

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

35267-2-71

~~NO. 78224-5~~

KITSAP COUNTY

Appellants,

v.

CENTRAL PUGET SOUND GROWTH
MANAGEMENT HEARINGS BOARD, et al.

Respondents.

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**FUTUREWISE, KITSAP CITIZENS FOR RESPONSIBLE
PLANNING, SUQUAMISH TRIBE AND JERRY HARLESS JOINT
RESPONDENTS' BRIEF**

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I. INTRODUCTION

There are two primary issues in this case, both concerning Kitsap County's ongoing obligation under Washington's Growth Management Act (GMA)¹ to periodically review, and, if necessary, take effective action to ensure that local land use planning remains in compliance with the GMA and is achieving results intended by the GMA.

Specifically at issue is the extent and particulars of the County's obligations under RCW 36.70A.130 and RCW 36.70A.215.

RCW 36.70A.130 requires the County to periodically update its comprehensive plan and development regulations to ensure continued compliance with the GMA. As part of this update, the County is required to review its *urban growth areas* (UGA); including densities permitted both in incorporated and unincorporated areas.² The statute requires this UGA review *at least every ten years*.³ The County in this appeal takes issue with the Board's interpretation of *at least every ten years*. This brief will show that the only reasonable interpretation is ten years from the first statutory deadline for the County's adoption of a comprehensive plan.

RCW 36.70A.215 requires Kitsap County to monitor its on-the-ground development patterns to determine whether or not these patterns

¹ RCW Chapter 36.70A.

² RCW 36.70A.130(3)(a).

³ *Id.*

are consistent with the policies adopted in the County's Comprehensive Plan. If not, the County is required to adopt and implement *reasonable measures* to bring development in line with the adopted policies within the subsequent five year period.

As required by this statute, the County prepared a *Buildable Lands Report* that showed excessive development and densities occurring in rural areas at the expense of development occurring within UGAs, a pattern that is clearly inconsistent with adopted comprehensive plan policies. Rather than adopt *reasonable measures* to address the problem, the County instead adopted *Resolution 2004-158* that merely listed pre-existing regulations. This brief will show that because the regulations listed existed during the period over which the inconsistency between the on-the-ground development and comprehensive plan policies persisted, they could not *reasonably likely* to address the inconsistency within the subsequent five year period as required by RCW 36.70A.215(4).

On the first issue, the Central Puget Sound Growth Management Hearings Board ruled that the County's interpretation of the deadline for reviewing its UGA was in error. On the second issue, the Board ruled that the County had in fact adopted reasonable measures, but then failed to evaluate the *reasonable likelihood* of those measures increasing consistency between the comprehensive plan and on-the-ground

development occurring in Kitsap County. This brief in response argues that this Court should uphold the Board on the first issue and reverse the Board on the second issue.

II. SUMMARY OF ARGUMENT

This brief will first address the standard of review in this case, followed by a statement of facts. Next this brief will provide a brief summary of the relevant GMA requirements. The next two sections will address the Board's ruling with respect to the timing of the UGA update pursuant to RCW 36.70A.130 and the County's obligation to adopt reasonable measures pursuant to RCW 36.70A.215. Finally, this brief will conclude by asking this Court to uphold the Board's ruling regarding the timing of the UGA update, the Board's ruling finding that the Buildable Lands Report established inconsistencies between the comprehensive plan policies and on-the-ground development and the Superior Court's ruling that the *reasonable measures* listed by the County in *Resolution 04-158* were pre-existing and therefore not reasonably likely to address the inconsistency within the subsequent five year period.

III. THE STANDARD OF REVIEW BY THE COURTS

Kitsap County's brief ignores that different standards of review apply to the Court's review of the Board's decision (as contrasted with the Board's review of the County's decision). This Court reviews the Board's

decision applying the standards set forth in the Administrative Procedures Act RCW 34.05.570(3). Those standards include: whether the State agency has erroneously applied the law and whether the State agency's decision is not supported by substantial evidence. Kitsap County has totally ignored the substantial evidence test. The issue before this Court is whether the Board's decision is supported by substantial evidence. This is a deferential standard of review but it is deference afforded to the Board's decision. Under the substantial evidence test, appellate courts do not *re-weigh* the evidence to reach a conclusion contrary to the agency's.⁴

This Court recently has recognized and applied the substantial evidence test in reviewing a Hearings Board's decision holding that a county did not apply best available science when adopting a critical areas ordinance. See *Ferry County v. Concerned Friends of Ferry County*.⁵ As in Ferry County, there is substantial evidence in this record to sustain the Board's decision. The Court's inquiry should end there.

A. The Boards Retain Authority to Construe the Meaning of the GMA and this Court Should Accord Deference to Their Construction of the GMA.

⁴ *Ongom v. State Dept. of Health*, 124 Wn. App. 935, 104 P.3d 29, *rev. granted*, 155 Wn.2d 1001 (2005); *Niemann v. Vaughn Community Church*, 118 Wn. App. 824, 840, 77 P.3d 1208 (2003), *aff'd*, 154 Wn.2d 365, 113 P.3d 463 (2005).

