

FILED
Court of Appeals
Division II
State of Washington
9/12/2018 10:41 AM
NO. 51924-1-II

**IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

Kitsap County Superior Court Case No. 17-2-00637-0

JERRY HARLESS

Appellant,

v.

CENTRAL PUGET SOUND GROWTH MANAGEMENT
HRGS BD.,

Respondent

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

Case No. 17-2-00637-0

The Honorable Kevin D. Hull, Judge

REPLY BRIEF OF APPELLANT JERRY HARLESS

Jerry Harless
PO Box 8572
Port Orchard, WA 98366
jlharless@wavecable.com
360-271-2642

Appellant, pro se

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	iii
I. INTRODUCTION.....	1
II. SUMMARY OF ARGUMENT IN REPLY	2
III. ARGUMENT	3
A. Urban Land Capacity.....	3
1. Harless based his claims on the record. ...	3
2. Harless does not argue that land capacity must be calculated at maximum buildout.	6
B. Assignment of Error I: The Board Erred in Disregarding the Land Capacity Analysis.	7
1. The County Mischaracterizes Harless’ Issues and Arguments Before the Board..	7
2. The County Mischaracterizes the Board’s Orders.....	10
a. The Board did not consider Harless’ allegations.....	10
b. The Board did not consider the LCA. ...	11
C. Assignment of Error II and Issue 3: The County failed to revise the densities permitted within its UGAs.	12
1. Harless’ claim that the County failed to comply with RCW 36.70A.130(3) is not a new issue	13
2. Zoning is a factor in land capacity calculations as well as permitting decisions.	14
3. Densities permitted within UGAs is a controlling factor for calculating UGA capacity.....	15
4. The LCA did not consider the zoning ordinance gross density provisions.....	18

D.	Assignment of Error III and Issue 4: The County Zoning Ordinance is Inconsistent with and Fails to Implement the Comprehensive Plan.	20
E.	Assignment of Error IV and Issue 5: Increasing permitted density creates excess capacity and violates the GMA.	21
IV.	CONCLUSION	24

TABLE OF AUTHORITIES

Cases

<i>Bostain v. Food Exp., Inc.</i> , 159 Wash. 2d 700, 727, 153 P.3d 846, 859–60 (2007).	17
<i>Cockle v. Dep't of Labor & Indus.</i> , 142 Wash. 2d 801, 812, 16 P.3d 583, 588 (2001)	18
<i>Diel v. Mason County</i> , 94 Wn.App at 653	23
<i>Kabbae v. Dep't of Soc. & Health Servs.</i> , 144 Wash. App. 432, 435, 192 P.3d 903, 904 (2008).	18
<i>Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.</i> , 164 Wn.2d 329.	5
<i>Thurston County v. Western Washington Growth Management Hearings Bd.</i> , 164 Wn.2d 329, 341, 190 P.3d 38, 44 (2008)	5, 23
<i>Thurston County</i> , 164 Wn.2d 351-352 and at 352 n. 13	23

Growth Management Hearings Board Decisions

<i>F. Robert Strahm v. City of Everett</i> , CPSGMHB Case No. 5-3-0042, FDO at 12	15
<i>F. Robert Strahm v. City of Everett</i> , CPSGMHB Case No. 5-3-0042, FDO at 17.	12
<i>F. Robert Strahm v. City of Everett</i> , CPSGMHB Case No. 5-3-0042, FDO at pg. 17.	17
<i>F. Robert Strahm v. City of Everett</i> , CPSGMHB Case No. 5-3-0042, FDO at pg. 8-9.	17
<i>Fred F. Brown v. City of Everett</i> , CPSGMHB Case No. 15-3-0018 FDO at 8-9.	22
<i>Fred F. Brown v. City of Everett</i> , CPSGMHB Case No. 15-3-0018 FDO at pp. 8-9.	17, 18

Statutes

RCW 36.70A.010 and .020(2) and (2) 17
RCW 36.70A.040 8, 9, 14
RCW 36.70A.040(3), .110(2), .115 and .130(2) and (3).....25
RCW 36.70A.0708
RCW 36.70A.110 and .115 14
RCW 36.70A.110(2).....23
RCW 36.70A.110(2) and .130(3)..... 16
RCW 36.70A.110, 115 and 130(3).....3
RCW 36.70A.110, RCW 36.70A.115 and RCW 36.70A.1308
RCW 36.70A.115.....23
RCW 36.70A.130 15
RCW 36.70A.130(2)14, 15
RCW 36.70A.130(3) 3, 14
RCW 36.70A.130(3)(a) and (b)..... 15, 23
RCW 36.70A.130(3)(b) 14

