

FILED  
Court of Appeals  
Division II  
State of Washington  
8/20/2018 2:57 PM

CASE NO. 51924-1-II

COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

---

JERRY HARLESS,

Appellant,

vs.

CENTRAL PUGET SOUND GROWTH HEARINGS BOARD  
AND KITSAP COUNTY,

Respondents.

---

ON APPEAL FROM CENTRAL PUGET SOUND  
GROWTH HEARINGS BOARD  
Central Puget Sound Growth Hearings Board No. 16-3-0010c  
Superior Court No. 17-2-00637-0

---

RESPONSE BRIEF OF REPENDENT KITSAP COUNTY

---

TINA R. ROBINSON  
Prosecuting Attorney

LISA NICKEL, WSBA No. 31221  
LAURA ZIPPEL, WSBA No. 47978  
Deputy Prosecuting Attorneys  
614 Division Street  
Port Orchard, WA 98366  
(360) 337-4992

**TABLE OF CONTENTS**

**I. INTRODUCTION..... 1**

**II. STATEMENT OF THE CASE..... 1**

**A. GMA Background..... 1**

**1. Determining urban growth area capacities ..... 3**

**2. Zoning regulations ..... 10**

**B. Procedural History..... 11**

**1. The County’s action..... 11**

**2. Petitioner Harless’ Appeal..... 14**

**III. ARGUMENT..... 15**

**A. Standard of review ..... 15**

**B. Harless’ allegations that Kitsap County’s urban growth areas have double the capacity are unsupported by the record ..... 19**

**C. Assignment of Error I (Issues I and 2). The Board did not err in how it considered the land capacity analysis relative to the consistency requirements of GMA ..... 22**

**1. The Board did not ignore the land capacity analysis in its decision..... 22**

**2. A land capacity analysis need not be adopted by ordinance, but also cannot be the object of a consistency challenge..... 24**

**D. Assignment of Error II (Issue 3). This assignment should be dismissed as it is both a new issue that cannot now be raised and is unsupported by law and fact..... 26**

**1. Assignment of Error II/Issue 3 is a new issue..... 26**

**2. Assignment of Error II/Issue 3 is unsupported by law or fact ..... 27**

**E. Assignments of Error III and IV (Issues 4 and 5). Kitsap County’s zoning regulations implement and are consistent with the County’s comprehensive plan..... 30**

**1. Using gross acreage to calculate maximum allowed**

densities does not result in extra “capacity” or oversized urban growth areas..... 31

2. Kitsap County’s zoning regulations implement and are consistent with the comprehensive plan’s sizing of the urban growth areas..... 34

3. Kitsap County’s zoning code does not create a second market factor..... 37

IV. CONCLUSION ..... 37

## TABLE OF AUTHORITIES

### Cases

<i>Barrie v. Kitsap County</i> , 93 Wn.2d 843, 613 P.2d 1148 (1980).....	18
<i>Benton County Fire Protection District No. 1 v. Benton County</i> , EWGMHB Case No. 94-1-0023 (04/25/1995) .....	4
<i>Bircumshaw v. State</i> , 194 Wn. App. 176, 380 P.3d 524 (2016) .....	30
<i>Bowers v. Pollution Control Hearings Board</i> , 103 Wn. App. 587, 13 P.3d 1076 (2000).....	26
<i>Building Association of Clark County v. Clark County</i> , WWGMHB Case No. 04-2-0038c (11/23/2005) .....	4
<i>City of Seattle v. Allison</i> , 148 Wn.2d 75, 59 P.3d 85 (2002) .....	30
<i>Clark County v. WWGMHB</i> , 177 Wn.2d 136, 298 P.3d 704 (2013) .....	32
<i>Coyne v. GMHB</i> , 195 Wn. App. 1057 (2016).....	17
<i>Den Beste v. Pollution Control Hearings Board</i> , 81 Wn. App. 330, 914 P.2d 144 (1996).....	19
<i>Dixon v. City of Bremerton</i> , 25 Wn.2d 508, 171 P.2d 243 (1946) .....	13
<i>Fishburn v. Pierce County Planning &amp; Land Services Dep't</i> , 161 Wn. App. 452, 250 P.3d 146 (2011).....	19
<i>Fred F. Brown v. City of Everett</i> , CPSGMHB Case No. 15-3-0018 (06/07/2016).....	6, 7
<i>Fuhriman v. City of Bothell</i> , CPSGMHB Case No. 05-3-0025c (08/29/2005) ....	11
<i>Hamilton v. Kitsap County</i> , CPSGMHB Case No. 16-3-0010c .....	14
<i>Herman v. Shoreline Hearings Board</i> , 149 Wn. App. 444, 204 P.3d 928 (2009) 19	
<i>Hood Canal Sand &amp; Gravel v. Jefferson County</i> , WWGMHB, Case No. 14-2-0008c (03/16/2015).....	18
<i>Joy v. Department of Labor &amp; Industries.</i> , 170 Wn. App. 614, 285 P.3d 187 (2012).....	19
<i>Keesling v. King County</i> , CPSGMHB Case No. 97-3-0027 (03/23/1998) .....	27
<i>King County v. CPSGMHB</i> , 142 Wn.2d 543, 553, 14 P.3d 133 (2000) .....	16, 18
<i>King County v. Washington State Boundary Review Board for King County</i> , 122 Wn.2d 648, 860 P.2d 1024 (1993).....	26
<i>Kittitas County v. EWGMHB</i> , 172 Wn.2d 144, 256 P.3d 1193 (2011) .....	17
<i>Kittitas County v. Kittitas County Conservation</i> , 176 Wn. App. 38, 308 P.3d 745 (2013).....	17
<i>Manke Lumber Co. Inc., v. CPSGMHB</i> , 113 Wn. App. 615, 53 P.3d 1011 (2002).....	18

<i>Olympic Stewardship Foundation v. State Environmental and Land Use Hearing Office</i> , 199 Wn. App. 668, 399 P.3d 562 (2017) .....	16
<i>Petree v. Whatcom County</i> , WWGMHB Case No. 08-2-0021c (10/13/2008) .....	5
<i>Phoenix Dev., Inc. v. City of Woodinville</i> , 171 Wn.2d 820, 256 P.3d 1150 (2011).....	18
<i>Quadrant Corp. v. Growth Management Hearings Board</i> , 154 Wn.2d 224, 110 P.3d 1132 (2005).....	4, 17
<i>Sherry v. Financial Indemnity Co.</i> , 160 Wn.2d 611, 160 P.3d 31 (2007) .....	19
<i>Spokane County v. Eastern Growth Management Hearings Board</i> , 176 Wn. App. 555, 309 P.3d 673 (2013).....	2, 17, 18, 35
<i>Strahm v. Snohomish County</i> , CPSGMHB Case No. 15-3-0004 (01/19/2016) 3, 33	
<i>Suquamish Tribe and Harless v. Kitsap County</i> (“Suquamish II”), CPSGMHB Case No. 07-3-0019c (08/31/2011).....	8, 12, 25, 26
<i>Tacoma v. Pierce County</i> , CPSGMHB Case No. 94-3-0001(07/05/1994).....	24
<i>Thurston County v. Cooper Point Ass'n</i> , 148 Wn.2d 1, 57 P.3d 1156 (2002).....	17
<i>Vashon-Maury v. King County</i> , CPSGMHB Case No. 95-3-0008 (10/23/1995).....	5, 12, 24, 25
<i>Whatcom County Association of Realtors v. Whatcom County</i> , WWGMHB Case No. 16-2-0007 (04/07/2017).....	4

**Growth Management Hearings Board Decisions** - \* Please note that all page citations to cases by the Growth Management Hearings Board use documents from [www.gmhb.wa.gov/search/case](http://www.gmhb.wa.gov/search/case) as the page numbering in Westlaw does not always match.

### Statutes

Revised Code of Washington Chapter 34.05 .....	15
Revised Code of Washington 34.05.554.....	26, 32, 37
Revised Code of Washington 34.05.562(1).....	19
Revised Code of Washington 34.05.570.....	16
Revised Code of Washington 34.05.570(1).....	17
Revised Code of Washington 34.05.570(3).....	16
Revised Code of Washington 34.05.570(3)(d) .....	16
Revised Code of Washington 34.05.570(3)(e) .....	16
Revised Code of Washington Chapter 36.70A .....	1
Revised Code of Washington 36.70A.010.....	2
Revised Code of Washington 36.70A.011.....	2

Revised Code of Washington 36.70A.020(1) .....	2
Revised Code of Washington 36.70A.020(2) .....	2
Revised Code of Washington 36.70A.030(7) .....	25
Revised Code of Washington 36.70A.040.....	2, 18, 24, 25, 26, 27, 34, 37
Revised Code of Washington 36.70A.040(3)(d) .....	25, 34
Revised Code of Washington 36.70A.070.....	24
Revised Code of Washington 36.70A.110.....	2, 3
Revised Code of Washington 36.70A.110(2).....	4, 9, 11
Revised Code of Washington 36.70A.110(3).....	10
Revised Code of Washington 36.70A.110.215.....	3
Revised Code of Washington 36.70A.115.....	3, 9
Revised Code of Washington 36.70A.115(1).....	3, 32
Revised Code of Washington 36.70A.130.....	2, 11
Revised Code of Washington 36.70A.130(3).....	10
Revised Code of Washington 36.70A.190.....	3
Revised Code of Washington 36.70A.215(3)(a).....	8
Revised Code of Washington 36.70A.290.....	17, 24
Revised Code of Washington 36.70A.290(1).....	27, 32, 37
Revised Code of Washington 36.70A.320.....	24
Revised Code of Washington 36.70A.320(1).....	17
Revised Code of Washington 36.70A.320(2).....	18
Revised Code of Washington 36.70A.320(3).....	17
Revised Code of Washington 36.70A.3201.....	10, 18
Revised Code of Washington 36-70A.300 .....	17
Revised Code of Washington 43.62.035.....	9
Revised Code of Washington Chapter 58.17. RCW.....	7

**Regulations**

King County Code 12A.12.030(B)(27) .....	14
King County Code 12A.12.030(B)(28) .....	14
King County Code Chapter 21A.12.....	14
King County Code 21A.12.030(B)(12) .....	14
Kitsap County Code 17.110.255.....	6
Kitsap County Code 17.120.010.....	21
Kitsap County Code 17.210.010.....	21
Kitsap County Code 17.420.020(A) .....	13, 21, 36
Kitsap County Code 17.420.050(A) .....	21, 36

Kitsap County Code 17.420.060(A)(18).....	21
Kitsap County Code 17.420.110(A)(18).....	21
Washington Administrative Code 242-03-210(c).....	32, 37
Washington Administrative Code Chapter 365-196.....	3, 32
Washington Administrative Code 365-196-050 .....	3
Washington Administrative Code 365-196-210 .....	38
Washington Administrative Code 365-196-210(2) .....	7
Washington Administrative Code 365-196-210(5) .....	11, 29
Washington Administrative Code 365-196-210(6) .....	6, 32
Washington Administrative Code 395-196-210(32) .....	32
Washington Administrative Code 365-196-300 .....	3, 38
Washington Administrative Code 395-196-300(2)(b).....	32
Washington Administrative Code 365-196-300(3) .....	11
Washington Administrative Code 395-196-300(3)(a).....	32
Washington Administrative Code 365-196-300(3)(b)(i).....	36
Washington Administrative Code 365-196-300(4) .....	11
Washington Administrative Code 365-196-305 .....	10
Washington Administrative Code 365-196-310 .....	3
Washington Administrative Code 365-196-310(4) .....	4
Washington Administrative Code 365-196-310(4)(b).....	5, 27, 29
Washington Administrative Code 365-196-310(4)(b)(ii)(B).....	5
Washington Administrative Code 365-196-310(4)(b)(ii)(C).....	5
Washington Administrative Code 365-196-310(4)(b)(ii)(D) .....	29
Washington Administrative Code 365-196-310(4)(b)(ii)(F).....	5, 6
Washington Administrative Code 365-196-325 .....	3, 4, 5, 27, 29
Washington Administrative Code 365-196-325(1)(a).....	9
Washington Administrative Code 365-196-325(2) .....	6
Washington Administrative Code 365-196-325(2)(a).....	4, 29, 32, 36
Washington Administrative Code 395-196-325(2)(c).....	29
Washington Administrative Code 395-196-325(2)(e)(i) .....	32
Washington Administrative Code 365-196-415(3)(b).....	34
Washington Administrative Code 365-196-800 .....	2

**Other Authorities**

Brent D. Lloyd, 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 (2001) .. 5, 34

Washington Department of Commerce, Urban Growth Area Guidebook:  
Reviewing, Updating and Implementing Your Urban Growth Area 103  
(November 2012)..... 6, 7, 8, 9, 33

**Rules**

Rules of Appellate Procedure 10.3 ..... 19  
Rules of Appellate Procedure 10.4(c)..... 13

## **APPENDIX**

Ordinance 281-2002

## **I. INTRODUCTION**

This case is about local land use planning and will require the court to decide whether the agency charged with determining compliance with the Growth Management Act, chapter 36.70A RCW, correctly upheld Kitsap County's most recent comprehensive plan update. Initially, the case appears nuanced and complicated, but once fact is separated from fiction and once a few planning concepts are understood, it only takes common sense to see that the decision to uphold the county's comprehensive plan was compliant with and appropriate under state law.

The basic dispute stems from the term "capacity" and what "sufficient capacity" means in the context of planning for growth. Capacity is not the same as the theoretical maximum volume, but is synonymous with what can be realistically accommodated. Petitioner Harless mistakenly believes in the former for future planning, but this is contrary to law. Thus, his alleged inconsistency is false. As shown below, Kitsap County's development regulations and comprehensive plan, each compliant with the Growth Management Act, are consistent with each other.

