the Planning Commission, the County has not provided it. *Id.* Petitioners suggest that the County should have followed the review and amendment procedures set forth in RCW 36.70A.130 [annual review cycle] or .470 [docketing procedures.] *Id.*

The County responds that, as Petitioners acknowledge, it has adopted and implements a public participation program as required by RCW 36.70A.140 – citing Chapter 30.73

SCC. However, the County argues these provisions of the SCC [nor the .140 provisions of the GMA] do not apply to the challenged Ordinances since they were adopted via emergency procedures. Snohomish Response, at 1-8. The County notes that Emergency Ordinance Nos. 05-121 [Odor] and 05-122 [Seismic] were adopted pursuant to RCW 36.70A.390,[6] and were adopted for an interim period of six-months. The County also notes that Emergency Ordinance No. 05-126 was adopted pursuant to emergency provisions in the Snohomish County Code – 30.73.090(3) and 30.73.040(2)(a) - which allows such action without planning commission review so long as there is a public hearing prior to adoption. In either case, the County asserts it was not required to adopt the Ordinances pursuant to .140. *Id.* at 9. The County further documents, and Petitioners do not dispute, that for each Ordinance there was a public hearing that provided the opportunity for public comment, both orally and in writing.[7]

Additionally, the County argues that this Board has held that RCW 36.70A.140 does not apply to emergency actions – *citing McVittie v. Snohomish County* (*McVittie V*), CPSGMHB Case No. 00-3-0016, Final Decision and Order, (Apr. 12, 2001), at 20-24. Snohomish Response, at 8. Further, the County argues that the question of whether an emergency existed, or circumstances justified the County's action, was not alleged as a Legal Issue in Petitioners' PFR or in the PHO. Therefore, the County asserts, the Board may not address this issue. *Id.* at 10. The County also contends that the annual review provisions of RCW 36.70A.130(2) are not alleged in this matter, nor do they apply to development regulations. Likewise the docketing provisions of RCW 36.70A.470 are not alleged in this case, nor are they applicable to these emergency actions. *Id.*

Intervenor King County contends that the County's declaration of emergency[8] is presumed valid and that the Board has previously determined that it will not review such declarations – *citing Wallock v. City of Everett* (*Wallock I*), CPSGMHB Case No. 96-3-0025, Final Decision and Order, (Dec. 3, 1996), at 10 and *Clark v. City of Covington* (*Clark*), CPSGMHB Case No. 02-3-0005, Final Decision and Order, (Sep. 27, 2002), at 5. Intervenor also supports the assertion of the County that the Odor and Seismic Emergency Ordinances were adopted pursuant to the provisions of .390. *Id.*

Petitioners reply that the County's continued reliance upon emergency actions undermines public participation as anticipated by the GMA. Sno-King Reply, at 4. Petitioners note that the original emergency ordinances – 05-029 [Odor] and 05-030

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[6] RCW 36.70A.390 allows adoption of interim measures without planning commission or agency recommendation or without holding a public hearing so long as a public hearing is held within 60-days of its adoption and findings are entered. *See* RCW 36.70A.390. These Ordinances were adopted on October 17, 2005 and the public hearing was on December 7, 2005.

[7] *See* Emergency Ordinance No. 05-121, at 3, and Emergency Ordinance No. 06-024, at 1 [Odor Ordinances]; Emergency Ordinance No. 05-122, at 3, and Emergency Ordinance No. 06-025, at 1 [Seismic Ordinances]; and Emergency Ordinance No. 05-126, at 3. *See also*, 5/25/06 Order on Motions, at 14.

[8] Intervenor quotes the WHEREAS provisions of both Emergency Ordinances as evidence of the facts and circumstances – the findings – supporting the declaration of emergency. *See* King Response, at 2-4, and the WHEREAS clauses of Ordinance Nos. 05-121 and 05-122.

[Seismic] have expired and have been replaced by the challenged emergency ordinances – 05-121 and 05-122; and now even these actions have been replaced by new Emergency Ordinance Nos. 06-024 [Odor] and 06-025 [Seismic]. *Id.* Petitioners claim that in lieu of an early and continuous public participation process with Planning Commission participation and SEPA review, the County's "emergency" is ongoing and contrary to the GMA. *Id.*

Board Discussion:

Although the Board understands the depth of Petitioners concerns, the Board must agree with the County and Intervenor. It is undisputed that the public, including Petitioners, were provided the opportunity to comment on the challenged Emergency Ordinances at a public hearing on December 7, 2005, a hearing held within the 60-day timeframe required by RCW 36.70A.390. Petitioners provided testimony and written comment on the Emergency Ordinances, but were unable to persuade the County to accept their views. While review by the Planning Commission and expanded public participation is encouraged by the GMA, the County is correct that the GMA does not compel such procedures when an emergency is declared or interim measures are enacted. RCW 36.70A.390 provides one means of taking such action and the County Code provides another. However, under either option, effective notice and the opportunity for public participation are provided. Snohomish County has adhered to these provisions and has complied with the applicable notice and public participation requirements and goal of the GMA.