Rules

WAC 365-19617
WAC 365-196-310(4)(b).....17

Other Authorities

*Accommodating Growth or Enabling Sprawl? The Role of
Population Growth Projections in Comprehensive
Planning Under the Washington State Growth
Management Act*, 36 Gonz.L.Rev 73, 105 (2001).....24
Urban Growth Area Guidebook: Reviewing, Updating and
Implementing Your Urban Growth Area, Washington
Department of Commerce (November 2012), pg. 103..... 18

I. INTRODUCTION

The law and the facts in this case are clear and straight-forward and most are not in dispute once the issues and Board's orders are properly understood.

Parties appear to agree that a land capacity analysis may form the basis of a claim of inconsistency between a comprehensive plan and a zoning code or a claim that UGAs are oversized – but disagree about whether these were the issues before the Board.

Parties appear to agree that defining maximum allowed density as dwellings per acre of gross land area authorizes more homes to be built on a given land area than defining that same maximum density as dwellings per acre of net developable land – but disagree about how many more.

Parties appear to agree, for the most part, that the County's land capacity analysis evaluated future density in terms of net developable land and that the zoning ordinance permits the same nominal densities but in terms of gross land area.

The principal areas of disagreement, once the issues and Board's orders are properly understood, are a) whether

increasing the number of homes that may be built in a UGA increases the “capacity” of that UGA in terms of RCW 36.70A.110, 115 and 130(3), and b) whether a zoning ordinance that greatly increases the density at which homes may be built in a UGA over what was assumed when the UGA was designated in a comprehensive plan is consistent with and implements that plan.

These questions can be found in the plain language of the GMA. There is no other reasonable conclusion from the facts but that, due to an inconsistent zoning ordinance, Kitsap County’s designated UGAs contain more capacity than is necessary to accommodate twenty years of forecast growth and thus are oversized in violation of the GMA.

II. SUMMARY OF ARGUMENT IN REPLY

Harless established the doubling of UGA capacity caused by the zoning ordinance density provisions with citations to the record. Harless did not, as the County claims, argue that UGA capacity must be calculated at full buildout.

The County mischaracterizes the issues and arguments Harless presented to the Board and the Board’s Orders. Once those errors are corrected, the Board’s Orders are clearly erroneous.

Harless raised the issue of noncompliance with RCW 36.70A.130(3) before the Board and that statute required the County to adjust zoned densities to properly size UGAs. The County did not consider the zoned densities adopted with Ordinance 534-2016 in its LCA.

Contrary to the County's claims, Harless did not mischaracterize the consistency requirements of the GMA and the inconsistency between zoned and calculated densities rises to the level prohibited by the GMA

III. ARGUMENT

A. Urban Land Capacity

1. Harless based his claims on the record.

The primary factual basis for Harless' claim of oversized UGAs is that the gross land area available for development is roughly twice the net developable area calculated in the County's land capacity analysis. Because the County calculated urban density and thus UGA capacity based on net land area and the zoning code allows density based on gross area, the zoning ordinance doubles the capacity of the UGA to accommodate population growth.

The County contends in its response that this claim is not supported by the record and that Harless has cited only to his own brief to the Board.¹ This is incorrect.

Unfortunately, there is no single place in the record to compare the gross and net areas of UGAs across the entire County as these statistics are distributed among 21 separate tables evaluating seven UGAs and scattered across 45 pages in the FSEIS.²

For each UGA, the land capacity analysis includes three separate tables converting gross residential land area into net developable area and capacity, one for underutilized lands, another for vacant lands and the third sums the net, but not gross acres. As the County points out, attempting to add figures across multiple tables can introduce transcription errors. So, inconvenient as it is, the only way to determine the magnitude of difference between gross and net density is to examine the fourteen residential land capacity tables at AR 430-475 that Harless cites to in his

¹ County Response at 19-22.

² AR at 430-475, Final Supplemental Environmental Impact Statement (FSEIS), Volume II, Appendix A, pages A-003 through A-048. Interspersed between the residential capacity tables are additional tables of commercial and employment calculations for each UGA.

letters to the County and his briefs to the Board and the courts.