## **II. STATEMENT OF THE CASE**

### **A. GMA Background**

The Growth Management Act (GMA) was adopted by the state legislature in 1990 to address ways to accommodate growth in a logical and

coordinated fashion.<sup>1</sup> Its main focus is to encourage development in urban areas – designated as urban growth areas – and to conserve the rural areas.<sup>2</sup> To accomplish these goals, GMA requires the fastest-growing cities and counties to prepare comprehensive plans and development regulations to guide and direct the population that is projected to live and work in the jurisdiction over the next twenty-year planning horizon.<sup>3</sup> Comprehensive plans are generalized, coordinated land use policy statements that serve as “a guide or blueprint” for growth.<sup>4</sup> Development regulations implement the comprehensive plan with specific details and provide on-the-ground requirements for actual development.<sup>5</sup>

Once these plans and regulations are established, GMA calls for them to be reviewed and, if needed, revised every eight years to ensure they remain compliant with legislative changes and to ensure the designated urban growth areas have sufficient capacity for the projected growth.<sup>6</sup>

This appeal is solely about the interaction between Kitsap County’s methodology for determining capacity, and thus size, of the urban growth areas and the County’s development regulations that allow a particular

---

<sup>1</sup> RCW 36.70A.010.

<sup>2</sup> RCW 36.70A.011; .020(1) and (2); .110.

<sup>3</sup> RCW 36.70A.040. GMA also requires all jurisdictions to protect critical environmental areas and conserve natural resource lands, such as farms and forests.

<sup>4</sup> *Spokane County v. Eastern Growth Management Hearings Board*, 176 Wn. App. 555, 574, 309 P.3d 673 (2013).

<sup>5</sup> WAC 365-196-800.

<sup>6</sup> RCW 36.70A.130.

development to choose, within an established range, the actual density at full build-out. Because Harless' challenge requires a general understanding of the relationship between these planning concepts, both are discussed below.

1. Determining urban growth area capacities

The determination of whether there is sufficient land to accommodate development in urban growth areas is done through a land capacity analysis. GMA requires this through RCW 36.70A.115(1), which states:

Counties ... shall ensure that, taken collectively, adoption of and amendments to their comprehensive plans and/or development regulations ***provide sufficient capacity of land suitable for development*** within their jurisdictions to accommodate their allocated housing and employment growth ... as adopted in the applicable countywide planning policies and ***consistent with the twenty-year population forecast from the office of financial management.***<sup>7</sup>

Guidance for accomplishing this land capacity analysis is provided within state Department of Commerce regulations,<sup>8</sup> and wide discretion is given to jurisdictions to tailor the methodology to local circumstances.<sup>9</sup>

---

<sup>7</sup> RCW 36.70A.115 (emphasis added).

<sup>8</sup> See generally, chapter 365-196 WAC, authorized by RCW 36.70A.190. See specifically WAC 365-196-310 and -325. The guidelines in chapter 365-196 WAC are considered to be only guidelines, but not mandatory requirements. *Strahm v. Snohomish County*, CPSGMHB Case No. 15-3-0004, Final Decision and Order at 3-4 (01/19/2016).

<sup>9</sup> See e.g., RCW 36.70A.110, .215; WAC 365-196-050, -300, -310, and -325. See generally

At the broadest level, a land capacity analysis evaluates whether there is sufficient land available for development within urban growth areas to accommodate the projected population.<sup>10</sup> “[T]he land capacity analysis is intended to provide the information needed to right-size the [urban growth areas].”<sup>11</sup> As provided in the guiding regulations, “The land capacity analysis is a comparison between the collective effects of all development regulations operating on development and the assumed densities established in the land use element.”<sup>12</sup> While this is necessarily a mathematical process, the assumptions and methodology used for this analysis are, by their nature, imprecise:

The [land capacity analysis] is a critical mechanism for the sizing of a[n urban growth area] because it is utilized to determine how much urban land is needed. It is prospective – looking forward over the coming 20 years to see if there is enough land within the UGA to accommodate the growth that has been allocated to the area. However, part of this determination of how much land is available is filled with assumptions or “educated guesses” that lack absolute certainty....

---

*Quadrant Corp. v. Growth Management Hearings Board*, 154 Wn.2d 224, 236-237, 110 P.3d 1132 (2005) (GMA grants counties deference in how they plan for future growth to account for local circumstances); *Benton County Fire Protection District No. 1 v. Benton County*, EWGMHB Case No. 94-1-0023, Final Decision and Order at 11 (04/25/1995) (“each community is both given discretion and encouraged to create its own ‘vision of urban development.’ ”); *Building Association of Clark County v. Clark County*, WWGMHB Case No. 04-2-0038c, Amended Final Decision and Order at 2 (11/23/2005) (“the decisions Clark County made in regard to the land capacity assumptions are within the discretion afforded to local elected officials.”)

<sup>10</sup> RCW 36.70A.110(2); WAC 365-196-310(4), -325.

<sup>11</sup> *Whatcom County Association of Realtors v. Whatcom County*, WWGMHB Case No. 16-2-0007, Final Decision and Order at 23 (04/07/2017).

<sup>12</sup> WAC 365-196-325(2)(a).

This lack of precision permeates the entire process because the assumptions are largely qualitative, reach into the distant future, and reasonable people can disagree about them.<sup>13</sup>

The first step of the land capacity analysis is to consider the zones within each urban growth area and calculate the overall land within each zone that is either vacant (capable of development) or underutilized (capable of redevelopment).<sup>14</sup> From this acreage, the amount of land that is considered unusable is deducted.<sup>15</sup> These areas are typically those encumbered by critical areas (e.g., wetlands or streams) and their buffers, by greenbelts or open space to be preserved, by building setbacks, by easements and space for utilities, rights-of-way, and other public services, or by other features.<sup>16</sup> A market factor is then applied to the resulting area as a means to account for fluctuating market forces that would cause property to remain undeveloped or underdeveloped over the twenty-year planning period.<sup>17</sup> This market factor recognizes that not all developable land will be put to its

---

<sup>13</sup> *Petree v. Whatcom County*, WWGMHB Case No. 08-2-0021c, Final Decision and Order at 27 (10/13/2008).

<sup>14</sup> WAC 365-196-310(4)(b), -325. For a general overview of how counties across Washington calculate land capacity see Brent D. Lloyd, 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 at 111-117 (2001).

<sup>15</sup> It is important, and in fact required, that a land capacity analysis be based on net acreage. *Vashon-Maury v. King County*, CPSGMHB Case No. 95-3-0008, Final Decision and Order at 13 (10/23/1995).

<sup>16</sup> WAC 365-196-310(4)(b)(ii)(B) and (C).

<sup>17</sup> WAC 365-196-310(4)(b)(ii)(F).

maximum use because of such issues as owner preference, cost, stability, quality, and location.<sup>18</sup> The resulting net acreage is then the total land available (available acreage) for the incoming population (forecasted growth). Not only is using net acreage key to accurate planning, but it is required.

The next step is to calculate how much of the forecasted growth can be realistically accommodated by the available acreage. This is done by the use of a “density multiplier,” which is the assumed density for each zone within the urban growth area.<sup>19</sup> Generally speaking, density is the number of dwelling units (e.g., homes or apartment/condo units) per acre.<sup>20</sup> “Assumed density” is then defined as “the density at which future development is *expected* to occur...”<sup>21</sup> and is described by case law as the “reasonable estimate” of the density believed likely to occur during the planning period.<sup>22</sup> According to the state Department of Commerce, there is no one “right” way to determine assumed densities and, in fact, Commerce acknowledges:

---

<sup>18</sup> Id.

<sup>19</sup> WAC 365-196-325(2).

<sup>20</sup> Kitsap County Code defines a dwelling unit as “a single unit providing complete, independent living facilities for one or more persons, including permanent provisions for living, sleeping, eating, cooking and sanitation....” AR 700: KCC 17.110.255.

<sup>21</sup> WAC 365-196-210(6)(emphasis added).

<sup>22</sup> *Fred F. Brown v. City of Everett*, CPSGMHB Case No. 15-3-0018, Final Decision and Order at 9-10 (06/07/2016) (quoting WASHINGTON DEPARTMENT OF COMMERCE, URBAN GROWTH AREA GUIDEBOOK: REVIEWING, UPDATING AND IMPLEMENTING YOUR URBAN GROWTH AREA 103 (November 2012)).

The process will be challenging because each jurisdiction will have its own set of issues depending on the complexity of its zoning code, other land use policies, and market conditions. In addition, the theoretical densities allowed in an area must be balanced with potentially very different achieved densities in those same zones.<sup>23</sup>

Generally, however, jurisdictions tend to consider the following factors: actual development in the area,<sup>24</sup> the type and nature of approved plats,<sup>25</sup> incentives provided in development regulations to encourage development and density, the range of densities allowed in the zone, population growth and growth targets, and an evaluation of local, regional and national real estate market trends, as well as any other factor appropriate to the local jurisdiction.<sup>26</sup> These “[a]ssumptions about future development density are critical elements” of the analysis and are not used anywhere else in the planning context.<sup>27</sup>

In the 2006 Comprehensive Update, adopted over a decade ago,

---

<sup>23</sup> WASHINGTON DEPARTMENT OF COMMERCE, URBAN GROWTH AREA GUIDEBOOK: REVIEWING, UPDATING AND IMPLEMENTING YOUR URBAN GROWTH AREA 103 (November 2012) (“COMMERCE 2012 GUIDEBOOK”), available at <https://deptofcommerce.app.box.com/s/pnkar5j81ghxrgfdgr3ofa7pmw5v37da>.

<sup>24</sup> This is factored in as the recent “achieved density,” which is the density at which new development occurred in the planning period preceding the analysis....” WAC 365-196-210(2).

<sup>25</sup> Plats subdivide land into lots that can then be developed. The density of platted lots is important in a land capacity analysis because plats, for the most part, control the future density of that property. See generally chapter 58.17. RCW.

<sup>26</sup> COMMERCE 2012 GUIDEBOOK, *supra* note 23, at 102-103. See also *Fred F. Brown*, CPSGMHB Case No. 15-3-0018, Final Decision and Order at 9.

<sup>27</sup> *Fred F. Brown*, CPSGMHB Case No. 15-3-0018, Final Decision and Order at 11; COMMERCE 2012 GUIDEBOOK, *supra* note 23, at 103.

Kitsap County initially used the lowest density allowed within a particular zone as the assumed density for that zone since it was the minimum that the County could require and was thus the guaranteed density. On appeal, this methodology was found to be noncompliant because using the minimum allowed density did not consider the facts on the ground regarding what density was likely to be achieved, which was shown to be slightly higher.<sup>28</sup> A similar result would occur if the County were to do as Harless argues and use the theoretical maximum allowed zoning density as the assumed density because it would not reflect actual trends in development. GMA recognizes this problem in a similar context when it states, “the zoned capacity of land alone is not a sufficient standard to deem land suitable for development or redevelopment.”<sup>29</sup> In other words, just because a parcel is allowed to achieve a maximum density does not mean it will be developed at that density. Thus, using outer limits of what is possible, whether minimum or

---

<sup>28</sup> *Suquamish Tribe and Harless v. Kitsap County (“Suquamish II”)*, CPSGMHB Case No. 07-3-0019c, Final Decision and Order on Remand at 56 and 58 (08/31/2011). On remand, the County adopted the methodology that was used in the land capacity analysis for the 2016 Comprehensive Plan Update, and it was approved not only by GMHB, but Petitioner Harless agreed it was compliant as well. AR 1581: Petitioners Response to County’s Status Report/Statement of Actions Taken to Comply, p.3. *See also Suquamish II*, CPSGMHB Case No. 07-3-0019c, Order Finding Compliance at 11-13 (11/6/2012) (Kitsap County’s amended land capacity multiplier for the urban low zone is compliant because it reflects local circumstances).

<sup>29</sup> RCW 36.70A.215(3)(a). This section sets out the buildable lands review and evaluation program, which looks back at how development is occurring. The land capacity analysis conducts similar calculations, but looks forward. COMMERCE 2012 GUIDEBOOK, *supra* note 23, at 83.

maximum, is not based in reality and cannot, by definition, be an assumed density.

Once assumed density is determined, that number is multiplied by the available acreage to calculate the number of dwelling units per acre that can reasonably be expected to be built in that zone over the next twenty years.<sup>30</sup> The number of dwelling units per acre is then converted into population by multiplying the number of persons per dwelling unit generally found in that zone. This results in the estimated population capacity, which is then added to the other zones in the urban growth area to determine overall capacity.

Comparing this calculated population capacity to the forecasted growth for each urban growth area is the ultimate focus of the analysis.<sup>31</sup> The forecasted growth number is selected through a coordinated effort between the county and all cities within the county based on a range of projected population estimated by the state Office of Financial Management.<sup>32</sup> Once selected, the forecasted growth and its distribution to the various urban growth areas is set forth in countywide planning policies

---

<sup>30</sup> COMMERCE 2012 GUIDEBOOK, *supra* note 23, at 104-106.

<sup>31</sup> RCW 36.70A.115; WAC 365-196-325(1)(a). Cities complete their own land capacity analyses for the land within the incorporated city boundaries. Counties then calculate the total capacity of the urban growth areas.