⁵135 Wn.2d 824, 833, 123 P.3d 102 (2005).

Kitsap County construes *Quadrant*⁶ and *Viking Properties*⁷ as standing for the proposition that the Hearings Boards do not have authority to make GMA policy decisions.

It certainly *is* within the Board's province to construe the meaning of the Act it is charged with enforcing. Indeed, as stated in *Quadrant*, the courts will normally "accord deference to an agency interpretation of the law where the agency has specialized expertise." *Id.*, 154 Wn.2d at 233 (quoting *Redmond v. CPSGMHB*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998)). As this Court explained in construing another environmental statute, the Shorelines Management Act:

[W]hen a statute is ambiguous--as in the instant case--there is the well known rule of statutory interpretation that the construction placed upon a statute by an administrative agency charged with its administration and enforcement, while not absolutely controlling upon the courts, should be given great weight in determining legislative intent. *Bradley v. Dept. of Labor & Ind.*, 52 Wn.2d 780, 329 P.2d 196 (1958); *White v. State*, 49 Wn.2d 716, 306 P.2d 230 (1957). The primary foundation and rationale for this rule is that considerable judicial deference should be accorded to the special expertise of administrative agencies. Such expertise is often a valuable aid in interpreting and applying an ambiguous statute in harmony with the policies and goals the legislature sought to achieve by its enactment. At times, administrative interpretation of a statute may

⁶*Quadrant Corporation v. Growth Management Hearings Board*, 154 Wn.2d 244, 110 P.3d 1132 (2005).

⁷*Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005).

approach 'lawmaking,' but we have heretofore recognized that it is an appropriate function for administrative agencies to 'fill in the gaps' where necessary to the effectuation of a general statutory scheme. See Barry & Barry v. Dept. of Motor Vehicles, 81 Wn.2d 155, 500 P.2d 540 (1972). It is likewise valid for an administrative agency to 'fill in the gaps' via statutory construction--as long as the agency does not purport to 'amend' the statute.⁸

Kitsap County makes much of the court's statement in Quadrant that "deference to County planning actions . . . supersedes deference granted by the APA and Courts to administrative bodies in general," but fails to acknowledge that that statement was linked by the Court to only those planning actions "that are consistent with the goals and requirements of the GMA."⁹

Contrary to Kitsap County's assertions, the Boards retain the ability to construe the meaning of the GMA. In Ferry County, supra, the Western Board had construed the GMA's best available science requirement to mean that a "[c]ounty cannot choose its own science over all other science and cannot use outdated science to support its choice." Ferry County, supra, 155 Wn.2d at 837 (quoting Island County Citizens Growth Management Coalition v. Island County, No. 98-2-0023c, 2000 WL 268939 at 7 (W. Wash. Growth Mgmt. Hr'gs. Board, Mar. 6, 2000)).

⁸ Hama Hama Co. v. Shorelines Hearings Bd., 85 Wn.2d 441, 448, 536 P.2d 157 (1975).

⁹ Quadrant, p. 238

Notably, the Supreme Court did not chide the Western Board for construing the BAS requirement in this way. Rather, the Supreme Court endorsed the Western Board's construction saying that the Western Board had "correctly stated" that proposition. *Id.*

Thus, even after *Quadrant* and *Viking Properties*, the *Ferry County* case demonstrates that the Boards retain the authority to construe the Act and that the courts will consider and defer to those statutory interpretations.

B. Conclusion Standard of Review

The clearly erroneous standard established by the Legislature governing board review of GMA actions is not as lax a review as Kitsap County would have the Court believe. The clearly erroneous standard of review is a "broader," "more intense," "critical review" involving a "higher degree of ... scrutiny than is normally appropriate for administrative action." This Court should not allow Board errors in prior cases to cloud its view regarding the correctness of the Board decision in this one.

IV. SUMMARY OF THE GROWTH MANAGEMENT ACT

This section summarizes the key provisions of the GMA applicable to this case. More detail is given of provisions at issue in this case in subsequent subsections of the argument.

“The Legislature adopted the Growth Management Act (GMA) to control urban sprawl”¹⁰ The GMA was enacted in two parts by the 1990 and 1991 legislatures. It has been amended every year since then.

The GMA includes goals and requirements.¹¹ These goals “shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations.”¹² The GMA has stated 13 goals.¹³ (There are actually 14 goals if one includes the addition of the policy of the Shorelines Management Act as a GMA goal.¹⁴) The GMA goals that most directly affecting this appeal are:

- “Urban Growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.”¹⁵

¹⁰ *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 138 Wn.2d 161, 167, 979 P.2d 374, 377 (1999).

¹¹ RCW 36.70A.320(3).

¹² RCW 36.70A.020.

¹³ RCW 36.70A.020.

¹⁴ RCW 36.70A.480(1)RCW 36.70A.020.

¹⁵ RCW 36.70A.020(1).