In his Opening Brief beginning on page 14, Harless cites to these tables several times, first to identify where land capacity is calculated and by what density method,³ and then to identify the 2-1 ratio between gross and net land area.⁴

In the record, Harless cited to these tables in testimony before the County Planning Commission,⁵ then the Growth Board,⁶ Superior Court⁷ and finally in his Trial Brief to this Court.⁸ Until now, the County has not disputed his 2-1 gross-to-net land area estimate. Nor does the County offer a different figure.

Because sufficient capacity to accommodate planned growth was established with net densities, any non-zero increase in capacity resulting from the gross density provisions of the zoning ordinance causes the UGAs to be oversized by the *Thurston County* standard.⁹ So even if

³ Harless' Opening Brief at 14 fn 30, 15, fn 31 and 32 and 16, fn 35.

⁴ Harless' Opening Brief at 16, fn 36.

⁵ AR at 1073-1078, May 12, 2018 letter from Jerry Harless to Kitsap County Planning Commission with land capacity analysis tables attached.

⁶ AR at 1027-1028 and 1030; Harless' Prehearing Brief to the Board at 16, fn. 19, 17, fn. 21 and 19, fn. 28.

⁷ CP at 63; Harless' Trial Brief to Kitsap County Superior Court at 10.

⁸ Harless' Opening Brief at 16, fn. 35, and fn. 36, 19, fn. 44 and fn. 46 and 27, fn.66.

⁹ *Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.*, 164 Wn.2d 329.

Harless' math is wrong and gross land area is only 50% more than net land area, or 30% or 20%, the UGAs are oversized. The only dispute is by how much.

2. Harless does not argue that land capacity must be calculated at maximum buildout.

The County claims that Harless is arguing that UGA capacity must be calculated at the maximum buildout.¹⁰ This is also false. The County's calculated capacity is based on assumed future densities that are 1/2 to 2/3 of the zoned maximum.¹¹ The doubling effect of calculating maximum density on gross land area doubles the maximum buildout. Harless is arguing that, holding the County's 1/2 and 2/3 ratios constant, capacity is also doubled. For example, in the Urban Low Residential (5-9 du/acre) zone, the assumed future density of 6 du/acre becomes 12 du/acre. The County's trial exhibit displays these figures side-by-side.¹²

This is likely the source of the County's confusion as to whether Harless is arguing that capacity is doubled or tripled by the zoning ordinance.¹³ Holding the 2/3 ratio

¹⁰ County Response at 1 and 29-30.

¹¹ AR at 1066, 2014 Buildable Lands Report, Appendix A: Land Capacity Analysis Methods at 15.

¹² CP at 119 Illustrative Trial Exhibit.

¹³ County Response at 20.

constant, capacity is doubled ($2 \times 6 = 12$). Buildout, on the other hand, is now triple the LCA prediction ($3 \times 6 = 18$).

Harless' claim of error holds the County's ratios constant.

B. Assignment of Error I: The Board Erred in Disregarding the Land Capacity Analysis.

The County does not defend the Board's errors, but distorts the issues presented and the Board's findings.

1. The County Mischaracterizes Harless' Issues and Arguments Before the Board.

The County wrongly claims that "Harless did not challenge the size of any urban growth area"¹⁴ and even asks this Court to dismiss that allegation as a new issue not raised before the Board.¹⁵

This is contradicted by the plain language of Harless' legal issue and his briefing¹⁶ and oral argument before the Board.¹⁷ The legal issue Harless placed before the Board is:

Has Kitsap County failed to be guided by RCW 36.70A.020(1) and (2) and failed to comply with the consistency requirements of RCW 36.70A.040 and RCW 36.70A.070 and the **requirements of RCW 36.70A.110, RCW 36.70A.115 and RCW 36.70A.130** to adopt an internally consistent plan, development

¹⁴ County Response at 23

¹⁵ County Response at 26-27.

¹⁶ AR at 1026-1027; Harless' Prehearing Brief to the Board at 15-16.

¹⁷ TR January 25, 2017 at 8, 16, 45-46 and 50.

regulations that are consistent with and implement that plan and **designate Urban Growth Areas (UGAs) appropriately sized to accommodate growth** in that the Land Capacity Analysis (LCA) calculates land capacity by applying permitted density to net developable land area while the zoning regulations calculate permitted density on gross land area, **resulting in excessively oversized UGAs?**¹⁸

Harless challenged the size of *all* UGAs.