The Board also affirms its prior decisions in *McVittie V*, *Wallock I* and *Clark*. In *McVittie V* the Board held that RCW 36.70A.140 is not applicable to emergency or interim actions so long as effective notice and the opportunity for public comment is provided. In *Wallock I* and *Clark* the Board indicated it will not inquire into the facts and circumstances supporting a jurisdiction's declaration of emergency.

The Board acknowledges the Petitioners' frustration with the County's continued use of emergency actions to address the Odor and Seismic issues posed in this PFR, but the GMA does not specifically constrain the exercise of such discretionary actions by local jurisdictions.[9] Emergency actions, by their very nature, may bypass the more extensive public review procedures of .140, the annual review provisions of .130 and the docketing procedures of .470. Nonetheless, the Board is encouraged that the County indicated at the HOM that it is moving to adopt *permanent* Odor and Seismic regulations and is availing itself of the expertise of its Planning Commission in a broader discussion with the public of these regulations.

[9] Note however, that in *MBA Camwest v. City of Sammamish*, CPSGMHB Case No. 05-3-0027, Final Decision and Order, (Aug. 4, 2005) the Board found that an emergency moratorium re-enacted 12 times (6-years) was a *de facto* permanent development regulation and no longer an interim ordinance or measure subject to .390.

Conclusion

Snohomish County provided effective notice and the opportunity for public comment when it adopted Emergency Ordinance Nos. 05-121 and 05-122 [pursuant to .390] and Emergency Ordinance No. 05-126 [pursuant to SCC 30.73.090]. The County has complied with the applicable public participation procedures and Goal 11 of the GMA in adopting the challenged Emergency Ordinances.

B. LEGAL ISSUE NO. 2 – CRITICAL AREAS AND BEST AVAILABLE SCIENCE

Legal Issue No. 2, as stated in the PFR and PHO, was modified by the Board's 5/25/06 Order on Motions. Legal Issue No. 2 is now stated as follows:

> 2. *(A) The County has violated State Law, Best Available Science (BAS) RCW 36.70A.172 and RCW 36.70A.060(2), RCW 36.70A.170. The ordinance [05-122] does not protect the function and values as well as the public where necessary to protect critical areas and areas of human habitation. See PFR, at 3; PHO, at 7-8; and OoM, Appendix A, at 17-18, and Appendix B, at 19.*
>
> *[The Board characterizes Issue Two A as: Did the County fail to comply with the critical area provisions of RCW 36.70A.060(2), .170 and .172 when it adopted the Seismic-Ordinance?]*

Applicable Law

RCW 36.70A.170 requires the County to identify and designate critical areas – including Geologically Hazardous Areas. "Geologically Hazardous Areas" are defined as "areas that because of their susceptibility to erosion, sliding, earthquake, or other geological events, are not suited to the siting of commercial, residential or industrial development consistent with public health and safety concerns." RCW 36.70A.030(9).

RCW 36.70A.060(2) requires the County to "adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170."

RCW 36.70A.172(1) provides, in relevant part:

> In designating and protecting critical areas under this chapter, counties and cities *shall include the best available science* in developing policies and development regulations *to protect the functions and values of critical areas.*

(Emphasis supplied).

Discussion

Geological Context:

The movement of the earth's tectonic plates is a source of seismic activity. The Puget Sound region is an active seismic area, and part of the larger area known as the Cascadia subduction zone. In the northwest, the Juan de Fuca plate's movement under the North American plate is a significant source of the region's volcanoes and earthquake activity. Ex. B-39. The Seattle Fault and the South Whidbey Island Fault (SWIF) are evidence of this seismic activity. Here there is no dispute that the SWIF is now understood to extend through portions of Snohomish County and into portions of King County. *See* Ex. B-30, Brightwater Draft Supplemental EIS, at 2-1. Recent studies by the U.S. Geological Service (USGS) have also discovered new faults, or lineaments [Lineaments 4, and perhaps X], to the SWIF extending into southern Snohomish County in proximity to the proposed Brightwater Wastewater Treatment Facility site. *Id.*

Regulatory Context - the International Building Code (IBC):