<sup>32</sup> RCW 36.70A.110(2), .115; WAC 365-196-325(1)(a); RCW 43.62.035.

adopted by all jurisdictions.<sup>33</sup> If the forecasted growth allotted by the countywide planning policies is more than the estimated capacity of an urban growth area, the county may use its discretion, based on local circumstances, to expand the urban growth area or take other measures to encourage growth at increased densities.<sup>34</sup>

## 2. Zoning regulations

Whereas the land capacity analysis determines the amount of land reasonably needed for the incoming population at the planning stage, development regulations – particularly the zoning code – guide the actual development of land at the construction stage. Zoning codes establish, among other things, the various zones for a jurisdiction (e.g., residential, commercial, industrial); the allowed uses within each zone; setbacks that each building must have from lot lines; parking and landscaping requirements; and, most importantly for this case, the range of allowed densities within each zone.<sup>35</sup>

State regulations define “allowed densities” as “the density, expressed in dwelling units per acre, allowed under a county’s or city’s

---

<sup>33</sup> WAC 365-196-305.

<sup>34</sup> RCW 36.70A.130(3) (If necessary during the update process, urban growth area sizes and densities shall be revised to accommodate new projected growth); RCW 36.70A.110(3) (hierarchy of where urban growth should occur); RCW 36.70A.3201 (counties have discretion to plan for growth).

<sup>35</sup> See generally AR 683 – AR 950: Kitsap County’s Zoning Code.

development regulations when considering the combined effects of all applicable development regulations.”<sup>36</sup> Because GMA requires jurisdictions to provide a range of densities,<sup>37</sup> most jurisdictions not only provide zones that allow low, medium, and high density (e.g., urban low residential, urban high residential), they also provide a range of allowed densities within that zone (e.g., urban low residential may allow five to nine dwelling units per acre). GMA, however, does not dictate how these densities are to be calculated.<sup>38</sup>

## **B. Procedural History**

### **1. The County’s action**

In June 2016, Kitsap County adopted Ordinance 534-2016 to update its comprehensive plan and development regulations in accordance with the deadlines established by RCW 36.70A.130.<sup>39</sup> The Ordinance made several procedural and substantive findings for the update and then adopted and incorporated by reference the following documents:

- Appendix A – The Kitsap County Comprehensive Plan 2016-2036
- Appendix B – The 2016 Capital Facilities Plan
- Appendix C – The Comprehensive Plan and Zoning Maps
- Appendix D – Amendments to Kitsap County

---

<sup>36</sup> WAC 365-196-210(5).

<sup>37</sup> See e.g., RCW 36.70A.110(2); WAC 365-196-300(3) and (4).

<sup>38</sup> *Fuhrman v. City of Bothell*, CPSGMHB Case No. 05-3-0025c, Final Decision and Order at 23-24 (08/29/2005).

<sup>39</sup> AR 6 – AR 28: Ordinance 534-2016.

Code 13.12.025

- Appendix E – Amendments to Kitsap County Zoning Code<sup>40</sup>

It did not, however, adopt the various technical documents used to inform the policy decisions that culminated in the Ordinance.<sup>41</sup> These include both the draft and final 2016 Supplemental Environmental Impact Statement, the Land Capacity Analysis, and the 2014 Buildable Lands Report. As Harless acknowledges, GMA does not require adoption of these supporting documents as they do not set policy or mandate requirements; they merely discuss and analyze.<sup>42</sup>

Within these supporting technical documents, Kitsap County performed its land capacity analysis consistent with the above description and calculated the amount of net developable land that will be available for each zone during the next twenty years.<sup>43</sup> The County then multiplied this acreage by the various assumed densities<sup>44</sup> to achieve the estimated future capacity for each urban growth area. Comparing this number with the

---

<sup>40</sup> AR 27: Ordinance 534-2016, at p. 22.

<sup>41</sup> See generally AR 6 – AR 28: Ordinance 534-2016.

<sup>42</sup> *Vashon-Maury v. King County*, CPSGMHB Case No. 95-3-0008, Final Decision and Order at 14 (10/23/1995); Harless Brief at 23.

<sup>43</sup> See e.g., AR 105 – AR 109: Final SEIS at p.2-11 – p.2-15; AR 430 – AR 475: 2016 Final EIS, Appendix A; AR 1066: 2014 Buildable Lands Report at Appendix A, at p.15; and AR 1068: 2014 Buildable Lands Report at p.43.

<sup>44</sup> The assumed densities were calculated through an analysis called the Buildable Lands Report in 2014, and the methodology used to determine the assumed densities was previously challenged and upheld in *Suquamish II*, CPSGMHB Case No. 07-3-0019c, Order Finding Compliance at 11-13 (11/06/2012). The current assumed densities are shown in AR 108: Final SEIS at p.2-14.

forecasted growth established by the 2015 Countywide Planning Policies<sup>45</sup> resulted in adjusting the sizes of various urban growth areas for an approximately 1% reduction in urban growth areas countywide.<sup>46</sup>

As part of the 2016 Comprehensive Plan update, Kitsap County also made modifications to its zoning code; however, it did not change how densities were calculated.<sup>47</sup> As is typical among jurisdictions, Kitsap County's zoning regulations continue to allow a range of densities to be constructed in each zone.<sup>48</sup> For each range, the regulations also continue to require that the minimum density be calculated on net acreage of the particular parcel and maximum density be calculated on gross acreage of the parcel.<sup>49</sup> The ultimate range depends upon the specific situation for each parcel. For example, a ten-acre parcel that contains one acre of unbuildable land in the urban low residential zone, which has a standard range of five to nine dwelling units per acre, will have an effective allowed density range of

---

<sup>45</sup> See generally AR 951 – AR 1008: 2015 Countywide Planning Policies. Distribution of population among jurisdictions is found at AR 993.

<sup>46</sup> AR 14: Ordinance 534-2016 at p.9.

<sup>47</sup> See generally AR 24 – AR 25: Ordinance 534-2016 at p.19-p.20 listing changes in Title 17 Zoning.

<sup>48</sup> AR 108: Final SEIS at p.2-14; AR 829: Table 17.420.050(A) showing maximum and minimum allowed densities for select zones.

<sup>49</sup> AR 821: KCC 17.420.020(A). The County has used this method of calculating allowed density since at least 2002 as shown by Ordinance 281-2002, which the County asks the Court to take judicial notice of under *Dixon v. City of Bremerton*, 25 Wn.2d 508, 510, 171 P.2d 243 (1946). A copy of the ordinance is no longer available online and is attached here as Appendix 1 in accordance with RAP 10.4(c). See also AR 1525: Comment Matrix at p.10 for support of that this methodology is not new.

forty-five to ninety dwelling units per acre. This method is a simple way to provide flexibility and an incentive to develop at higher densities, which in theory should be able to eventually increase achieved densities. Other jurisdictions like King County allow similar flexibilities, but through a more complicated process.<sup>50</sup>

## 2. Petitioner Harless' Appeal

Petitioner Harless challenged Ordinance 534-2016 before the Central Puget Sound Growth Management Hearings Board (Board) and raised two issues, only one of which is relevant here.<sup>51</sup> Harless alleged that the size of County's urban growth areas, established through the land capacity analysis, was inconsistent with the allowed densities of the County's zoning code.<sup>52</sup>

The Board dismissed the issue, stating that Harless failed to satisfy his burden to prove that anything in the Ordinance violated any of the GMA

---

<sup>50</sup> King County, for example, establishes similar minimum and maximum densities and deducts certain unusable portions from the calculations, but it also allows development below minimum densities with waivers and only allows maximum densities with incentives, such as a transfer of development rights. *See generally* King County Code at chapter 21A.12, including KCC 21A.12.030(B)(12)(adjusting minimum densities), KCC 12A.12.030(B)(27) and (28) (adjusting maximum densities), available at [https://aqua.kingcounty.gov/council/clerk/code/24-30\\_Title\\_21A.pdf](https://aqua.kingcounty.gov/council/clerk/code/24-30_Title_21A.pdf) (last accessed 8/8/18). This information was made available to the Board as shown in AR 1152: County's Prehearing Brief at p.69.

<sup>51</sup> The appeal was ultimately consolidated with other appeals of the Ordinance and subsequently entitled *Hamilton v. Kitsap County*, CPSGMHB Case No. 16-3-0010c.

<sup>52</sup> AR 2 – AR 4: Harless Petition for Review to the Growth Management Hearings Board at p.6 - p.7.

provisions cited in his issue statement. Harless filed a motion for reconsideration arguing that the Board dismissed his issue merely because the land capacity analysis, which was the focus of Harless' argument, was not adopted by the Ordinance.<sup>53</sup> The Board denied his motion stating that the motion was "based on a finding and conclusion that the Board did not make."<sup>54</sup> The Board then confirmed that it did consider Harless' allegations, which was that the zoning code was inconsistent with the comprehensive plan, but then found that he failed to meet his burden of proof to actually show an inconsistency.<sup>55</sup>

Harless then appealed to the Kitsap County Superior Court, which upheld the Board's decision and adopted detailed findings and conclusions in support of the Board's decision and County Ordinance 534-2016.<sup>56</sup> This appeal followed.

### **III. ARGUMENT**

#### **A. Standard of review**

The Administrative Procedures Act (APA), ch. 34.05 RCW, governs appeals from decisions of administrative bodies such as the Growth

---

<sup>53</sup> AR 1672 – AR 1673: Harless Motion for Reconsideration at p.6- p.7.

<sup>54</sup> AR 1710 – AR 1711: Order on Motions for Reconsideration at p.2 – p.3.

<sup>55</sup> Id.

<sup>56</sup> CP 121-126: *Harless v. Kitsap County*, Kitsap County Cause No. 17-2-00637-0, Findings of Fact, Conclusions of Law and Order.

Management Hearings Board.<sup>57</sup> Under the APA, a court may only overturn a decision if one or more infirmities identified in RCW 34.05.570(3) are found. Here, Harless is challenging only two:

- (d) The agency has erroneously interpreted or applied the law;
- (e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court, which includes the agency record for judicial review, supplemented by any additional evidence received by the court under this chapter;

Under RCW 34.05.570(3)(d), the court reviews alleged errors of law de novo, while also giving “substantial weight” to the Board’s interpretation of GMA as it has “specialized expertise in dealing with such issues.”<sup>58</sup> The Board’s legal conclusions are only overturned when the appellant can show that the Board erroneously interpreted or applied the law.<sup>59</sup>

Under RCW 34.05.570(3)(e), alleged errors of fact are reviewed for support by substantial evidence.<sup>60</sup> If there is “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order” the decision will not be overturned.<sup>61</sup> Washington courts view the

---

<sup>57</sup> RCW 34.05.570.

<sup>58</sup> *King County v. CPSGMHB*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000); *Olympic Stewardship Foundation v. State Environmental and Land Use Hearing Office*, 199 Wn. App. 668, 686, 399 P.3d 562 (2017).

<sup>59</sup> RCW 34.05.570(3)(d).

<sup>60</sup> RCW 34.05.570(3)(e).

<sup>61</sup> *King County v. CPSGMHB*, 142 Wn. 2d 543, 553, 14 P.3d 133 (2000).

evidence in the light most favorable to the party who prevailed in the fact-finding forum, which in this case is the County.<sup>62</sup> Moreover, courts defer to the Board's determination of the weight given to reasonable, but competing factual inferences.<sup>63</sup> When reviewing mixed questions of law and fact, courts determine the law independently and then apply it to the Board's factual findings.<sup>64</sup>

The burden of demonstrating agency error under the APA is on the appealing party.<sup>65</sup> And, this burden is even greater in GMA appeals because courts, like the Board before, are to grant deference to the local planning decisions.<sup>66</sup> In fact, "GMA deference to county planning actions supersedes APA deference to administrative adjudications."<sup>67</sup> Under GMA, a county's actions are presumed valid upon adoption.<sup>68</sup> This means a Board "shall find compliance unless it determines that the action ... is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [GMA]."<sup>69</sup> For the Board to find an action clearly

---

<sup>62</sup> *Kittitas County v. Kittitas County Conservation*, 176 Wn. App. 38, 48, 308 P.3d 745 (2013).

<sup>63</sup> *Id.*

<sup>64</sup> *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 8, 57 P.3d 1156 (2002). Actual findings, however, are not required by RCW 36.70A.290 or .300. *Coyne v. GMHB*, 195 Wn. App. 1057 (2016) (unpublished and cited under GR 14.1).

<sup>65</sup> RCW 34.05.570(1).

<sup>66</sup> *Kittitas County v. EWGMHB*, 172 Wn.2d 144, 154, 256 P.3d 1193 (2011).

<sup>67</sup> *Spokane County v. EWGMHB*, 176 Wn. App. 555, 583, 309 P.3d 673 (2013); *Quadrant Corp.*, 154 Wn.2d at 238.

<sup>68</sup> RCW 36.70A.320(1).

<sup>69</sup> RCW 36.70A.320(3).

erroneous, the Board must be “left with the firm and definite conviction that a mistake has been committed.”<sup>70</sup> This deferential standard reflects the discretion in local planning under GMA to ensure local needs are met.<sup>71</sup>

In front of the Board, Harless had the burden of proving that the County’s actions were not compliant with GMA.<sup>72</sup> To do so, Harless had to clearly demonstrate how Kitsap County violated GMA based on specific evidence in the record.<sup>73</sup> Conclusory statements not based on evidence, or based on mathematical examples, cannot meet this requirement.<sup>74</sup> Specifically, to prove his argument that Kitsap County’s development regulations and comprehensive plan were inconsistent under RCW 36.70A.040, Harless was required to show how the development regulations did not “generally conform” to the comprehensive plan’s “blueprint.”<sup>75</sup> The Board determined that Harless did not meet his high burden of proof to show any inconsistency and therefore properly dismissed the matter.