The County also erroneously claims that Harless offered the LCA as “the object of a consistency challenge” rather than as the evidentiary record of an inconsistency between the zoning ordinance and the comprehensive plan that caused oversized UGAs¹⁹ and praises the Board’s orders in light of this straw man. This portrayal is unreasonable in light of Harless’ briefing to the Board.²⁰

This straw man is unmasked by the County’s own brief to Superior Court:

What can be a basis for a consistency challenge under RCW 36.70A.040 is the designation or establishment of urban growth area boundaries, which are part of the comprehensive plan and are based on the land capacity analysis. Both Harless’ issue statement

¹⁸ AR at 3; Harless’ Petition for Review to the Board at 2. Bold emphasis added.

¹⁹ County Response at pp. 24-26.

²⁰ AR at 1021-1022, 1026-1028 and 1031-1032; Harless Prehearing Brief to the Board at pp. 10-11, 15-17 and 20-22. See also AR at 1671-1672; Harless Motion for Reconsideration before the Board at pp. 5-6.

and briefing before the Board focus on this very issue.

...

By these statements, Harless is comparing urban growth area sizes, which are part of the Plan, and the development regulation; he was not directly comparing the land capacity analysis.²¹

As Harless argued before the Board²² and in his Opening Brief to this Court,²³ the Board's refusal to consider the LCA as a basis for Harless claims contradicts its own precedent.

The County attempts to distinguish the Board's and the courts' long precedents of deciding UGA capacity challenges on the basis of land capacity analyses, arguing that those cases did not deal with claims of inconsistency. This is a distinction without a difference. These cases evaluate claims that erroneous calculations within an LCA result in noncompliant UGA designations within plans.

Here the faulty calculation is the impact of permitted density as set forth in the zoning ordinance which results in oversized UGAs. The root of this miscalculation is an

²¹ CP at 86-87; County Response Brief to Superior Court at pp. 16-17.

²² AR 1673-1675; Harless Motion for Reconsideration before the Board at pp. 7-9.

²³ Harless' Opening Brief at pg. 11 and 23.

inconsistency between how the zoning ordinance calculates density and how the LCA calculated density to size UGAs.

2. The County Mischaracterizes the Board's Orders.

Once the issues raised and argued below are properly understood, the Board's error is unescapable. The Board made no findings regarding the merits of Harless' appeal, i.e. whether the zoning ordinance was consistent with and implemented the plan and whether UGAs were oversized. Rather, the Board held that the LCA could not form the basis for Harless' claims because it was not adopted by ordinance.²⁴

a. The Board did not consider Harless' allegations.

The County wrongly claims that the Board rejected this characterization of its order.²⁵ The Board prefaced its initial order with a statement that its jurisdiction is limited and that LCA could not form the basis of Harless' claims.²⁶ Harless read these two statements together to mean that the Board had found the LCA outside its subject matter jurisdiction. In his Motion of Reconsideration, he argued

²⁴ AR at 1651-1652; Board's Final Decision and Order at 13-14 and AR at 1710-1711; Board's Order Denying Motions for Reconsideration at 2-3.

²⁵ County Response at 15.

²⁶ AR at 1651-1652; Board's Final Decision and Order at 13-14.

that the LCA was part of the record and thus the Board had jurisdiction to consider it in comparing the zoning ordinance to the comprehensive plan.

It was this assumed lack of subject matter jurisdiction that the Board referred to as a “finding and conclusion the Board did not make.”²⁷ Far from rejecting Harless’ contention that the Board had rejected the LCA as a basis for Harless’ claims, the Board doubled down on that finding.²⁸

b. The Board did not consider the LCA.

The County has stipulated that the LCA need not be adopted by ordinance and may form the basis for a consistency claim between a development regulation and the UGA designations of a comprehensive plan.²⁹ So in essence the County does not agree with the Board’s finding and can reconcile it to the GMA only by distorting Harless’ claims.

The Board was willing to consider the LCA in evaluating whether it was sufficient to support a UGA in Harless’ other legal issue but would not consider it as the basis for Harless’ claims of inconsistency.³⁰ The Board was silent as to its evidentiary value in determining whether the

²⁷ AR at 1711; Board Order Denying Motions for Reconsideration at 3.

²⁸ Id.

²⁹ CP at 85-87; County Response Brief to Superior Court at 15-17.

³⁰AR at 1651-1652; Board Final Decision and Order at 13-14.