The IBC, which is adopted by the State of Washington as RCW 19.27, governs construction of buildings and structures in all local jurisdictions. The IBC includes provisions for design and construction in seismic hazard areas where documented active faults exist. Ex. B-25. Mapping of these active faults by the U.S. Geologic Services (USGS) is required in order to have the IBC's provisions apply. *Id.* The IBC provides a classification system (Category I, II, III and IV) for buildings and other structures by the nature of occupancy and for different risk factors, including seismic risk. Category I structures are generally those that pose a lower hazard to human life if the structure fails than might occur to structures listed in the other Categories. Category II structures include structures not listed in Categories I, III and IV, which would include most residential, commercial and industrial development. Category III facilities generally include public facilities (*e.g.* power generating stations, water and wastewater treatment plants) and buildings and structures where large numbers of people congregate (*e.g.* 250 students, 300 people, 50 patients). Category IV structures includes essential facilities (e.g. hospitals, fire, police, rescue, emergency facilities and shelters). *Id.* Seismic Design Categories range from Category A to F, which relate structure risk and seismic risk. Category A pertains to low risk structures in areas of low seismicity. Structures in Category E and F "shall not be sited where there is a known potential for an active fault to cause rupture of the ground surface at the structure." Ex. B-24, at 131.

Position of the Parties:

Generally, Petitioners suggest that the County's Seismic Ordinance only applies to a single project [*i.e.* Brightwater] and not to other types of facilities within seismic areas. Sno-King PHB, at 18. Additionally, Petitioners assert that the County's adoption of setbacks is unsubstantiated under law, and that best available science (BAS) must be used to determine the correct actions to take. *Id.*

Specifically related to the Seismic Ordinance, Petitioners contend that the: 1) County's definition of "Seismic Hazard Areas" differs from the GMA's definition of "Geologically Hazardous Areas" because it does not include a "suitability requirement" [apparently, to identify areas that are "not suitable" for development]; 2) County *itself* has not undertaken the responsibility for identifying and locating potential faults and other seismic area, but instead relies upon information provided by others; 3) application of the Ordinance should apply to other uses and facilities such as multi-family housing, schools and churches, where large numbers of people congregate; 4) the building official that enforces the Ordinance is not qualified, since only a state licensed geologist can practice geology; 5) setbacks are not supported by science, since the International Building Code does not contain setback requirements; and 6) it is questionable that Seismic Group III uses and Seismic Design Category E or F structures would survive a surface rupture with only a 50' setback. *Id.* at 19-27.

In response, the County notes that it is presently in the process of conducting its critical areas regulation review and update as required by the GMA and has produced a document summarizing BAS for that process which was relied upon here. Snohomish Response, at 13; *see* Ex. B-39. The County contends that the development and adoption of its Seismic Ordinance was precipitated by investigations on the Brightwater site, which led to the identification of a "regulatory gap" where the IBC would not apply. The County asserts that it filled that "gap" by adopting the challenged Ordinance. *Id.* In short, the County explains that further geologic investigation of the Brightwater site was required that disclosed an extension of the SWIF – Lineaments 4 and X. These areas have not yet been mapped by the USGS and incorporated into the IBC. Consequently, they are not covered by the IBC, state building code or the present county building code. Therefore, the County adopted the challenged Seismic Ordinance to fill the present void. Snohomish Response, at 14-18.

Specifically, related to the Seismic Ordinance, the County argues that: 1) BAS (*i.e.* USGS mapping and the use of aeromagnetic surveys, ground magnetic surveys, light detection and ranging imagery data [LiDAR] and trenching) has been, and is used to identify and designate seismic hazard areas such as the recently discovered faults germane to the pending matter, but BAS need not be relied upon to protect the "functions and values" of geologically hazardous areas since they do not require protection – rather, these areas need to be identified to protect people and property from the effects of seismic events; 2) GMA definitions by themselves do not create substantive duties, *citing Hanson v. King County*, CPSGMHB Case No. 98-3-0015c, Final Decision and Order, (Dec. 16, 1998), at 7-8; 3) the County's definition, which includes inferred faults, affords additional protection to the public and is not contrary to the GMA's definition; 4) the Seismic Ordinance applies to *all* structures included in Seismic Use Group II and III and Seismic Design Categories E and F and Petitioners have failed to point to any GMA provision that requires the County to include all the structures desired by them; 5) the Ordinance's requirement that any structure be setback 50-feet from an identified active trace fault and the authorization to require additional studies are supported by comparable

seismic regulations in other jurisdictions (*e.g.* State of California, Los Angeles County, Cities of Los Angeles and San Diego, and Salt Lake County, Utah) and is within the County's discretion. Snohomish Response, at 18-30.