---

<sup>70</sup> *King County v. CPSGMHB*, 142 Wn.2d 543, 552, 14 P.3d 133 (2000) (quoting *Department of Ecology v. Public Utilities District No. 1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)).

<sup>71</sup> RCW 36.70A.3201. “GMA acts exclusively through local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs.” *Phoenix Dev., Inc. v. City of Woodinville*, 171 Wn.2d 820, 830, 256 P.3d 1150 (2011).

<sup>72</sup> RCW 36.70A.320(2).

<sup>73</sup> *Manke Lumber Co. Inc., v. CPSGMHB*, 113 Wn. App. 615, 624, 53 P.3d 1011 (2002) (citing *King County*, 142 Wn.2d at 552).

<sup>74</sup> *Hood Canal Sand & Gravel v. Jefferson County*, WWGMHB, Case No. 14-2-0008c, Final Decision and Order at 57 (03/16/2015).

<sup>75</sup> *Spokane County v. EWGMHB*, 176 Wn. App. 555, 574–75, 309 P.3d 673 (2013); *Barrie v. Kitsap County*, 93 Wn.2d 843, 849, 613 P.2d 1148 (1980).

**B. Harless' allegations that Kitsap County's urban growth areas have double the capacity are unsupported by the record.**

Harless repeatedly makes conclusory statements that Kitsap County's urban growth areas have double the capacity and because it is so pervasive and is the foundation for his argument, it is addressed at the outset. Harless assumes this doubling to be fact, but nowhere is it stated in the record. Accordingly, it must be rejected.

Rule of Appellate Procedure 10.3 requires arguments to be supported by facts that are found in the record. Where they are not supported, case law prohibits courts from considering them, including any inferences therefrom.<sup>76</sup> Courts are also not authorized to accept new evidence on review except in limited circumstances that do not apply here.<sup>77</sup>

In his opening brief to this court alone, Harless states ten times that the urban growth area capacities are double as if it were fact.<sup>78</sup> However,

---

<sup>76</sup> *Joy v. Department of Labor & Industries.*, 170 Wn. App. 614, 629, 285 P.3d 187 (2012) (Conclusory arguments unsupported by fact do not justify legal consideration); *Fishburn v. Pierce County Planning & Land Services Dep't*, 161 Wn. App. 452, 468, 250 P.3d 146 (2011) (Courts will not search a record to find support for Appellant's argument); *Sherry v. Financial Indemnity Co.*, 160 Wn.2d 611, 615 n.1, 160 P.3d 31 (2007) (Courts do not consider facts unsupported by the record).

<sup>77</sup> RCW 34.05.562(1). *See also Den Beste v. Pollution Control Hearings Board*, 81 Wn. App. 330, 332–33, 914 P.2d 144 (1996) (Facts on review are limited to those decided at the administrative hearing); *Herman v. Shoreline Hearings Board*, 149 Wn. App. 444, 455–456, 204 P.3d 928 (2009) (Except in limited circumstances, a court should not consider new evidence on review).

<sup>78</sup> *See e.g.* Harless Brief at 6, 10, 12, 16, 17, 33, 34, 36, 37, and 38.

only one time does he support his statement and even then it is to his own brief before the Board.<sup>79</sup> And, while this citation does generally reference the land capacity tables, Harless ultimately bases the doubling theory on his own mathematical calculations, which were neither fully articulated in front of the Board nor upheld by the Board in the Final Decision and Order.<sup>80</sup> In fact, in front of the Board, Harless' claims were inconsistent, at times arguing that the urban growth areas actually provided for triple the capacity.<sup>81</sup> Harless' claims continued to be inconsistent and conclusory in his superior court brief.<sup>82</sup>

Connected to this doubling theory, Harless provides an “illustrative” table at the end of his brief.<sup>83</sup> He claims the table demonstrates how “oversized” the urban growth areas are relative to the assumed densities in

---

<sup>79</sup> Harless Brief at 16, n.36.

<sup>80</sup> AR 1026 – AR 1032: Petitioner Prehearing Brief at p.15- p.21; AR 1651 – AR 1652: Board Final Decision and Order at p.13-14. Harless also mixes-up the growth target numbers at pages 32-33 of his Brief. The total growth target estimated for Kitsap County from 2012-2036 is 77,071. The growth target for that same period in the unincorporated UGAs is 32,359. AR 677: Kitsap County Comprehensive Plan at p.11-152. *See also* AR 107: Final SEIS at p.2-13.

<sup>81</sup> AR 1032: Harless Prehearing Brief at p.21 (“By authorizing nearly triple the urban housing capacity...”) and AR 1033: Harless Prehearing Brief at p.22 (“the actual permitted capacity of the UGA is nearly triple that calculated in the LCA.”). Contrast with AR 1031: Harless Prehearing Brief at p.20 (“The difference in capacity... is more than a doubling of available capacity.”). *See also* GMHB transcript at 8 (“the difference is a factor of two to three times the allowed density”), at 12 (“three times the capacity”), and at 15 (“two to three times the capacity”).

<sup>82</sup> *See e.g.*, CP 63: Harless Trial Brief at p.10 (“this doubles the capacity”) and (“These subtractions reduce gross land area in UGAs by more than half, varying from one UGA to another due to differences in environmental features such as wetlands, steep slopes, etc.”), CP 64: Harless Trial Brief at p.11 (“the zoning creates two to three times the capacity calculated by the LCA”).

<sup>83</sup> Harless Brief at 37.

the land capacity analysis. However, Harless' argument is circular and relies on his own inaccurate assumption that urban growth area capacity is doubled. The table proves nothing except that if one assumes capacity is doubled, the urban growth area has double capacity. The table also has obvious errors and is not reliable, even for what it portends to show. For example, Harless misstates the density range for the "UMR" zone as "10-19 DU/Acre;" the zoning code and comprehensive plan instead provide a range of 10-18 dwelling units per acre.<sup>84</sup> Harless also includes the "MU" and "SLH" zones, but these were removed in the update.<sup>85</sup> Finally, and more significantly, Harless miscalculates the purported maximum zoning densities (sixth column) in both the Greenbelt Zone (IGZ)<sup>86</sup> and Urban Restricted Zone (UR). By definition, these zones have a high concentration of critical areas and thus have both minimum and maximum allowed densities calculated on net acres.<sup>87</sup>

Finally, as it relates to this presumed "doubling," Kitsap County has

---

<sup>84</sup> What Harless calls the UMR zone is the Urban Medium Residential (UM) in AR 672: 2016 Comprehensive Plan at p.11-17, and AR 716: KCC 17.120.010.

<sup>85</sup> AR 24: Ordinance 534-2016 at p.19.

<sup>86</sup> Harless abbreviates this zone as IGZ, but in Kitsap County Code it is abbreviated as GB. AR 716: KCC 17.210.010.

<sup>87</sup> AR 821: KCC 17.420.020(A), noting the exception with reference to KCC 17.420.110(A)(18). The reference to .110 was a typographical error that was fixed during codification and was meant to reference KCC 17.420.060(A)(18), which is the footnote to both the UR and GB zones. *See also* AR 829: KCC 17.420.050(A) and AR 840: KCC 17.420.060(A)(18). The fix is shown online at <http://www.codepublishing.com/WA/KitsapCounty/#!/Kitsap17/Kitsap17420.html#17.420.020>.

never admitted or agreed that the net developable land is half of the gross land area as Harless claims.<sup>88</sup> The County's use of the ten-acre illustrative example before superior court was merely an attempt, using Harless' own example for simplicity, to clarify how density is calculated.<sup>89</sup> The court should thus disregard Harless' factual assumption that the urban growth areas have double the capacity.

**C. Assignment of Error I (Issues I and 2). The Board did not err in how it considered the land capacity analysis relative to the consistency requirements of GMA.**

In Harless' first two issues he asks this Court to reverse the Board's decision due to its alleged failure to base its decision on the entire record and its alleged misinterpretation of GMA's consistency standards. Harless' claims must fail, however, because they misstate the reason for the Board's decision and misunderstand the law.

1. The Board did not ignore the land capacity analysis in its decision.

Harless appears to believe that the Board dismissed his issue because it did not consider the land capacity analysis as part of the record. However, it is clear by the language used by the Board in both its Final Decision and Order and in its Order Denying Reconsideration that this is

---

<sup>88</sup> Harless Brief at 16.

<sup>89</sup> Compare CP 76: Kitsap County's Superior Court Response Brief at p.6 with CP 63: Harless Trial Brief at p.10.

incorrect. The Board acknowledged it could, and did, consider the land capacity analysis in a challenge to the size of an urban growth area:

While the [land capacity analysis] can be assessed for its sufficiency in supporting the [urban growth area] and land use map which are part of the challenged ordinance, as we did in Issue 1, it does not follow that the [land capacity analysis], absent adoption, can be considered to be a part of the Ordinance so as to consider an assertion of inconsistency with a single development regulation.<sup>90</sup>

The Board thus was not unaware of the land capacity analysis and did not ignore it.

The Board also did not claim, as Harless asserts, that the land capacity analysis could not be evidence. Rather, it gave the land capacity its due consideration relative to the issue at hand. Unlike Issue 1, referenced in the quote above, in the issue now before the Court, Harless did not challenge the size of any urban growth area and did not directly challenge the methodology for sizing urban growth areas. Instead, he alleged inconsistencies. The consistency requirements of GMA, however, are clear and limited, as is further discussed below. It was GMA itself, and not any disregard for a document in the record, that prevented the Board from considering the land capacity analysis as an object for consistency. This is

---

<sup>90</sup> AR 1651-52: Board Final Decision and Order at p.13 – p.14. Issue 1 was a challenge involving the sizing of a specific UGA and has been resolved separately. AR 1647 – AR 1650: Board Final Decision and Order at p.9-12.

not a violation of RCW 36.70A.290 or .320. Harless' claim should be dismissed.

2. A land capacity analysis need not be adopted by ordinance, but also cannot be the object of a consistency challenge.

Both parties agree that a land capacity analysis is not a policy document.<sup>91</sup> Rather, it is a supporting technical document that performs a mathematical exercise to be used by policy makers to establish or modify urban growth area boundaries.<sup>92</sup> It is solely required by GMA as a “show your work” document.<sup>93</sup> The consistency requirements of GMA only apply to documents that actually control and guide development – the plans and regulations.

Harless referenced the consistency requirements in both RCW 36.70A.070 and .040 in his issue statement and arguments before the Board. Now, however, he raises only consistency under RCW 36.70A.040. This provision states in part,

“the county ... shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive

---

<sup>91</sup> Harless Brief at 22-23.

<sup>92</sup> *Vashon-Maury*, CPSGMHB Case No. 95-3-0008c, Final Decision and Order at 93 (10/23/1995) (*quoting Tacoma v. Pierce County*, CPSGMHB Case No. 94-3-0001, Final Decision and Order at 13 (07/05/1994)).

<sup>93</sup> *Vashon-Maury*, CPSGMHB Case No. 95-3-0008c, Final Decision and Order at 13-14 (“In undertaking [a land capacity analysis] counties must distinguish between gross acres and net (or buildable) acres.... Counties have great deal of discretion in how they achieve this requirement. The Board only demands that counties “show their work” so that both the general public and the Board (if a UGA is appealed) know how the county derived its UGAs and established the appropriate densities.”)

plan ....”<sup>94</sup>

Development regulations are defined as “the controls placed on development or land use activities by a county....”<sup>95</sup> Harless does not dispute that the land capacity analysis is not a development regulation.<sup>96</sup> There is also no longer any dispute that the land capacity was not part of the comprehensive plan.<sup>97</sup> Thus, because the land capacity analysis is neither a comprehensive plan nor a development regulation, by RCW 36.70A.040’s plain language, it cannot be compared in a consistency challenge.

The Board’s decision is also consistent with past decisions. The cases and Board decisions cited by Harless, while addressing land capacity analyses, do not specifically look at a land capacity analysis in terms of a consistency challenge under RCW 36.70A.040 and are therefore easily distinguished.<sup>98</sup> In *Vashon-Maury*, there was no direct challenge of a land capacity analysis. Rather, it was used in argument to justify the sizing of the urban growth areas around King County’s cities and to show that the sizing complied with the countywide planning policies.<sup>99</sup> In *Suquamish II*, the Petitioners directly challenged the methodology of the land capacity

---

<sup>94</sup> RCW 36.70A.040(3)(d).

<sup>95</sup> RCW 36.70A.030(7).

<sup>96</sup> Harless Brief at 22-23.

<sup>97</sup> Id. This is changed from Harless’ argument in superior court. CP 68: Harless’ Trial Brief at p.15.

<sup>98</sup> Harless Brief at 23.

<sup>99</sup> See generally, *Vashon-Maury v. King County*, CPSGMHB Case No. 95-3-0008c, Final Decision and Order (10/23/1995).

analysis, not that the zoning regulations and land capacity analysis were inconsistent.<sup>100</sup> As the Board stated in its Final Decision and Order here, the land capacity analysis can be assessed for its sufficiency in supporting the sizing of the urban growth areas – which the Board did in both *Vashon-Maury* and *Suquamish II* – but it does not follow that the land capacity analysis itself can be directly compared in a consistency challenge under RCW 36.70A.040.<sup>101</sup> The Board, therefore, did not misinterpret or misapply the law. Harless’ challenge must be dismissed.

**D. Assignment of Error II (Issue 3). This assignment should be dismissed as it is both a new issue that cannot now be raised and is unsupported by law and fact.**

Assignment of Error II is a new issue that was never raised before the Board or superior court and should be rejected as improper. It should also be rejected because it is not grounded in law or fact.