UGAs were oversized,³¹ a role the Board has found appropriate for such allegations in the past:

The Board finds and concludes that Petitioner’s reliance on the data and land capacity analysis developed by the City, and used by the City in reviewing and evaluating its ability to accommodate growth is an appropriate means of carrying the burden of proof.³²

The County’s response is that because the Board considered the LCA as the basis for one legal issue, it must have considered it here.³³ But the Board’s “it does not follow” language precludes this interpretation.

C. Assignment of Error II and Issue 3: The County failed to revise the densities permitted within its UGAs.

It is clear from the record that the County based its calculations of future density in its UGAs solely on past housing trends within a context of permitted density defined as dwellings per acre of net land area without regard for the higher densities permitted by the gross land area provisions of the zoning ordinance. Harless has demonstrated that this does not comply with the GMA’s UGA sizing and update requirements as it results in oversized UGAs.

³¹Id.

³²*F. Robert Strahm v. City of Everett*, CPSGMHB Case No. 5-3-0042, FDO at 17.

³³County Response at 22-23.

The County has four responses:

1. This is a new issue not raised before the Board;
2. Zoned density for permit decisions is not relevant to calculations of future density.
3. The density permitted by the zoning ordinance is just one of several factors that “may” be considered in calculating UGA capacity, but past housing trends is the controlling factor;
4. The LCA considered the full range of densities allowed under the zoning ordinance.

All of these arguments lack merit and should be rejected by the Court.

1. Harless’ claim that the County failed to comply with RCW 36.70A.130(3) is not a new issue

The County falsely claims that Harless’ allegation that the County failed to comply with the RCW 36.70A.130(3)(b) requirement to revise permitted densities to correctly size UGAs is a new issue not raised before the Board.³⁴ The County acknowledges that Harless’ alleged oversized UGAs in violation of RCW 36.70A.110 and .115, but omits his claim that §130(3) was also violated.³⁵

³⁴ County Response at 26-27.

³⁵ CP at 85-87; County Response Brief to Superior Court at 15-17, and County Response at 14.

Before the Board, Harless framed his arguments in terms of two GMA “fundamentals,” consistency and appropriately-sized UGAs.³⁶ He grounded the consistency issue in terms of RCW 36.70A.040 and .130(2).³⁷ He alleged violation of two provisions of the RCW 36.70A.130 update requirements: the §130(2) requirement for consistent development regulations and the §130(3)(a) and (b) requirements to review and revise densities permitted within UGAs to achieve the correct UGA capacity.³⁸ This issue was raised and thoroughly briefed before the Board.

2. Zoning is a factor in land capacity calculations as well as permitting decisions.

The County, in its discussion of the Growth Management Act requirements for sizing urban growth areas, attempts to distinguish between housing density as calculated in a land capacity analysis and the housing density that is prescribed in zoning development regulations as though the latter has nothing to do with the former.³⁹ The County does this by referring only to RCW 36.70A.115 and

³⁶ AR 1014-1016; Harless’ Prehearing Brief to the Board at 3-5.

³⁷ AR 1018-1020 and 1026-1027; Harless’ Prehearing Brief to the Board at 7-9 and 15-16.

³⁸ AR 1026-1027 Harless’ Prehearing Brief to the Board at 15-16.

³⁹ County Response at 3.

supporting Department of Commerce guidelines as the regulatory framework for sizing UGAs.⁴⁰

But the language of RCW 36.70A.110(2) requires counties to include in their UGAs “areas **and densities** sufficient to permit” projected growth. The update requirements of RCW 36.70A.130(3) required the County to review and to revise the “**densities permitted**” in its UGAs to accommodate projected growth. The Board, citing to both RCW 36.70A.110(2) and .130(3), has characterized this as “providing *densities* to accommodate urban growth.”⁴¹

By trying to divorce the regulatory effect of zoning from the planning exercise of sizing UGAs, the County is contradicting the clear language of the GMA which inextricably links permitted densities to calculations of UGA capacity as well as the planning reality that future density will be the cumulative result of future permit decisions.

3. Densities permitted within UGAs is a controlling factor for calculating UGA capacity.

Harless alleges that the County designated oversized UGAs in its comprehensive plan because the densities

⁴⁰ Id.