Intervenor King County contends that more is being learned about earthquake faults and that the authorization for the building official to require additional studies and investigations incorporates and goes beyond BAS. King Response, at 7. Also, Intervenor argues that the County's definition of "Seismic Hazard Areas" is more protective than that of the IBC; and the 50' setback requirement is reasonable especially in light of the opportunity to require additional studies to locate "active fault traces." Id. at 7-9.

In reply, Petitioners argue that "trenching" must be done to locate "active fault traces" and that licensed geologists, not building officials, are the appropriate officials to make these determinations. Sno-King Reply, at 10-13. Petitioners also contend that the Seismic Ordinance does not reiterate, or reference, the IBC prohibition of structures being built over active faults and suggests that other "lifelines" [Petitioners do not identify these] must be protected from fault ruptures. *Id.* at 12-16. Petitioners assert that the County's action does not do enough to prevent critical facilities from being constructed on or near a fault, and that rather than filling gaps, the Seismic Ordinance "illegally diminishes the IBC requirements." *Id.* at 16- 20.

Board Discussion:

It is important to note that *only* Emergency Ordinance No. 05-122 is the subject of this challenge.

As noted *supra*, RCW 36.70A.170, .060(2) and .172 require the County to identify, designate and protect the *functions and values of designated critical areas using BAS.* At issue here is an amendment to the County's Building Code provisions addressing the construction of certain structures in geological hazard areas; not its critical area regulation update. Emergency Ordinance No. 05-122 does not identify, designate or protect the functions and values of any critical area; rather it regulates the construction of structures in geologically hazardous areas. As the Board has noted in a prior case,

> The GMA has defined geologically hazardous areas as "areas that are not suited for the siting of . . . development consistent with public health and safety concerns." [RCW 36.70A.030(9)], but there is no affirmative mandate associated with this definition except to protect "functions and values [of the designated critical area]." Petitioners have not persuaded the Board that the requirement to protect the function and value of critical areas has any meaning with respect to volcanic hazard areas or that the GMA contains any independent life-safety mandate.

Tahoma Audubon Society, et al., v. Pierce County, (TAS), CPSGMHB Consolidated Case No. 05-3-0004c, Final Decision and Order. (Jul. 12, 2005), at 25.

Likewise, Petitioners here have failed to persuade the Board that the requirement to use BAS to protect the functions and values of critical areas has any meaning with respect to known or inferred seismic faults. This is not to say that the use of BAS is not important in "identifying" and "designating" geologically hazardous areas;[10] but rather its significance in "protecting" such critical areas verges on meaningless in the context of seismic areas.

The County's duty and obligation to protect the public from potential injury or damage that may occur if development is permitted in geologically hazardous areas is not rooted in the challenged GMA critical areas provisions. Rather, providing for the life safety of occupants and the control of damage to structures and buildings is within the province of building codes. In Washington, the State Building Code [Chapter 19.27 RCW][11] applies and is enforced by all jurisdictions throughout the state – including Snohomish County. The State Building Code, in turn, has adopted the IBC (2003 version), including its performance standards and construction requirements. *See* RCW 19.27.020. The IBC, as well as the County's Building Code, include provisions and requirements for earthquake resistant design and construction. Ex. B-39.

Here there is no dispute that the SWIF extends through a portion of Snohomish County; nor is there disagreement that certain new faults – Lineaments 4 and perhaps X – have been discovered in the project area during the review process for an essential public facility – the Brightwater facility. There is also no disagreement that construction of buildings and structures near a seismic hazard area is governed by the IBC, as adopted by the State Building Code, and applicable to Snohomish County. However, the County has identified a "regulatory gap" which it characterizes as follows: The IBC's seismic provisions only apply to faults that have been verified and mapped by the USGS. The recently discovered "lineaments" have not been mapped by the USGS. Therefore, the IBC provisions are not directly applicable. Consequently, to protect the public and property, the County has taken the action of adopting the Seismic Ordinance to fill this regulatory gap. Petitioners do not refute the existence of this "gap" or this characterization of the problem by the County.[12] Instead, Petitioners contend that the County's action does not do enough.

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[10] The Board notes that the County is currently in the process of updating its critical areas regulations and the Board trusts that, upon completion of that process, the County will have included within its designations of Geologically Hazardous Areas the SWIF and other recently discovered faults or lineaments.

[11] The Board recognizes that it is not empowered to, nor will it, determine compliance with the requirements of this statute.