1. Assignment of Error II/Issue 3 is a new issue.

To protect the integrity and function of administrative hearings, the APA limits judicial review to issues raised before the administrative body, with exceptions not applicable here.<sup>102</sup> Likewise, both GMA and the

---

<sup>100</sup> *Suquamish II*, CPSGMHB Case No. 07-3-0019c, Final Decision and Order on Remand at 14-15 (8/15/2007).

<sup>101</sup> AR 1651: Board’s Final Decision and Order at p.13 – p.14.

<sup>102</sup> RCW 34.05.554; *King County v. Washington State Boundary Review Board for King County*, 122 Wn.2d 648, 668-669, 860 P.2d 1024 (1993); *Bowers v. Pollution Control Hearings Board*, 103 Wn. App. 587, 597, 13 P.3d 1076 (2000).

Board's procedural rules limit Board decisions to those issues presented by a petitioner in formal issue statements.<sup>103</sup>

Harless is limited to the issue he raised before the Board, which was whether the County's 2016 Comprehensive Plan was consistent with implementing development regulations under RCW 36.70A.040. This was clearly carried through Harless' briefing to the Board where he focused on the fact that the land capacity analysis measured density in units per net acre while the zoning code allows maximum densities calculated on gross acres.<sup>104</sup> This was also clearly confirmed in superior court when Harless admitted that he was not asserting that either the land capacity analysis or the zoning code were individually noncompliant with GMA, but were merely inconsistent.<sup>105</sup> He cannot now claim that there is more to his issue than consistency. Any such attempt should be rejected.

2. Assignment of Error II/Issue 3 is unsupported by law or fact.

Even if the Court decides this issue substantively, neither GMA nor the record supports Harless' position. The Assignment states that the

---

<sup>103</sup> RCW 36.70A.290(1); WAC 242-03-210(c); *Keesling v. King County*, CPSGMHB Case No. 97-3-0027, Final Decision and Order at 4 (03/23/1998) (Petitioner is limited to her issue statement and may not restate or reframe her issue in her prehearing brief to fix fundamental deficiencies).

<sup>104</sup> AR 1025 – AR 1032: Harless Prehearing Brief at p.14-21; AR 1622 – AR 1628: Harless Reply Brief at p.4 – p.10.

<sup>105</sup> CP 65: Harless Trial Brief at p.12 (“But Harless did not allege either was non-compliant on its face...”); AR 1027: Harless Prehearing Brief at p.16 (“The Land Capacity Analysis... follows what has now become the standard county LCA formula, more or less conforming to WAC 395-196-310(4)(b) and WAC 395-196-325.”).

County “failed to revise the densities permitted within its UGA.”<sup>106</sup> However, none of the arguments contained in the section support or even attempt to establish that the County actually failed to revise densities.<sup>107</sup> Instead, Harless focuses on an inaccurate understanding of the County’s dispute with the term “permitted” during the superior court briefing and misconstrues the role of allowed densities in the land capacity analysis.

In its briefing before the superior court, the County’s explanation of the term “permitted” simply clarified that in different contexts “permitted density” can refer to future densities that are allowed or to past densities for which permits have been issued. Because Harless used “permitted density” throughout a variety of his arguments, rather than the already defined terms of “allowed density,” “assumed density,” and “achieved density,” his briefing unnecessarily confused and conflated the role of the land capacity analysis and zoning regulations.

Harless’ briefing before this Court continues to confuse the issue through selective quotes regarding the land capacity analysis. These quotes suggest an inaccurately narrow focus of the analysis and do not acknowledge the larger regulatory scheme. For example, Harless claims that the land capacity analysis “is to be based on allowed land use densities

---

<sup>106</sup> Harless Brief at 24.

<sup>107</sup> In fact, the County did revise a number of its zoning densities as shown at AR 23 – AR 25: Ordinance 534-2016 at p.18 – p.20 summarizing zoning code changes.

and intensities.”<sup>108</sup> However, a full reading of the section shows that allowed densities are only one of six “general considerations” that “may” be included in the land capacity analysis.<sup>109</sup> Even as to these allowed densities, the guidelines do not require consideration solely of the maximum density; the plain language contemplates consideration of the full range of densities allowed under development regulations.<sup>110</sup> This is exactly the analysis applied by the County. The full range of allowed densities were considered, along with other factors as previously explained, to determine the density at which future development is expected to occur, as required by GMA.

Harless also inaccurately claims that the land capacity analysis must be based on the “collective effects of land use regulations...,” but this too is only a partial quote. The full provision states, “The land capacity analysis is a *comparison* between the collective effects of all development regulations operating on development and the assumed densities established in the land use element.”<sup>111</sup> This comparison invites the use of development trends, which are another important consideration under the guidelines.<sup>112</sup>

---

<sup>108</sup> Harless Brief at 26, n.60, quoting a portion of WAC 365-196-310(4)(b)(ii)(D).

<sup>109</sup> WAC 365-196-310(4)(b).

<sup>110</sup> WAC 365-196-310(4)(b)(ii)(D). *See also* WAC 365-196-210(5) defining “allowed density.”

<sup>111</sup> WAC 365-196-325(2)(a)(emphasis added).

<sup>112</sup> WAC 365-196-325(2)(c)(“counties ... should ... consider available information on trends in local markets to inform its evaluation of sufficient land capacity....”).

Thus, contrary to Harless' argument, the County correctly used assumed densities based on development trends when calculating its land capacity.

It is important to look to the plain meaning of the regulations in the context of the entire statutory and regulatory scheme.<sup>113</sup> Terms and phrases cannot be read in isolation.<sup>114</sup> Here, a full and accurate reading of the statute and rules show that to achieve sufficient land for future growth reasonable assumptions based on a variety of factors as to how growth will occur must be considered. Looking only at what is allowed in zoning, much less focusing solely on maximum allowed densities, is thus neither compliant with GMA nor the regulations. Assignment of Error II and Issue 3 should be rejected.

**E. Assignments of Error III and IV (Issues 4 and 5). Kitsap County's zoning regulations implement and are consistent with the County's comprehensive plan.**

In these final errors, Harless claims that Kitsap County's zoning ordinance conflicts with its comprehensive plan because the zoning allegedly doubles the capacity of urban growth areas, and because of this doubling, the urban growth areas are oversized. As discussed above in Section III(B), his allegations of double capacity are unsupported by the record and are at odds with prior statements. Even if there was support that

---

<sup>113</sup> *Bircumshaw v. State*, 194 Wn. App. 176, 187, 380 P.3d 524 (2016).

<sup>114</sup> *City of Seattle v. Allison*, 148 Wn.2d 75, 81, 59 P.3d 85 (2002).

the overall gross acreage is twice the net acreage, the effect on land capacity, as contemplated by GMA, is not as Harless claims.

As discussed below, the County's comprehensive plan established urban growth areas based on the growth that can be realistically expected. The County's zoning code allows this expected density, as required by GMA, but also provides a method of calculating densities that encourage higher density. This implements, and thus generally conforms to, the comprehensive plan. There is no inconsistency. The Board correctly concluded that Harless did not meet his burden of proof to show otherwise.

1. Using gross acreage to calculate maximum allowed densities does not result in extra "capacity" or oversized urban growth areas.

Harless claims an inconsistency because Kitsap County used net acreage with assumed densities when it set urban growth boundaries and uses gross acreage when calculating the maximum allowed density for a project on a particular parcel. He focuses on the terms "gross" and "net" because of his underlying belief that using "gross" acreage allows additional "capacity." Harless uses the term capacity as if it were a simple volume measurement comparable to a cup having capacity for eight ounces, but GMA's use of the term is not that simple. The theoretical maximum capacity of land is not the goal of the land capacity analysis. Rather, the

goal is to calculate “sufficient capacity.”<sup>115</sup> Sufficient capacity is defined as “provid[ing] for the capacity necessary to accommodate all the growth ... allocated to that jurisdiction,”<sup>116</sup> and is expressly to be done by using assumed densities,<sup>117</sup> which again is defined as “the density at which future development is expected to occur.”<sup>118</sup> GMA capacity thus is not concerned with the theoretical maximum, but with capacity sufficient to realistically accommodate the expected growth. Accordingly, merely *allowing* higher densities does not actually create “capacity” as the term is used in GMA.

Without additional “capacity,” the urban growth areas also cannot be oversized. Urban growth areas are “right-sized” based on a land capacity analysis that uses assumed densities. To say that an urban growth area is oversized is thus another way of saying the assumed densities are incorrect. Harless, however, is not challenging the assumed densities so this argument must fail.<sup>119</sup>

Even if the court evaluates the assumed densities of the county’s land capacity analysis, Harless’ argument fails because it is based on unrealistic growth assumptions. As stated above, the land capacity analysis

---

<sup>115</sup> RCW 36.70A.115(1); WAC 395-196-300(3).

<sup>116</sup> WAC 395-196-210(32).

<sup>117</sup> WAC 395-196-300(2)(b); WAC 395-196-300(3)(a); WAC 395-196-325(2)(a) and (e)(i).

<sup>118</sup> WAC 365-196-210(6).

<sup>119</sup> Harless did not challenge this below and so it cannot be an issue before this court. *Clark County v. WWGMHB*, 177 Wn.2d 136, 144-45, 298 P.3d 704 (2013). See also RCW 34.05.554; RCW 36.70A.290(1); WAC 242-03-210(c).

is concerned with establishing sufficient capacity at expected densities. Assumed densities thus are to be reasonable estimates based on data, not lofty desires. According to a prior Board decision and the Department of Commerce:

For each zone and planned land use designation, jurisdictions will develop assumed densities to be used in the Land Supply Analysis. ***These assumptions are meant to be reasonable estimates of densities to expect over the long-term planning period. Assumed densities will only be used for the purposes of the [land capacity analysis] and will not be used to guide or influence other County or local land use policy decisions.*** In determining assumed densities, jurisdictions will consider the following range of inputs: recent achieved densities; County and city land use goals and policies; local knowledge of development plans and pending development; and any other local market or policy conditions that are likely to impact future development densities.<sup>120</sup>

For Kitsap County, the data included the full range of allowed densities as well as other density incentives provided in the zoning code, but the analysis revealed that the development trend is actually closer to the lower end of the range of allowed densities. In other words, most parcels are choosing *not* to develop at the highest densities, at least not yet. It would be unreasonable for Kitsap County to assume for future planning that such high

---

<sup>120</sup> *Strahm v. Snohomish County*, CPSGMHB Case No. 15-3-0004, Final Decision and Order at 13 (01/19/2016) (quoting COMMERCE 2012 GUIDEBOOK, *supra* note 23) (emphasis added).

density will occur merely because the County allows it to be so.<sup>121</sup> In fact, doing so would result in excessively small urban growth areas and therefore not actually accommodate the population.<sup>122</sup> Until evidence that development is actually occurring at or near the maximum densities, Kitsap County cannot rely on the maximum allowed density for setting urban growth area boundaries. When densities do increase, Kitsap County will reevaluate and modify the assumed densities; such is the entire purpose of the regular review requirements of GMA. Contrary to Harless' argument, urban growth areas that do not assume a maximum buildout but assume supported trends are not "oversized," they are "right-sized."

2. Kitsap County's zoning regulations implement and are consistent with the comprehensive plan's sizing of the urban growth areas.

Pursuant to RCW 36.70A.040, development regulations, such as zoning, must be consistent with and implement the comprehensive plan.<sup>123</sup> Consistency does not mean that development regulations must exactly

---

<sup>121</sup> It would also be inconsistent with WAC 365-196-415(3)(b) to plan for capital facilities based on Harless' theory. This provision requires counties to use the assumed densities of the land capacity analysis when assessing the needs of capital facilities. Contrary to Harless' argument on page 33 of his brief that the County's housing, transportation, and parks plans, etc. are "woefully inadequate," the County's plans follow GMA guidelines and will adequately serve the County's forecasted future growth.

<sup>122</sup> Excessively small urban growth areas are just as problematic as oversized ones. Undersized urban growth areas increase unaffordable housing in urban areas, push growth into rural areas, and increase urban sprawl and traffic congestion. Lloyd, *supra* note 14, at 105.

<sup>123</sup> RCW 36.70A.040(3)(d).

match the comprehensive plan; rather, they need only to “generally conform.”<sup>124</sup> This is because a comprehensive plan provides general guidance or a “blueprint,” while development regulations apply to specific projects. The plan and zoning code look at different aspects of development and have different, albeit related, functions.<sup>125</sup> Thus, so long as the development regulations implement and generally conform to the comprehensive plan’s general “blueprint,” they are consistent.

Kitsap County performed its land capacity analysis as described in Section II(A)(1) and Section II(B)(1) above. In short, it determined the net available acreage and calculated assumed densities based on a variety of factors and local circumstances, and then multiplied them to determine the land supply needed for each urban growth area to have sufficient capacity. The urban growth area boundaries were set accordingly. This then became the County’s blueprint.

The County’s blueprint is implemented by the County’s zoning code and, although the code uses gross acreage for maximum allowed densities, the code is consistent with the plan. GMA does not proscribe how a jurisdiction is to calculate density and in fact allows jurisdictions discretion

---

<sup>124</sup> *Spokane County. v. EWGMHB*, 176 Wn. App. 555, 574–575, 309 P.3d 673 (2013) (“a development regulation need not strictly adhere but must ‘generally conform’ to the comprehensive plan.”).

<sup>125</sup> *Id.*

to determine the exact characteristics of their zoning codes with two limitations. WAC 365-196-300(3)(b)(i) requires development regulations to “allow development at the densities assumed in the comprehensive plan.” WAC 365-196-325(2)(a) also requires development regulations to “allow at least the low end of the range of assumed densities established in the land use element.” Both requirements are to ensure sufficient land capacity is provided.<sup>126</sup> Kitsap County’s zoning code meets both requirements.