⁴¹ *F. Robert Strahm v. City of Everett*, CPSGMHB Case No. 5-3-0042, FDO at 12, italics in original.

permitted within those UGAs are far greater than assumed when the UGA capacity was calculated in the LCA. Harless relies on the “densities permitted within UGAs” language of RCW 36.70A.110(2) and .130(3).⁴²

The County relies on past housing trends observed in its buildable lands report as the driver of future density regardless of what may be allowed by the zoning ordinance.⁴³ This assertion defies the purpose of the GMA – to effect change and thwart past trends of low density sprawl.⁴⁴

The County’s response is based on the procedural criteria (WAC 365-196) and guidelines of the Department of Commerce.⁴⁵ The County argues from these that permitted densities are “only one of six ‘general considerations’ that ‘may’ be included in a land capacity analysis.”⁴⁶ This implies that the densities permitted within UGAs is an optional consideration. The County contends that past housing trends control UGA capacity regardless of permitted densities.⁴⁷

The County here is misinterpreting the Commerce guidelines which do not subordinate permitted densities to

⁴² AR 1026-1027; Harless’ Prehearing Brief to the Board at 15-16.

⁴³ County Response at 29-30.

⁴⁴ RCW 36.70A.010 and .020(2) and (2).

⁴⁵ County Response at 3-7 and 29-30.

⁴⁶ County Response at pg. 29 citing WAC 365-196-310(4)(b).

⁴⁷ County Response at pp. 29-30.

past development patterns. Rather, these patterns are treated as an indicator that actual development may fall below full buildout rather than a determinant of future densities.⁴⁸ The Board has noted that trend information “provides needed perspective for evaluating...theoretical capacity”⁴⁹ but has also noted that “...what happened in the past is not a reliable indicator of future development activity.”⁵⁰

The Board has also held that the LCA must take into account “any policy or regulatory changes which may affect development.” Future densities assumed in the LCA “will necessarily vary with different policies, goals and market conditions.”⁵¹

Even if the Commerce rules can be interpreted to subordinate the GMA requirement to base UGA capacity on permitted densities, the Washington Supreme Court has held that “[c]ourts should not defer to an agency's interpretation of a statute if that interpretation conflicts with the statutory

⁴⁸ Urban Growth Area Guidebook: Reviewing, Updating and Implementing Your Urban Growth Area, Washington Department of Commerce (November 2012), pg. 103.

⁴⁹ *F. Robert Strahm v. City of Everett*, CPSGMHB Case No. 5-3-0042, FDO at pg. 17.

⁵⁰ *Fred F. Brown v. City of Everett*, CPSGMHB Case No. 15-3-0018 FDO at pp. 8-9.

⁵¹ *F. Robert Strahm v. City of Everett*, CPSGMHB Case No. 5-3-0042, FDO at pg. 8-9.

mandate”⁵² and that, while it may defer to an agency’s interpretation when that will help the court achieve a proper understanding of a statute, such an interpretation is not binding, especially if it conflicts with the statute.⁵³ An agency rule that contradicts the plain language and legislative intent of the statute would be invalid.⁵⁴

The County’s belief that the past controls the future regardless of zoning is in error. “[W]hat happened in the past is not a reliable indicator of future development activity.”⁵⁵

4. The LCA did not consider the zoning ordinance gross density provisions.

The County’s claim that it considered the “full range of allowed densities” in the land capacity analysis used to size its UGAs⁵⁶ is contradicted by the record. At the time the LCA was prepared, the draft zoning ordinance calculated maximum densities as dwellings per net developable acre,

⁵²*Bostain v. Food Exp., Inc.*, 159 Wash. 2d 700, 727, 153 P.3d 846, 859–60 (2007).

⁵³*Cockle v. Dep’t of Labor & Indus.*, 142 Wash. 2d 801, 812, 16 P.3d 583, 588 (2001) (citations omitted).

⁵⁴*Kabbae v. Dep’t of Soc. & Health Servs.*, 144 Wash. App. 432, 435, 192 P.3d 903, 904 (2008).

⁵⁵*Fred F. Brown v. City of Everett*, CPSGMHB Case No. 15-3-0018 FDO at pp. 8-9.

⁵⁶County Response at 33.

just as in the LCA. The gross density method was introduced after the FSEIS containing the LCA was issued.