[12] In fact, Petitioners seem to acknowledge "the regulatory gap" when they suggest that the County could lobby the legislature to have the State Building Code include the SWIF in the IBC, if they wanted to, during the 2006 legislative session when the IBC is slated for review and update by the State. Sno-King Reply, at 16.

Emergency Ordinance No. 05-122 [and its successor 06-025] defines seismic hazard areas, where the provisions of the Seismic regulations apply, as areas where "known or inferred faults" are present. *See* Section 2 of Ordinance Nos. 05-122 and 06-025, at 2. The Seismic Ordinance provides for a 50' setback from the edge of an "identified active fault trace" and it enables the building official to require additional studies to determine the specific location of an "identified active fault trace." *Id.* at 2. The Board notes that the County *qualifies* the source of any information provided to the County regarding seismic hazards, requiring that it be "geotechnical studies and reports prepared by licensed professionals pursuant to Chapter 19.27 RCW or SCC 30.62.240; geotechnical studies and reports prepared by federal, state or local agencies; and geotechnical studies, reports and environmental impact statements prepared through the requirements of the State Environmental Policy Act (SEPA) Chapter 43.21C RCW." *Id.* at 2.

The Board finds and concludes that the County's adoption of the Seismic Ordinance [05-121] is a responsible and reasonable action in the face of the regulatory gap it has identified; and more importantly, the Petitioners have **not carried their burden of proof** in demonstrating that the County's adoption of Emergency Ordinance No. 05-122 is noncompliant with any of the GMA's critical area provisions alleged by Petitioners.

Specifically the Board finds and concludes that there is no discrepancy between the County's definition of "seismic hazard areas" and the GMA's definition of "geologically hazardous areas." While the GMA definition imposes no independent duty upon the County to protect life safety, the Board notes that the County's definition falls within the broader GMA definition and is more protective than that included in the IBC, since it includes protections for "inferred fault" areas. Second, the Ordinance does not just apply to a single project. The terms of the Ordinance are clear; it applies to Seismic Use Groups II and III, as well as structures within Seismic Design Categories E and F. These classifications and categories include the higher occupancy structures [*e.g.* schools and churches] that Petitioners sought to have included. Further, it is within the County's discretion to determine how much protection to provide to the lives and property of its citizens. *See TAS, supra.* Third, the Board notes that the IBC prohibits construction "over" active faults. The Seismic Ordinance's setback provision adheres to this principle by limiting construction not only "over" the active fault, but within 50' of such an active fault trace. The County's research into approaches other jurisdictions have taken supports the notion of such a setback. While Petitioners may want a larger setback, the Board believes the width of a setback is within the County's discretion to decide, and not contrary to any of the literature presented. Further, the fact that the building official, on a case by case basis, after requiring and receiving pertinent geological information (by licensed professionals), may alter or adjust the setback also appears to be within the County's discretion.

Conclusion

Petitioners have **not carried their burden of proof** in demonstrating that the County's adoption of Emergency Ordinance No. 05-122 is noncompliant with any of the GMA's critical area provisions alleged by Petitioners.

C. LEGAL ISSUE NO. 3 - CONSISTENCY

Legal Issue No. 3, as stated in the PFR and PHO, was modified by the Board's 5 25 06 Order on Motions. Legal Issue No. 3 is now stated as follows:

> 3. *(A) Did the County fail to comply with the update and consistency provisions of RCW 36.70A.130(1)(c), .060, .040(3) and (4), 020(10) and the Natural Environment [NE 1.B.2, 1.D, 1.D.4, 1.D.5, 3.A, 3.A.1 through A.5, 3.E.2, 3.E.3, 3.E.4, 3.I, and 8.B.7], Capital Facilities [CF 1.A.1, 2.A.1, and 12.A.2], and Utility [UT 1.B, 3, and 3.A] policies of the Comprehensive Plan when it adopted the Odor, Seismic, and EPF Ordinances? See 3 13 06 PFR Clarification, at 3; PHO, at 8-9; and OoM, Appendix A, at 18, and Appendix B, at 19.*
>
> *[The Board characterizes Issue Three A as: Did the County fail to comply with the update and consistency (policies noted) provisions of RCW 36.70A.130(1)(c), .060 and .040(3) and (4), .020(10) when it adopted the Odor, Seismic and EPF Ordinances?]*

County Motion to Dismiss for Lack of Standing

In its response brief, the County indicates that it "has searched its records on file and has not unearthed any comments submitted by SKEA raising "the matter" of the "consistency" challenge in Issue Three." The County then challenges Petitioners' standing on this issue and moves to dismiss. Snohomish Response, at 42.