As is evident by the record, Kitsap County chose to provide a range of allowed densities where the minimum density is calculated on net acreage of the particular parcel and the maximum allowed density is calculated on gross acreage of that parcel.<sup>127</sup> The end result is a numerical range, again just for that particular parcel, of dwelling units that may be constructed. For each zone, the full allowed density range, regardless of how they are calculated, include the assumed densities for that zone.<sup>128</sup> Stated another way, the assumed densities reasonably likely to occur over the next twenty-year planning horizon are within the range of densities allowed on the ground by the zoning ordinance. Sufficiency, compliance, and consistency are achieved. Harless did not meet his burden of proof to convince the Board

---

<sup>126</sup> WAC 365-196-300(3)(b)(i); WAC 365-196-325(2)(a).

<sup>127</sup> *See e.g.*, AR 829: KCC 17.420.050(A), AR 821: KCC 17.420.020(A).

<sup>128</sup> AR 108: FSEIS at p.2-14 showing the allowed densities and assumed densities side by side.

otherwise and his appeal should be rejected.

3. Kitsap County's zoning code does not create a second market factor.

Harless' final argument is that Kitsap County is creating a second market factor through the zoning code, but this is outside the scope of his issue statement to the Board and should be disregarded.<sup>129</sup> Even if considered, Harless' argument fails because it relies on a misinterpretation of the GMA. As explained in the previous sections, counties must use assumed densities to plan for growth. Assumed densities are based on both historical data and predicted trends. GMA does not require, nor even allow, assumed densities to be the maximum theoretical density allowed under the zoning code. Arguing otherwise goes against the purpose of the GMA to plan for future growth based on assumptions founded in reality. Kitsap County is not creating a second market factor by using assumed densities and net acreage in its land capacity analysis.

#### IV. CONCLUSION

Harless appealed the decision of the Growth Management Hearings Board on procedural and substantive grounds. The procedural arguments are flawed as a matter of law and fact because a land capacity analysis itself cannot be compared with development regulations under RCW 36.70A.040.

---

<sup>129</sup> RCW 34.05.554; RCW 36.70A.290(1); WAC 242-03-210(c).

Furthermore, Harless' reading of the Board's decision is erroneous because the Board did in fact consider the zoning code's alleged inconsistency with the comprehensive plan, which was adopted by the Ordinance and which sized the County's urban growth areas based on the land capacity analysis. The Board did not dismiss merely because the land capacity analysis was not adopted by the Ordinance. Accordingly, Harless' procedural challenges fail.

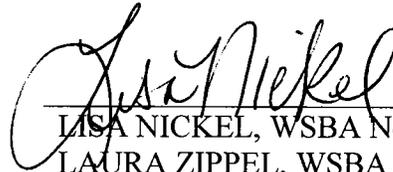
Harless' substantive challenge fails as well. Using the defined density terms provided in WAC 365-196-210 and -300, the distinction between the calculations of the land capacity analysis and the calculations of the maximum density in the zoning code is clear. The former provides the best reasonable estimate of future development in order to provide "sufficient" capacity; the latter provides a range of densities at which a specific project is allowed to develop. Using net acreage in the land capacity analysis is appropriate and in fact required. Using gross acreage to determine the maximum number of dwelling units allowed under the zoning code is also an appropriate and GMA-compliant way for the County to exercise its discretion in providing a range of densities for property owners.

GMA requires that assumed densities fall within the range of densities actually allowed by the zoning code. GMA also requires development regulations generally conform to the comprehensive plan; an

exact match is neither required nor possible. GMA does not require, as Harless argues, that maximum allowed density must be the same as assumed density. To do so runs afoul of reality and good planning. There is thus no inconsistency. The Board was correct in its holding and Harless has not satisfied his high burden of proof to show the County's plan and zoning code are inconsistent. The Board's decision must be upheld and Harless' appeal dismissed.

Respectfully submitted this 20th day of August, 2018.

TINA R. ROBINSON  
Kitsap County Prosecuting Attorney

A handwritten signature in cursive script, appearing to read "Lisa Nickel", written over a horizontal line.

LISA NICKEL, WSBA No. 31221  
LAURA ZIPPEL, WSBA No. 47978  
Deputy Prosecuting Attorneys  
Attorneys Respondent Kitsap County

**CERTIFICATE OF SERVICE**

I, Doris D. Needles, certify under penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On August 20, 2018, I caused to be served in the manner noted a copy of the foregoing document upon the following:

Jerry Harless, <i>Pro Se</i>	<input type="checkbox"/>	Via U.S. First-Class Mail
P.O. Box 8572	<input type="checkbox"/>	Via Certified Mail
Port Orchard, WA 98366	<input type="checkbox"/>	Via Hand Delivery
jlharless@wavecable.com	<input checked="" type="checkbox"/>	Via E-mail

Lisa Peterson, WSBA #30372	<input type="checkbox"/>	Via U.S. First-Class Mail
Assistant Attorney General	<input type="checkbox"/>	Via Certified Mail
800 Fifth Avenue, Suite 2000	<input type="checkbox"/>	Via Hand Delivery
Seattle, WA 98104-3188	<input checked="" type="checkbox"/>	Via E-mail
Lisap1@atg.wa.gov		
<u>lalseaef@atg.wa.gov</u>		

DATED August 20, 2018, at Port Orchard, Washington.

  
Doris D. Needles, Legal Assistant  
Kitsap County Prosecutor's Office  
614 Division Street, MS 35-A  
Port Orchard, WA 98366  
(360) 307-4271

# APPENDIX

## **ORDINANCE NO. 281-2002**

### AMENDING THE KITSAP COUNTY ZONING ORDINANCE

#### **BE IT ORDAINED:**

**NEW SECTION Section 1.** A new section 110.057 is added to Chapter 110 of Ordinance No. 216-1998, adopted May 7, 1998, as follows:

**110.057        Alternative technology**

“Alternative technology” means the use of structures, fixtures, and technology which substantially limit the visibility of wireless communication support structures and facilities. This may include, but is not limited to, use of existing utility poles, flagpoles, existing structures such as water tanks, church steeples and any other method which substantially minimizes the visual impact of wireless communication support structures and facilities. This is commonly referred to as “Stealth Technology.”

**Section 2.** Section 110.105 of Ordinance No. 216-1998, adopted May 7, 1998, is amended as follows:

**110.105        Bed and breakfast house.**

“Bed and breakfast house” means an owner occupied dwelling which is used to provide overnight guest lodging for compensation in not more than four (4) guest rooms (5-10 bedrooms will be reviewed as a Conditional Use) and which usually provides a morning meal as part of the room rate structure. Meal service at other times of the day will be reviewed as a Conditional Use.

**Section 3.** Section 110.210 of Ordinance No. 216-1998, adopted May 7, 1998, is amended as follows:

**110.210        Density.**

“Density” means a ratio comparing the number of dwelling units with land area. In all zones where a maximum allowable density is identified, the maximum allowable density is calculated based on gross acreage of the parcel. In all zones where a minimum density is required, the minimum density is calculated based on net developable acreage. Net developable acreage is determined by subtracting critical areas, required buffers, roadways, stormwater facilities and other portions of the site which are undevelopable, from the gross acreage.

**Section 4.** Section 110.240 of Ordinance No. 216-1998, adopted May 7, 1998, is amended as follows:

**110.240        Dwelling, single family.**

“Dwelling, single-family” or “single-family dwelling” means a building designed or used for residence purposes by not more than one (1) family, and containing one (1) dwelling unit only. A recreational vehicle is not considered a dwelling unit.

A.        “Attached” means sharing common walls.

B. "Detached" means physically separated.

Section 5. Section 110.675 of Ordinance No. 216-1998, adopted May 7, 1998, is amended as follows:

**110.675 Sign.**

"Sign" means a collection of letters, numbers or symbols which calls attention to a business, product, activity, person or service. Balloons or balloon type devices in excess of five (5) cubic feet, or flown more than 20 feet in elevation measured from grade, or taller than 20 feet in height measured from mean grade are considered signs for the purposes of this ordinance.

NEW SECTION. Section 6. A new section is added to Chapter 110 of Ordinance No. 216-1998, adopted May 7, 1998, as follows:

**110.687 Stealth technology.** See "Alternative technology".

Section 7. Section 320.020, "Rural Use Table", of Ordinance No. 216-1998, adopted May 7, 1998, is amended as shown in Attachment A to this ordinance.

Section 8. Section 355.020, "Commercial Use Table", of Ordinance No. 216-1998, adopted May 7, 1998, is amended as shown in Attachment B to this ordinance.

Section 9. Section 370.020, "Business Park and Industrial Use Table", of Ordinance No. 216-1998, adopted May 7, 1998, is amended as shown in Attachment C to this ordinance.

Section 10. Section 445.090, "Conditionally Exempt Signs", subsection D, of Ordinance 216-1998, adopted May 7, 1998, is amended as follows:

- D. Political campaign signs shall be subject to the following:
1. Political campaign signs must be removed 14 days following an election with the exception that candidates or issues which will remain on the ballot for the general election following a primary election may remain until 14 days following the general election.
  2. Any political campaign signs located within county right-of-way are subject to the following requirements:
    - a. Use of metal signs, metal supports, metal frames, or wire frames is prohibited.
    - b. Political campaign signs placed within a county right-of-way are limited to a size no greater than four (4) square feet and may not extend higher than thirty-six inches (36") measured from the point in which they are placed in the ground to the top of the sign.
  3. A political campaign sign may not be placed on a utility pole, or on any state or county regulatory or informational sign or post.
  4. Any political campaign sign found to be inconsistent with the requirements contained within this ordinance is subject to removal and disposal by the county, and the candidate or campaign may be held responsible for the cost of removal.

Section 11. Section 460.010 of Ordinance No. 216-1998, adopted May 7, 1998, is amended as follows:

**460.010 Purpose**

Unless specifically stated elsewhere in this ordinance, a use lawfully occupying a structure or site on the effective date of this title, or of amendments thereto which does not conform to the use regulations for the zone in which it is located, is deemed to be a nonconforming use and may be continued, subject to the regulations hereinafter.

Section 12. Section 460.020 of Ordinance No. 216-1998, adopted May 7, 1998, is amended as follows:

**460.020. Nonconforming uses of land**

A. The Director may grant an application for a change of use if, on the basis of the application and the evidence submitted, the Director makes the following findings:

1. That the proposed use is classified in a more restrictive category than existing or preexisting use by the zone regulations of this ordinance. The classifications of a nonconforming use shall be determined on the basis of the zone in which it is first permitted, provided that a conditional use shall be a more restrictive category than a permitted use in the same category.
2. That the proposed use will not more adversely affect the character of the zone in which it is proposed to be located than the existing or preexisting use.
3. That the change of use will not result in the enlargement of the space occupied by a nonconforming use. Except that a nonconforming use of a building may be extended throughout those parts of a building which were designed or arranged to such use prior to the date when such use of the building became nonconforming, provided that no structural alteration, except those required by the law, are made.

The decision of the Director may be appealed to the Hearing Examiner.

- B. Unless specifically stated elsewhere in this title, if a nonconforming use not involving a structure has been changed to a conforming use, or if the nonconforming use ceases for a period of six (6) months or more, said use shall be considered abandoned, and said premises shall thereafter be used only for uses permitted under the provisions in the zone in which it is located.
- C. A nonconforming use not involving a structure, or one involving a structure (other than a sign) having an assessed value of less than two hundred dollars (\$200), shall be discontinued within two (2) years from the date of passage of this title.
- D. A use which is nonconforming with respect to provisions for screening shall provide screening within five (5) years from the date of passage of this title.
- E. If an existing nonconforming use or portion thereof, not housed or enclosed within a structure, occupies a portion of a lot or parcel of land on the effective date hereof, the area of such use may not be expanded, nor shall the use or any part thereof, be moved to any other portion of the property not theretofore regularly and actually occupied for

such use; provided, that this shall not apply where such increase in area is for the purpose of increasing an off-street parking or loading facility to the area specified in this Ordinance for the activity carried on in the property; and provided further that this shall not be construed as permitting unenclosed commercial activities where otherwise prohibited by this Ordinance.

Section 13. Section 470.010 of Ordinance No. 216-1998, adopted May 7, 1998, is amended as follows:

**470.010 Purpose.**

In addition to the general purposes of the comprehensive plan and the Zoning Ordinance, this Wireless Communication Facilities section is intended to:

- A. Provide for a wide range of locations and options for wireless communication providers while minimizing the visual impacts to surrounding properties associated with wireless communication facilities;
- B. Encourage creative approaches in locating wireless communication facilities which will be compatible with the surroundings;
- C. Encourage and facilitate co-location of antennas, support structures and related equipment for wireless communication providers, public service communications and emergency service communications;
- D. Provide for a process to locate and identify new site locations in a comprehensive manner which allows for substantial public participation; and
- E. Encourage the use of Alternative Technology.

Section 14. Section 470.030 of Ordinance No. 216-1998, adopted May 7, 1998, is amended as follows:

**470.030 Application requirements**

- A. Wireless communication providers shall meet with the Department to discuss the providers' plans for construction of new facilities to coordinate regional planning for the new year to identify the preferred network.
- B. Before an application for a Conditional Use Permit is submitted, all new site locations requiring a support structure in excess of 35 feet in height and not implementing alternative technology must be reviewed in a manner consistent with Section IX of the Kitsap County Comprehensive Plan, Land Use Appendix, regarding Essential Public facilities. This section does not apply to those applications which qualify as a co-location site where previous site approval has been granted for a support structure.
- C. The Kitsap County Department of Community Development (DCD) will develop and maintain a Geographic Information System (GIS) database that will identify the preferred network. This database will depict all existing and proposed wireless communication support structure locations. Locations will be mapped with the adopted Comprehensive Plan Land Use Maps with all publicly owned lands identified. This database will be provided to all wireless communication facility applicants and to the public.