The LCA formula was developed in the Draft EIS issued November 2015.⁵⁷ At that time development regulations (including zoning) had not yet been drafted.⁵⁸

Draft zoning regulations released April 6, 2018 specified that minimum and maximum densities were to be measured on net rather than gross acreage.⁵⁹ The FSEIS containing the final LCA was issued on April 29, 2018.⁶⁰ It was not until May 10, 2018 that a version of the draft zoning ordinance specifying maximum density in terms of gross land area was released,⁶¹ igniting this controversy.⁶²

⁵⁷ AR at 204, FSEIS Volume I, pg. 6-30 and AR at 430; FSEIS Volume II pg. A-003.

⁵⁸ AR at 287-288 and 290; FSEIS Volume I, Section DSEIS Comments (pages not numbered) and AR at 204, 213 and 214; FSEIS Volume I Response to DSEIES Comments, pp. 6-30, 6-39 and 6-41. Note comments and responses labeled 33-1, 33-2 and 33-9.

⁵⁹ AR at 1069-1072; April 6, 2016 Draft Development Regulations (Title 17), at 15, 103 and 163.

⁶⁰ AR at 52; FSEIS cover letter.

⁶¹ AR at 1074; May 12, 2016 letter from Jerry Harless to Kitsap County Planning Commission at 1.

⁶² AR at 1074-1078 May 12, 2016 letter from Jerry Harless to Kitsap County Planning Commission.

The Planning Commission recommended the April 6, 2016 version of the draft zoning ordinance,⁶³ But the Board of County Commissioners rejected this recommendation.⁶⁴

The “full range of allowed densities” the County considered in its LCA was net developable area as both the minimum and maximum. The gross density zoning provisions were drafted after the LCA was completed.

D. Assignment of Error III and Issue 4: The County Zoning Ordinance is Inconsistent with and Fails to Implement the Comprehensive Plan.

The County wrongly states that Harless’ claims that development regulations must be identical to plans and that UGA capacity must be calculated at full buildout.⁶⁵

The LCA estimates future density at 1/2 to 2/3 of the maximum allowed based on observations of past housing trends. Harless does not contest these ratios and that is why he alleges that UGAs are oversized by 100% and not by 200%.

⁶³AR 0025, Ordinance 534-2016 at pg.20 (Finding #3) and AR at 1452; May 19, 2016 Kitsap County Planning Commission Findings, Conclusions and Recommendations at 11.

⁶⁴AR 0025, Ordinance 534-2016 at 20 (Finding #4) and AR at 699 and 821; Chapter 17, Kitsap County Code (zoning) at 17 and 139.

⁶⁵ County Response at 1, 8, 30 and 34.

The County argues that a development regulation need not exactly mirror a comprehensive plan but must only “generally conform” as the plan is merely a “blueprint” for future development. The County interprets this to mean that so long as the future density predicted in the plan’s capacity analysis falls within the range of what is allowed by the zoning ordinance, it “generally conforms.”⁶⁶

By this logic, maximum permitted density could be infinite and remain consistent with the plan because future density will not increase over recent trends. The County’s zoning ordinance is implementing a “blueprint” for a three-bedroom house by authorizing construction of a six-bedroom house and finding it consistent with the blueprint.

**E. Assignment of Error IV and Issue 5:
Increasing permitted density creates excess
capacity and violates the GMA.**

The County argues that even though calculating maximum permitted density in terms of gross land area yields greater allowed density, that does not increase UGA capacity.⁶⁷ In other words, allowing more homes to be built

⁶⁶ County Response at 36.

⁶⁷County Response at 31-34.

in a UGA does not increase its capacity to accommodate growth. This statement is not only absurd on its face, but directly contradicts the GMA.

The County contends that allowing higher density does not increase UGA capacity because it does not force more growth or more dense growth to occur.⁶⁸

RCW 36.70A.115 requires the County to ensure that its plan and development regulations provide sufficient capacity to accommodate allocated growth. For UGAs, RCW 36.70A.110(2) directs that this be accomplished by including sufficient areas and densities to accommodate projected growth. RCW 36.70A.130(3)(a) and (b) direct that areas and densities permitted in UGAs be reviewed and revised to accommodate projected growth.

So, under the GMA regulatory scheme, UGA capacity is a factor of area and permitted density. Increase either area or density permitted in a UGA and capacity is increased.⁶⁹

⁶⁸County Response at 33-34

⁶⁹*Fred F. Brown v. City of Everett*, CPSGMHB Case No. 15-3-0018 FDO at 8-9.