In the alternative, the County also argues that only three of the Comprehensive Plan Policies referenced in Legal Issue 3 were in effect when the challenged ordinances were adopted. Therefore, the County contends, if Petitioners do have standing to argue the consistency issue, their argument should be limited to the Plan Policies in effect at the time the challenged ordinances were adopted. This would exclude Plan Policies adopted on December 21, 2005. *Id.* at 42-44.

In reply, Petitioners contend that they "have standing to pursue this issue based upon their general participation and public comment on these ordinances." Sno-King Reply, at 22. Further, Petitioners acknowledge that the referenced Plan Policies were adopted at least two weeks after the challenged Ordinances, but contend that the County controlled the timing of its actions, and the Plan amendments and challenged Ordinances were going through the Council's process during the same period of time and the County should have proceeded in a manner that allowed full public participation. *Id.* 22-24. In their reply

brief Petitioners did not offer, or provide, any evidence to support their participation on the matter of consistency.

At the hearing on the merits the County cited to *Wells v. Growth Management Hearings Board*, 100 Wn. App. 657 (2001) to support its motion for dismissal of Legal Issue 3. Petitioners argued that the County's motion should have been brought during motions practice, not in their briefing; further Petitioners asserted that Petitioners cannot be expected to list all Plan Policies where alleged inconsistencies exist when their opportunity to testify is limited to three minutes.

Applicable Law

The *Wells* case cited by the County provided the impetus for an amendment to the GMA in 2003. RCW 36.70A.280(2)(b) has long defined GMA participation standing; identifying who may file a petition for review – "a person who has *participated* orally or in writing before the county or city *regarding the matter on which a review is being requested*." (Emphasis supplied). The *Wells* amendment in 2003 added subsection (4) to RCW 36.70A.280, which provides:

> To establish participation standing under subsection (2)(b) of this section, *a person must show that his or her participation before the county or city was reasonably related to the person's issue as presented to the board.*

(Emphasis supplied).

Discussion

Petitioners' Legal Issue 3, as presented to the Board, involves the question of whether the Odor, Seismic and EPF Ordinances are consistent with the identified Snohomish County's Plan Policies. Petitioners have not provided any evidence to the Board that indicates that their participation before the County raised the consistency issue, or was even reasonably related to the question of consistency. If the County was unaware of this issue at the time the Ordinances were enacted, there was no way for the County to respond to and address the Petitioners' concerns. Therefore, the Board concludes that Petitioners have not shown that their participation was *reasonably related* to the issue presented to the Board.[13] Consequently, Petitioners have not established "participation standing" to pose Legal Issue 3 to the Board. Legal Issue 3 is **dismissed with prejudice.**

Conclusion

Petitioners have not shown that their participation before the County was *reasonably related to the issue presented to the Board.* Consequently, Petitioners have not

[13] The Board does not reach the question of whether plan policies generally or specific plan policies must be raised in public comment to preserve the consistency issue.

established "participation standing" to pose Legal Issue 3 to the Board. Legal Issue 3 is **dismissed with prejudice.**

D. INVALIDITY

The Board has previously held that a request for invalidity is a prayer for relief and, as such, does not need to be framed in the PFR as a legal issue. *See King County v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 13, 2003) at 18. However, in the present matter the Board has not found the County to be noncompliant with any of the alleged provisions of the GMA. Consequently, the Board need not inquire into the question of whether the County's action substantially interferes with the goal of the GMA.

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:

- Petitioners have not established "participation standing" to pose Legal Issue 3 to the Board. Legal Issue 3 is **dismissed with prejudice.**

- Snohomish County provided effective notice and the opportunity for public comment when it adopted Emergency Ordinance Nos. 05-121 and 05-122 [pursuant to .390] and Emergency Ordinance No. 05-126. Therefore, the County has **complied** with the *applicable* public participation procedures and Goal 11 of the GMA in adopting the challenged Emergency Ordinances.

- Petitioners have **not carried their burden of proof** in demonstrating that the County's adoption of Emergency Ordinance No. 05-122 is noncompliant with any of the GMA's critical area provisions alleged by Petitioners.

- The case of Sno-King Environmental Alliance, Emma Dixon and Gerald Farris v. Snohomish County [King County – Intervenor], CPSGMHB Case No. 06-3-0005, is **dismissed** and the matter is **closed.**

So ORDERED this 24th day of July, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
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.[14]

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[14] Pursuant to RCW 36.70A.300 this is a final order of the Board

Reconsideration Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court according to the procedures specified in chapter 34.05 RCW Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate Court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 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)

APPENDIX A

Procedural Background

A. General

On February 6, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Sno-King Environmental Alliance, Emma Dixon and Gerald Farris (**Petitioner** or **Sno-King**). The matter is assigned Case No. 06-3-0005, and is hereafter referred to as *Sno-King v. Snohomish County*. Board member Edward G. McGuire is the Presiding Officer (**PO**) for this matter. Petitioner challenges Snohomish County's (**Respondent** or **County**) adoption of Emergency Ordinance Nos. 05-121, 05-122, 05-126 and 05-127 pertaining to odor and seismic regulations, amending essential public facility regulations and approving a development agreement. The basis for the challenge is noncompliance with the Growth Management Act (**GMA** or **Act**).