- D. In addition to other requirements, the applications shall include the following items at a minimum:
1. Site and landscape plans drawn to scale;
  2. A report including a description of the tower with technical reasons for its design;
  3. Documentation establishing the structural integrity for the tower's proposed uses;
  4. The general capacity of the tower, and information necessary to assure that ANSI standards are met;
  5. A statement of intent on whether excess space on the site will be leased;
  6. Proof of ownership of the proposed site or authorization to utilize it;
  7. Copies of any easements necessary;
  8. An analysis of the area containing existing topographical contours; and
  9. A visual study depicting "where within a one (1) mile radius any portion of the proposed tower could be seen."

Section 15. Section 470.040 of Ordinance No. 216-1998, adopted May 7, 1998, is amended as follows:

**470.040 Wireless communication facilities-permitted uses.**

- A. Wireless Communication Support Structures:
1. Any support structure constructed greater than thirty-five feet in height shall be subject to the provisions of Sections 470.050.B and 470.050.C.
  2. Support Structures are subject to the site development standards of Section 470.060. A lattice support structure shall not be permitted unless it is demonstrated that an existing communication structure or a mono-pole is not available or that the existing location does not satisfy the operational requirements of the applicant.
  3. All new wireless communication support structures greater than thirty-five feet in height which do not employ alternative technology must obtain a conditional use permit (CUP).
- B. Wireless Communication Antenna Arrays:
1. Wireless communication antenna arrays not exceeding thirty-five feet in height are permitted on existing structures in any zone. Arrays shall not add more than thirty-five feet in height to the existing building or structure to which it is attached. When antenna arrays are proposed on single-family dwellings and associated accessory structures, they shall be subject to a Minor Site Plan Review, and are subject to the provision of Sections 470.050.C and 470.050.D.
  2. Wireless communication antenna arrays exceeding thirty-five feet in height are subject to the standards or wireless communication support structures in Section 470.050.
  3. Mini and micro antenna arrays are allowed on existing utility poles. Furthermore, existing poles may be extended in height up to 50% to accommodate antennas. Ground support facilities when existing utility poles are utilized shall be subject to review as a Minor Site Plan Review and subject to the requirements of Section 470.050.B.

- C. Construction of equipment shelters, cabinets, and other ancillary equipment not located on or in an existing structure shall be subject to a Minor Site Plan Review and the site development standards of Section 470.050.

Section 16. Chapter 470, “Wireless Communication Facilities”, Section .060, “Conditional Use Permit (CUP)”, Subsection A, of Ordinance No. 216-1998, adopted May 7, 1998 is amended as follows:

**470.060 Conditional use permit (CUP)**

- A. Decision Criteria: The intent of the CUP procedure is to determine the conditions under which a use may be permitted. These permits are subject to specific review during which conditions may be imposed to assure compatibility of the use with other uses permitted in the surrounding area. A CUP may be granted only if the following facts and conditions exist:
1. The need for the proposed wireless communication support structure shall be demonstrated if it is to be located in a residential zone or within three hundred (300) feet of an existing residential zone.
  2. An evaluation of the operational needs of the provider, alternative site, alternative existing facilities upon which the proposed antenna array might be located, and co-location opportunities on existing support structures within one (1) mile of the proposed site shall be provided by the applicant. Evidence shall demonstrate that no practical alternative is reasonably available to the applicant.
  3. The proposed support structure satisfies all of the provisions and requirements of Section 470.050; and
  4. The proposed support structure location has been reviewed in a manner consistent with Section 470.030.B.

Section 17. Chapter 520 of Ordinance No. 216-1998, “Appeals”, adopted May 7, 1998, is repealed.

NEW CHAPTER. Section 18. A new chapter is added to Ordinance No. 216-1998, adopted May 7, 1998, as follows:

**520 Appeals**

All appeals shall follow the process outlined in the Kitsap County Land Use and Development Procedures Ordinance.

Effective Date. The zoning amendments included in this ordinance were adopted by the Kitsap County Board of Commissioners by motions on September 13, 1999, following a recommendation by the Kitsap County Planning Commission, public notice and public hearing. This ordinance is therefore made effective on September 13, 1999. Any actions taken by the county since that date pursuant to the zoning provisions included in this ordinance are hereby ratified.

Severability. If any provision of this ordinance, or its application to any person, entity or circumstance is for any reason held invalid, the remainder of the ordinance, or the application of the provision to other persons, entities or circumstances is not affected.

DATED this 14th day of October, 2002.

KITSAP COUNTY BOARD OF COMMISSIONERS

\_\_\_\_\_  
Tim Botkin, Chair

\_\_\_\_\_  
Jan Angel, Commissioner

ATTEST:

\_\_\_\_\_  
Holly Anderson  
Clerk of the Board

\_\_\_\_\_  
Chris Endresen, Commissioner

Approved as to form:

\_\_\_\_\_  
Deputy Prosecuting Attorney

### 320. Rural Use Table

#### 020. Uses.

The following Rural Use Table 320.020 is a list of examples for allowable uses in the Forest Resource Lands (FRL), Interim Rural Forest (IRF), Rural Protection (RP), Rural Residential (RR), and Urban Reserve (URS) Zones. The appropriate review, as listed, is mandatory.

"P" - Permitted;

"SPR" - Site Plan Review, Section 410;

"C" - Conditional Uses, Section 420;

"X" - Uses specifically prohibited.

Rural Use Table 320.020

USES	FRL	IRF	RP	RR	URS
1. Forestry, including accessory buildings related to such uses and activities	P	P	P	P	P
2. Agricultural uses <sup>2</sup> , including accessory buildings related to such uses and activities	X	P	P	P	P
3. Single-family dwellings	C	P	P	P	P
4. Temporary stands not exceeding 200 square feet in area and exclusively for the sale of agricultural products grown on site <sup>3</sup>	P	P	P	P	P
5. Duplexes on double the minimum lot area required for the zone	X	P	P	P	P
6. Aggregate extraction sites <sup>4</sup>	P	P	X	X	X
7. Accessory dwelling unit <sup>1</sup>	X	C	C	C	C
7A. Accessory living quarters <sup>1</sup>	X	P	P	P	P
8. Accessory uses or structures	P	P	P	P	P
9. Commercial stables <sup>1</sup>	X	C	C	C	C
10. Bed and breakfast house	X	C	SPR <sup>2</sup>	SPR <sup>2</sup>	SPR <sup>2</sup>
<del>10A. Meal service other than breakfast associated with house</del>	<del>X</del>	<del>C</del>	<del>C</del>	<del>C</del>	<del>C</del>
11. Kennels <sup>1</sup> and housed within a bed & breakfast house	X	C	C	C	C
12. Public facilities <sup>7</sup>	C	C	C	C	C
13. Nurseries	X	C	C	C	C
14. Rock crusher used for the purpose of construction and maintenance of a timber management road system	C	C	X	X	X

### 320. Rural Use Table

USES	FRL	IRF	RP	RR	URS
15. Aquaculture	X	C	C	C	C
16. Publicly owned recreational facilities	X	C	SPR	SPR	SPR
17. Private recreational facilities	X	X	C	C	C
18. Performance Based Developments <sup>5</sup>	X	SPR	SPR	SPR	SPR
19. Places of worship <sup>1</sup>	X	C	C	C	C
20. Cemeteries and/or mausoleums, crematories and mortuaries within cemeteries <sup>1</sup>	X	X	C	C	C
21. Public or private schools <sup>1</sup>	X	C	C	C	C
22. Golf courses	X	X	C	C	C
23. Veterinary clinics <sup>1</sup>	X	X	C	C	C
24. Day-care centers <sup>1</sup>	X	X	C	C	C
25. Contractor's storage yard <sup>1</sup>	X	X	C	C	X
26. Community buildings, social halls, lodges, clubs and meeting places <sup>1</sup>	X	X	C	C	X
27. Home business <sup>1,6</sup>	C	SPR	SPR	SPR	SPR
28. Overnight accommodations, meeting facilities, and recreational vehicle (RV) facilities associated with a public park or private recreational facilities.	X	C	C	C	C

Commercial Use Table 355.020

USES	NC	HTC	UC	RC
<b>A. Residential</b>				
1. Medium and high density (Not on ground floor)	SPR	SPR	SPR	SPR
2. Performance Based Developments, subject to Section 425	SPR	SPR	SPR	SPR
3. Existing residences without any increase in density	P	P	P	P
<b>B. Retail Sales - General Merchandise and services</b>				
1. Stores in excess of 25,000 square feet gross floor area	X	SPR	SPR	SPR
2. Stores - 5,000 to 25,000 square feet gross floor area	C	SPR	SPR	SPR
3. Stores - less than 5,000 square feet gross floor area	SPR	SPR	SPR	SPR
<b>C. Retail Sales - Restaurants, Drinking Places</b>				
1. Delicatessens / Restaurants - fast food including drive up service windows	SPR	SPR	SPR	SPR
2. Drinking places, alcoholic beverages with or without entertainment	C	C	C	C
3. Espresso stands	SPR	SPR	SPR	SPR
<b>D. Retail Sales - Automotive Related Sales &amp; Services</b>				
1. Motor vehicle / RV dealers - new and used	X	SPR	SPR	SPR
2. Auto parts and accessory stores	X	SPR	SPR	SPR
3. Service stations / fuel sales	X <sup>1</sup>	SPR	SPR	SPR
4. Boat dealers, marine supplies, and repair	X	SPR	SPR	SPR
5. Farm equipment and implement dealer	X	SPR	SPR	SPR
6. Auto, truck, trailer and equipment rental or repair	X	SPR	SPR	SPR
7. Car washes	X	SPR	SPR	SPR

ATTACHMENT B

USES	NC	HTC	UC	RC
<b>E. Retail Sales - Miscellaneous Stores</b>				
1. Mobile home sales - new and used	X	SPR	SPR	SPR
2. Farm and garden supplies including nurseries	SPR	SPR	SPR	SPR
3. Fuel distributors / bulk storage	X	C	C	C
4. Laundry services	C	SPR	SPR	SPR
5. Lumber yards and building/construction materials	X	SPR	SPR	SPR
<b>F. Retail Sales - Products (Custom Fabricated, Processed, Assembled, Installed, Repaired, or Printed on the Premises within an Entirely Enclosed Building)</b>				
1. Cabinet, electrical, plumbing, sheet metal, heating & air conditioning and welding shops	C	SPR	SPR	SPR
<b>G. Services - Business</b>				
1. General office and management services in excess of 5,000 square feet gross floor area	X	SPR	SPR	SPR
2. General office and management services - 2,000 to 5,000 square feet gross floor area	C	SPR	SPR	SPR
3. General office and management services less than 2,000 square feet gross floor area	SPR	SPR	SPR	SPR
4. Duplicating, addressing, blueprinting, photocopying, mailing, and stenographic services	SPR	SPR	SPR	SPR
5. Mortuaries	C	SPR	SPR	SPR
6. Office equipment service and repair shop	C	SPR	SPR	SPR
7. Off-street parking facilities	X	SPR	SPR	SPR
8. Mini-storage warehouses	X	SPR	SPR	SPR
9. Auction house	X	SPR	C	SPR
10. Vehicle towing service storage	X	C	C	C
11. Financial and banking institutions	SPR	SPR	SPR	SPR
12. Real estate brokers, agents, and services	SPR	SPR	SPR	SPR
<b>H. Services - Lodging Places</b>				
1. Motels / Hotels	C	SPR	SPR	SPR
2. Recreational vehicle camping parks	X	C	X	X

355. Commercial Zones

USES	NC	HTC	UC	RC
<b>I. Services - Medical and Health</b>				
1. Hospitals / health care campus	X	SPR	SPR	SPR
2. Medical and dental laboratories	C	SPR	SPR	SPR
3. Sanitaria, convalescent, and rest homes	C	SPR	SPR	SPR
4. Animal hospital	SPR	SPR	SPR	SPR
5. Ambulance service	C	SPR	SPR	SPR
6. Congregate care facility	C	C	C	C
7. Clinic, outpatient	SPR	SPR	SPR	SPR
<b>J. Services - Amusement</b>				
1. Amusement centers - indoor	C	SPR	SPR	SPR
2. Amusement centers - outdoor	C	SPR	SPR	SPR
3. Carnival (temporary) and circus (temporary)	C	SPR	SPR	SPR
4. Health and racquet clubs	SPR	SPR	SPR	SPR
5. Theaters, indoor	SPR	SPR	SPR	SPR
6. Theaters, outdoor (drive-in)	X	C	C	C
7. Sports facilities, including stadium and arena facilities	C	SPR	SPR	SPR
<b>K. Services - Educational, Recreational</b>				
1. Nursery, day-care centers	SPR	SPR	SPR	SPR
2. Libraries	SPR	SPR	SPR	SPR
3. Private schools	SPR	SPR	SPR	SPR
4. Public parks, parkways, public/private recreational facilities, trails and related facilities	SPR	SPR	SPR	SPR
5. Marinas	SPR	SPR	SPR	SPR
<b>L. Services - Membership Organizations</b>				
1. Business, professional, civic, social and fraternal	SPR	SPR	SPR	SPR
2. Religious, places of worship	SPR	SPR	SPR	SPR

USES	NC	HTC	UC	RC
<b>M. Public Services and Facilities</b>				
1. Police and fire stations	SPR	SPR	SPR	SPR
2. Educational institutions	SPR	SPR	SPR	SPR
3. Post offices	SPR	SPR	SPR	SPR
4. Utility substation and related facilities	SPR	SPR	SPR	SPR
5. Zoos, museums, galleries, historic and cultural exhibits and similar uses	SPR	SPR	SPR	SPR
6. Transportation terminals	C	SPR	SPR	SPR
<b>N. Other</b>				
1. Forestry	P	P	P	P
2. Agriculture	P	P	P	P

<sup>1</sup> Conditional Use Permits for this use shall be considered in the NC zone for the purpose of redevelopment to comply with environmental regulations. Only those sites within the NC zone with existing facilities containing this use, or sites, which have been utilized for this use within the prior 10 years from date of application, shall be considered for redevelopment in the NC zone. Proposals, which do not meet this requirement, shall be prohibited. Redevelopment within this zone is intended to provide these services to a limited geographic region and as such, facilities shall be sized appropriately to this purpose. Redevelopment for this use within the NC zone must meet strict compatibility requirements and may be subject to additional requirements at the discretion of the Director and/or Hearing Examiner to insure compatibility. This shall include increased setbacks, increased landscaping requirements, architectural styles of both the building and pump island that reflect the neighborhood in which they are located, limited hours of operation, restrictions on exterior lighting, restrictions on signage, and limitations to the services offered.