Our Supreme Court has interpreted the GMA requirements for sufficient capacity to mean that “a county’s UGA designation cannot exceed the amount of land necessary to accommodate the urban growth projected by OFM, plus a reasonable land market supply factor.”⁷⁰ Note that the *Thurston* Court’s holding was not based on findings that more growth might occur in oversized UGAs. Rather, the finding was that sprawl would likely occur.⁷¹

Harless need not prove that more homes will be built in Kitsap County’s UGAs or at higher average densities, even though logic suggests that these will be the result of excess UGA capacity. In fact, Harless has no burden to prove that anything bad will result from oversized UGAs because our Supreme Court has already made that finding, noting that oversized UGAs are an egregious affront to the GMA policy against sprawl and inherently violate the GMA.⁷²

⁷⁰ *Thurston County*, 164 Wn.2d at 352, fn13 Citing *Diel v. Mason County*, 94 Wn.App at 653.

⁷¹ *Thurston County*, 164 Wn.2d 351-352 and at 352 n. 13, citing *Accommodating Growth or Enabling Sprawl? The Role of Population Growth Projections in Comprehensive Planning Under the Washington State Growth Management Act*, 36 Gonz.L.Rev 73, 105 (2001). (original footnotes omitted).

⁷² *Id.*

IV. CONCLUSION

The facts of this case are clear. The County designated UGAs based on a regime of net densities but adopted a zoning ordinance that allows development at gross densities, an impermissible inconsistency that rendered the UGAs oversized.

The Board did not address these issues in its orders, but instead erroneously concluded that, absent adoption in the challenged ordinance, the land capacity analysis could not form the evidentiary basis for these allegations.

The errors described above warrant an order reversing the Kitsap County Superior Court and the Central Puget Sound Growth Management Hearings Board orders and remanding to the Board for further proceedings.

Specifically, Harless moves this Court to:

1. Reverse the Board's holding that the County's land capacity analysis could not form the basis for Harless' claims on appeal.
2. Reverse the Board's holding that Kitsap County's 2016 revised comprehensive plan and zoning ordinance complied with the Growth Management Act requirements to revise densities, ensure consistency between

development regulations and comprehensive plan, and to appropriately size UGAs.

3. Remand to the Board to determine whether the oversized UGAs substantially interfere with RCW 36.70A.020(1) and (2), warranting an order of invalidity.

Respectfully submitted this 12th
day of September 2018



Jerry Harless, Appellant, *pro se*

AFFIDAVIT OF SERVICE

On July 19, 2018, I caused the **Reply Brief of Appellant Jerry Harless** to be electronically filed in PDF format with the Court of Appeals, Division II and to be served upon the following by electronic service via the Appellate Court Portal pursuant to a prior understanding:

Attorneys for Kitsap County:

Lisa J. Nickel and Laura F. Zippel
Kitsap County Prosecutor's Office
619 Division Street, MS-3A
Port Orchard, WA 98366

lzippel@co.kitsap.wa.us;
LNickel@co.kitsap.wa.us;
dneedles@co.kitsap.wa.us.

Attorney for the Central Puget Sound Growth Management Hearings Board:

Lisa Petersen
Assistant Attorney General
800 Fifth Avenue, Suite 2000
Seattle, WA 98104

Lisap1@atg.wa.gov
lalseaef@atg.wa.gov

Dated this 12th day of September, 2018.



JERRY HARLESS
Appellant, *pro se*

JERRY HARLESS - FILING PRO SE

September 12, 2018 - 10:41 AM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 51924-1
Appellate Court Case Title: Jerry Harless, Appellant v. Central Puget Sd. Growth Management Hrgs Bd.,
Respondent
Superior Court Case Number: 17-2-00637-0

The following documents have been uploaded:

- 519241_Briefs_20180912103649D2640811_4179.pdf
This File Contains:
Briefs - Petitioners Reply
The Original File Name was 51924-1-II Reply Brief of Appellant Jerry Harless.pdf

A copy of the uploaded files will be sent to:

- LalOlympiaCal@atg.wa.gov
- Lisap1@atg.wa.gov
- kcpaciv@co.kitsap.wa.us
- lnickel@co.kitsap.wa.us
- lzipfel@co.kitsap.wa.us

Comments:

Sender Name: Jerry Harless - Email: jlharless@wavecable.com
Address:
PO Box 8572
Port Orchard, WA, 98366
Phone: (360) 895-0871

Note: The Filing Id is 20180912103649D2640811