On February 13, 2006, the Board issued a "Notice of Hearing"; and on March 9, 2002, the Board held the prehearing conference (**PHC**).

On March 10, 2006, the Board received "Motion to Intervene by King County.[15]" Attached to the King Co. Motion were: 1) a "Declaration of Stan Hummel in Support of King County's Motion to Intervene;" and 2) a copy of a May 11, 2005 Letter from Jay Manning (DOE) to Aaron Reardon [Snohomish County Executive] and Gary Nelson [Chair, Snohomish County Council].

On March 13, 2006 the Board received Petitioners' "Clarification of Issues in Petition for Review." The same day, the Board issued its "Prehearing Order" (**PHO**) setting the schedule and Legal Issues, as clarified by Petitioners, for this case.

On March 15, 2006, the Board received a letter from Petitioner indicating that Corinne Hensley would be representing Sno-King Environmental Alliance. Additionally, the letter indicated that while Petitioner did not object to King County's participation in this matter, such participation should be limited and conditioned by the PHO.

On March 17, 2006, the Board received "Snohomish County's Response to King County's Motion to Intervene." Snohomish County did not object to intervention by King County.

On March 20, 2006, the Board issued an "Order on Intervention" **granting** intervener status to King County.

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[15] The Board did not address the Motion to Intervene by King County in the Prehearing Order. I was addressed in a separate order, after the parties had the opportunity to respond. *See* WAC 242-02-534.

B. Motions to Supplement the Record and Amend the Index

At the March 9, 2006 PHC, the County submitted "Snohomish County's Index to the Administrative Record" (**Index**). The Index included separate entries and identifying numbers for the record for each of the four challenged ordinances. The record for Ordinance No. 05-121 listed seven items, referenced as Index A1 through A7; the record for Ordinance No. 05-122 listed seven items, referenced as Index B1 through B7; the record for Ordinance No. 05-126 listed 34 items, referenced as Index C1 through C34; and the record for Ordinance No. 05-127 listed 14 items, referenced as Index D1-D14.

On March 28, 2006, the Board received a copy of a letter dated March 21, 2006, from Emma Dixon to John Moffat requesting that the County amend the Index to include certain specified items related to Ordinance Nos. 05-121, 05-122 and 05-127. Additionally, the letter asked that testimony related to Ordinance Nos. 05-029 and 05-031 (prior Odor and Seismic Emergency Ordinances) be included.

On March 27, the Board received a copy of a letter dated March 23, 2006 from John Moffat to Emma Dixon indicating that certain items would be added to the Index and others would not.

On April 12, 2006, the Board received the County's Amended Index (**Amended Index**). The Amended Index listed 91 additional items by Index number, including some of the items requested by Emma Dixon.

On April 10, 2006, the Board received "Sno-King Environmental Alliance Motion to Supplement the Record." Petitioner asked that the record be supplemented with 20 items - labeled as proposed exhibits Exh.. 1-19 and P1 through P18. Some of the proposed exhibits, but not all[16], were attached to the motion.

On April 25, 2006, the Board received the County's Second Amended Index (**2nd Amended Index**). The 2nd Amended Index noted two changes to the previous Index: (1) Index D10 should be dated October 16, 2005 and (2) Exhibit P11 should be added to the Index for both Ordinances 05-126 and 05-127.

On April 25, 2006, the Board received "Snohomish County's Response to Sno-King Environmental Alliance's Motion to Supplement the Record."

On May 1, 2006, the Board received "Petitioners' Reply to Snohomish County's Response to Petitioners Motion to Supplement the Record." Petitioners included a CD of the October 17, 2005 Snohomish County Council Public Hearing [Ex. A-2 and B-2] and attached three items to their reply – attachments A, B and C.

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[16] Petitioners sought to include the entire record from Emergency Ordinances 05-029 and 05-030. The record of these ordinances was not provided to the Board.

On May 5, 2006, the Board received "Snohomish County's Motion to Strike." The County asked the Board to strike attachments A, B and C to Petitioners' reply.