**020. Uses.**

The following Business Park and Industrial Use Table 370.020 is a list of examples of allowable uses in the Business Park (BP) and Industrial (IND) Zones.

Any use allowed in the Airport (A) zone is also an allowable use in the IND and BP zones utilizing the same review process as identified in the Airport zone. The appropriate review, as listed, is mandatory.

- "P" - Permitted;
- "SPR" - Site Plan Review, Section 410;
- "C" - Conditional Uses, Section 420;
- "X" - Uses specifically prohibited.

**Business Park and Industrial Use Table 370.020**

USES	BP	IND
<b>A. Services, Retail and Amusements</b>		
1. Laundry for carpets, overalls, rugs, and rug cleaning, using non-explosive and non-flammable cleaning fluids	SPR	SPR
2. Parcel delivery service	SPR	SPR
3. Animal hospital, kennels and animal boarding places	SPR	SPR
4. Ambulance service	SPR	SPR
5. All types of automobile, motorcycle, truck, boat, and equipment service, repair, rental and sales.	SPR	SPR
6. Boat building, and repair	SPR	SPR
7. Fuel oil distributors	X	SPR
8. Service commercial uses such as banks, restaurants, cafes, drinking places, automobile service stations, and other business services located to serve adjacent industrial areas	C	SPR

**370. Industrial Zone (IND)**

USES		BP	IND
9.	Retail or combination retail/wholesale lumber and building materials yard	X	SPR
10.	Manufactured home and trailer storage or rental	X	SPR
11.	Amusement park	X	C
12.	Circus, carnival or other type of transient and outdoor amusement enterprises	X	SPR
13.	Race track; auto or motorcycle	C	C
14.	Museums, aquariums, historic, or cultural exhibits	SPR	SPR
15.	Tourism facilities including outfitters, guides, and seaplane and tour-boat terminals	SPR	SPR
<b>B. Assembly -- Manufacture of Products</b>			
1.	Assembly and fabrication of sheet metal products	SPR	SPR
2.	Assembly, manufacture, compounding, packaging or treatment of articles or merchandise (Non-Hazardous)	SPR	SPR
3.	Assembly, manufacture, compounding, packaging or treatment of articles or merchandise (Hazardous)	X	C
4.	Ship building, dry dock, ship repair, dismantling	X	SPR
5.	Manufacture of paper and by-products of paper	X	SPR
6.a	Manufacture of roofing paper or shingles, asphalt in facilities less than 10,000 square feet	SPR	SPR
6.b	Manufacture of roofing paper or shingles, asphalt in facilities 10,000 square feet or greater	C	C
7.	Manufacture of mobile and manufactured homes	X	SPR
8.a	Forest products manufacturing or shipping facilities which are not located on the waterfront	X	SPR
8.b	Forest products manufacturing or shipping facilities which are located on the waterfront	X	C

USES	BP	IND
<b>C. Processing and Storage</b>		
1. Spinning or knitting of fibrous materials	SPR	SPR
2. Non-marine related wholesale business, and warehouses not including mini-storage facilities	SPR	SPR
3. Non-marine related cold storage plants, including storage and office	SPR	SPR
4. Processing uses such as bottling plants, creameries, laboratories, blue printing, and photocopying, tire retreading, recapping, and rebuilding	SPR	SPR
5. Storage or sale yard for building materials, contractors' equipment, house mover, delivery vehicles, transit storage, trucking terminal, and used equipment in operable condition	X	SPR
6. Brewery, distillery, or winery	SPR	SPR
7. Junkyards or wrecking yards	X	C
8. Grain elevator and flour milling	X	SPR
9. Sawmills, lumber mills, planing mills, and molding plants	X	SPR
10. Junk, rags, paper, or metal salvage, storage or processing	X	C
11. Rolling, drawing, or alloying ferrous and nonferrous metals	X	SPR
12. Rubber, treatment or reclaiming plant	X	SPR
13. Slaughterhouse or animal processing	X	C
14. Major petroleum storage and/or refining	X	C
15. Recycling centers (excluding junkyards)	SPR	SPR
16. Incinerator or reduction of garbage, offal, dead animals or refuse	X	C
17. Marine-related storage of equipment, supplies, materials, boats, nets, and vehicles	X	SPR
18. Cold storage facilities for marine or agricultural products	SPR	SPR

**370. Industrial Zone (IND)**

USES	BP	IND
<b>D. Aggregate Products</b>		
1. Manufacture of concrete products and associated uses	X	C
2. Manufacture of concrete products entirely within an enclosed building	SPR	SPR
3. Surface mining and quarries, subject to the provisions of the Mineral Resource Zone	X	C
<b>E. Other</b>		
1. Business and Professional services	P	SPR
2. Welding shop	C	SPR
3. Existing residential use without any increase in density	P	P
4. Residential dwelling for caretaker on the property in conjunction with a permitted use	P	P
5. Administrative, educational, and other related activities and facilities in conjunction with a permitted use	SPR	SPR
6. Research Laboratory	SPR	SPR
7. Aquaculture	X	C
8. Cabinet, electrical, plumbing, sheet metal/welding, electroplating and similar fabrication shops	SPR	SPR
9. Marine manufacturing repairs and services	SPR	SPR
10. Shellfish/fish hatcheries and processing facilities	X	C
11. Marinas	X	C
12. Forestry	P	P
13. Agriculture	P	P
14. Industrial Park	SPR	SPR

370. Industrial Zone (IND)

USES	BP	IND
<b>F. Public Services and Facilities</b>		
1. Police and fire substations	SPR	SPR
2. Educational institutions	SPR	SPR
3. Land/water transshipment facilities, including docks, wharves, marine rails, cranes, and barge facilities	C	C
4. Recreational Facilities Public/Private	C	C

<sup>1</sup>The Industrial Zone is not intended to provide the same function as Commercial Zones. Therefore, a minimum of 75% of the gross floor area of any structure under this section shall be devoted to industrial uses and no more than 25% of the gross floor area may be devoted to incidental retail sales including facilities or display areas associated with the industrial use.

## **NOTICE OF PUBLIC HEARING**

**NOTICE IS HEREBY GIVEN** that the Kitsap County Board of Commissioners will hold a public hearing on **October 14, 2002**, at the hour of **10:00 AM** in its chambers, County Administrative Building, 614 Division Street, Port Orchard, WA, to consider an ordinance amending the Kitsap County Zoning Ordinance Commissioners. These zoning amendments were adopted by the Kitsap County Board of Commissioners on September 13, 1999 following a recommendation by the Kitsap County Planning Commission, public notice and public hearing. A formal written ordinance incorporating the amendments was not signed at that time and is being presented now for the Commissioners' signature. Because the zoning amendments were adopted by motion on September 13, 1999, following the procedures required for adoption of an ordinance, the ordinance is made retroactive to that date, and all actions taken by the county since that date pursuant to the zoning amendments are ratified. A summary of the ordinance follows:

Section 1 adds a new definition of "Alternative Technology" to the Zoning Ordinance.

Section 2 amends the definition of "Bed and Breakfast House" to state that if a proposed bed and breakfast establishment serves a meal other than the morning meal, the application will be reviewed as a conditional use.

Section 3 amends the definition of "Density" to state how "maximum allowable density" "minimum density" and "net developable acreage" are calculated.

Section 4 amends the definition of "Dwelling, single family", to state that a recreational vehicle is not a dwelling unit.

Section 5 amends the definition of "Sign" to state when balloons and balloon-type devices are considered signs for the purposes of the Zoning Ordinance.

Section 6 adds a definition of "Stealth Technology" by cross-reference to "Alternative Technology".

Section 7 amends the "Rural Use Table" in the Zoning Ordinance to show, in accordance with the revised definition of "Bed and Breakfast House", that if a meal other than the morning meal is served in such a house, the application is reviewed as a conditional use.

Section 8 amends the "Commercial Use Table" in the Zoning Ordinance to add an extensive footnote explaining the limited circumstances in which "Service stations/fuel sales", normally prohibited in the Neighborhood Commercial zone, will be allowed as a conditional use.

Section 9 amends the "Business Park and Industrial Use Table" in the Zoning Ordinance to add "boat and equipment service, repair, rental and sales" as uses requiring "site plan review" in the Business Park and Industrial zones, and a footnote specifying the minimum amount of gross floor area to be devoted to industrial uses and the maximum amount that may be devoted to incidental retail sales.

Section 10 amends subsection D of Zoning Ordinance Section 445.090, “Conditionally Exempt Signs” to provide that conditions governing political campaign signs, including when they must be removed, the conditions under which they may be located in county right-of-way and a prohibition on placing them on utility poles and state and county regulatory or informational signs or posts. The section also provides that signs that do not comply with the restrictions are subject to removal and disposal by the county, at the candidate’s or campaign’s expense.

Section 11 adds the qualifying phrase, “Unless specifically stated elsewhere in this ordinance”, to the purpose section of the zoning ordinance chapter on non-conforming uses, 460.010, to avoid conflicts with other parts of the zoning ordinance.

Section 12 adds the qualifying phrase “Unless specifically stated elsewhere in this ordinance”, to Section 460.020B of the zoning ordinance, concerning when a nonconforming use is considered abandoned.

Section 13 adds two new “purposes” to Section 470.010 in the zoning ordinance chapter on wireless communication facilities. Those purposes are to provide a process to locate and identify new site locations in a comprehensive manner and with substantial public participation, and to encourage the use of alternative technology.

Section 14 adds a new subsection to Section 470.030 in the zoning ordinance on application requirements for wireless communication facilities concerning review of some facilities as “essential public facilities” under the county’s comprehensive plan.

Section 15 revises the language of Section 470.040 of the zoning ordinance, “Wireless communication facilities – permitted uses”, to increase the height allowed for support structures and antenna arrays from 20 to 35 feet in specified circumstances, and to add that all new wireless communication support structures greater than 35 feet in height which do not employ alternative technology must obtain a conditional use permit.

Section 16 amends Section 470.060 of the zoning ordinance, on conditional use permits for wireless communication facilities, to add that the proposed support structure location must be reviewed in a manner consistent with Section 470.030B (“Application requirements”).

Section 17 repeals Chapter 520, “Appeals”, to remove language that has been superseded.

Section 18 adds a new Chapter 520, “Appeals”, which provides that appeals are to follow the process outlined in the Kitsap County Land Use and Development Procedures Ordinance.

The full text of the ordinance will be sent upon request.

ALL THOSE INTERESTED are welcome to attend the hearing

HOLLY ANDERSON, Clerk of the Board  
Kitsap County Commissioners

**NOTE: KITSAP COUNTY DOES NOT DISCRIMINATE ON THE BASIS OF DISABILITY. INDIVIDUALS WHO REQUIRE ACCOMMODATIONS SHOULD CONTACT THE COMMISSIONERS' OFFICE AT (360) 337-4428 OR TDD (360) 337-7275 OR 1-800-816-2782. (PLEASE PROVIDE TWO WEEKS NOTICE FOR INTERPRETER SERVICES.**

**Publication Date: October 2, 2002  
THE KITSAP NEWSPAPER GROUP**

**All Files/Legals/1999 Zoning Ordinance Hearing Notice**

**KITSAP COUNTY PROSECUTING ATTORNEY'S OFFICE - CIVIL DIVISION**

**August 20, 2018 - 2:57 PM**

**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\_20180820145146D2772774\_8146.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was Response Brief of Respondent Kitsap County.pdf*

**A copy of the uploaded files will be sent to:**

- KeyserDingo@gmail.com
- LalOlympiaCal@atg.wa.gov
- Lisap1@atg.wa.gov
- jlharless@wavecable.com
- lzippel@co.kitsap.wa.us

**Comments:**

Response Brief of Respondent Kitsap County

---

Sender Name: Doris Needles - Email: dneedles@co.kitsap.wa.us

**Filing on Behalf of:** Lisa J Nickel - Email: lnickel@co.kitsap.wa.us (Alternate Email: kcpaciv@co.kitsap.wa.us)

Address:  
614 Division Street, MS-35A  
Port Orchard, WA, 98366  
Phone: (360) 337-4992

**Note: The Filing Id is 20180820145146D2772774**