On May 25, 2006, the Board issued its "Order on Motions." **The Order allowed the record to be supplemented with eight exhibits and consolidated the County's 2nd Amended Index into a single unified Index for the proceeding.** The Order summarized the items comprising the record in this case.

C. Dispositive Motions

On February 22, 2006, the Board received a letter from Snohomish County indicating that it intended to bring several dispositive motions to dismiss all or major portions of this matter. Petitioners were copied on the letter to the Board. Such motions, and the timing of their filing, were discussed at the PHC.

On March 9, 2006, at the PHC, the Board reviewed the proposed dispositive motions with the parties.

On April 10, 2006, the Board received "King County's Joinder and Brief in Support of Snohomish County's Dispositive Motions."[17] King County supported, and incorporated by reference, Snohomish County's arguments for dismissal. King County also briefed the question of the Board's subject matter jurisdiction over Ordinance No. 05-127 [the Development Agreement].

On April 11, 2006, the Board received "Snohomish County's Dispositive Motions" with 20 exhibits from the 2nd Amended Index. The County sought dismissal of many of the Petitioners' claims. The County asserted that the Board had no jurisdiction over development agreements and that the Petitioners, with some exceptions, lacked standing under both GMA and SEPA. The County further asserted that Legal Issues 1, 2A, 2B, 3B, and 3C should be dismissed for various reasons.

On April 25, 2006, the Board received "Sno-King Environmental Alliance's Response to Snohomish County's Motion to Dismiss," with 4 attachments, each proposed as additional exhibits to supplement the record [P-19, P-20, P-21 and P-22].

On May 1, 2006, the Board received "Snohomish County's Reply Re: Dispositive Motions," with 4 attached exhibits from the Index.

On May 5, 2006, the Board received the County's Motion to Strike, asserting that exhibits attached to Petitioner's Response – Dismiss were improperly before the Board because they were not in the County's 2nd Amended Index nor are they the subject of a Motion to Supplement the Record.

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[17] In granting intervener status to King County, the Board limited King County's participation in this proceeding, including motions. King County was authorized to support motions offered by Snohomish County, not initiate any dispositive motions of its own. *See* Order on Intervention, (Mar. 20, 2006), at 2-3.

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

On May 25, 2006. the Board issued its "Order on Motions." The Order both **granted** in part, and **denied** in part, the various Snohomish County's motions to **dismiss.**

D. Briefing and Hearing on the Merits

On June 8, 2006, the Board received "Sno-King Environmental Alliance et al.'s Prehearing Brief" with five attached exhibits (A-E). (**Sno-King PHB**).

On June 22, 2006, the Board received: 1) "Snohomish County's Response Brief" with 14 attached exhibits (three referenced as Appendices and 11 exhibits from the Index) (**Snohomish Response**); 2) "Snohomish County's Motion to Supplement the Record" with an attached copy of one item [King County Hearing Examiner decision dated August 3, 2004 – Denying Appeal, subject to condition of the Brightwater Final EIS appeal of adequacy.] (**Snohomish Motion – Supp.**); and 3) "Intervenor King County's Response Brief" with one attached exhibit. (**King Response**).

On June 29, 2006, the Board received ""Petitioners Reply Brief" (**Sno-King Reply**), with three attachments.

On July 6, 2006, the Board held the Hearing on the Merits (HOM) at the Board's offices at Suite 2470. 900 Fourth Avenue. Seattle. Washington. Board members Edward G. McGuire, Presiding Officer. Margaret A. Pageler and Bruce C. Laing[18] were present for the Board. Corinne Hensley appeared for Petitioners Sno-King Environmental Alliance, and Emma Dixon appeared *pro se*. Petitioner Gerald Farris did not appear. Respondent Snohomish County was represented by John R. Moffat, Lisa Anderson and Shawn Aronow. Intervener King County was represented by Verna P. Bromley. Court reporting services were provided by Eva Jankovits of Byers and Anderson. Board Law Clerk, Julie Taylor and Board Externs Brian Payne and Kris Hollingshead were also present. The hearing convened at 10:00 a.m. and adjourned at approximately 12:15 p.m.

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[18] Board member Bruce C. Laing's term was slated to expire on June 30, 2006. However, Governor Gregoire extended Mr. Laing's term until a new Board member can be seated.

SNOHOMISH COUNTY PROSECUTORS-LAND USE DIVISION

May 30, 2018 - 2:01 PM

Transmittal Information

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Appellate Court Case Title:	Futurewise, et al., Appellant v. Snohomish County, et al., Respondents
Superior Court Case Number:	17-2-01367-3

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Brief of Respondent Snohomish County

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