- “Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.”¹⁶

These goals require both substantive and procedural compliance.¹⁷

“The Board is required to consider both goals and the specific requirements in determining whether a plan complies with the GMA: ‘The board shall find compliance [with GMA] unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the *goals* and requirements of this chapter.’ RCW 36.70A.320(3) (emphasis added [by the Court of Appeals]).”¹⁸

Planning under the GMA consists of six steps. Counties that are required to plan or choose to plan under the GMA are required to complete the steps in the following order and to comply with the GMA goals and the requirements for each of these steps.¹⁹

Step 1: Adopt county-wide planning policies.²⁰ Countywide planning policies are collaboratively developed by the county and the

¹⁶ RCW 36.70A.020(2).

¹⁷ RCW 36.70A.290(2) & *Thurston County v. Cooper Point Ass'n*, 148 Wn.2d 1, 14, 57 P.3d 1156, 1163 (2002).

¹⁸ *Low Income Housing Institute v. City of Lakewood*, 119 Wn. App. 110, 115 -- 16, 77 P.3d 653, 655 (2003).

¹⁹ RCW 36.70A.040(4), RCW 36.70A.320(3).

²⁰ RCW 36.70A.040(4) (a).

cities in the county.²¹ The purpose of county-wide planning policies is to establish a countywide framework from which county and city comprehensive plans and development regulations are developed so that the documents are *consistent*.²²

Step 2: Identify and adopt development regulations to protect critical areas and agricultural lands, forest lands, and mineral resource lands.²³ Critical areas include the following areas and ecosystems: (a) wetlands; (b) areas with a critical recharging effect on aquifers used for potable water; (c) fish and wildlife habitat conservation areas (including rivers, streams, lakes, and salt-water shorelines); (d) frequently flooded areas; and (e) geologically hazardous areas.²⁴

After designating these areas, counties and cities are to adopt development regulations to “conserve” agricultural lands, forest lands, and mineral resource lands and to “protect” critical areas.²⁵

Step 3: Designate urban growth areas.²⁶ The county legislative authority shall designate urban growth areas (UGAs) sufficient to accommodate a planned population that is within the Office of Financial

²¹ RCW 36.70A.210(2)(a).

²² RCW 36.70A.210(1).

²³ RCW 36.70A.040(4)(b).

²⁴ RCW 36.70A.030(5), RCW 36.70A.040(3)(b), RCW 36.70A.060(2), and RCW 36.70A.170.

²⁵ RCW 36.70A.060(1) & (2).

²⁶ RCW 36.70A.040(4)(c).

Management's 20-year population projection range for the county.²⁷

Urban growth is to be encouraged within UGAs and growth can only occur outside UGAs if it is not urban in nature.²⁸

Step 4: Prepare and Adopt Comprehensive Plans. A

comprehensive plan is a generalized and coordinated land use policy statement adopted by a County Council under the GMA.²⁹ The comprehensive plan shall include one or more maps and text,³⁰ typically including goals, policies (guides decision making and action), and descriptive text. Policies can range from those that allow an action or decision, often indicated by the use of the word "may;" policies that require a decision or action but allow some discretion, often indicated by the use of the word should, and policies that require a decision or action, often indicated by the use of the word "shall."³¹

²⁷ RCW 36.70A.110(1).

²⁸ *Id.* Note that *rural* lands, such as those at issue in this case, are what remain after urban growth areas and resource lands are all identified and designated. RCW 36.70A.030(15), RCW 36.70A.060(1), & *Panesko, et al. v. Lewis County, et al.*, WWGMHB Case No. 98-2-0011c Final Decision and Order & Compliance Order, 2001 WL 246707 p. *11 (March 5, 2001).

²⁹ RCW 36.70A.030(4).

³⁰ RCW 36.70A.070.

³¹ "The difference in meaning between 'shall' and 'should' is now one of degree rather than kind. ... While even the 'shoulds' now have directive and substantive meaning, the 'shalls' impart a higher order of substantive direction." *City of Snoqualmie v. King County*, CPSGMHB Case No. 92-3-0004 Final Decision and Order p. *7 of 23 (March 1, 1993).

The GMA requires comprehensive plans to address six elements, including a rural element for counties.³² (The term “element” refers to topic areas that must be addressed in the comprehensive plan.) Counties and cities may also adopt optional elements as well.³³

The GMA includes substantive and procedural requirements for all of the required elements and for conservation of agricultural resource lands.³⁴ For example, RCW 36.70A.070 describes the requirements of the rural element. They include:

The rural element shall include measures that apply to rural development and protect the rural character of the area as established by the county, by:

- (i) Containing or otherwise controlling rural development;
- (ii) Assuring visual compatibility of rural development with the surrounding rural area;
- (iii) Reducing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area;
- (iv) Protecting critical areas, as provided in RCW 36.70A.060, and surface water and ground water resources; and
- (v) Protecting against conflicts with the use of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.³⁵

³² RCW 36.70A.070.

³³ RCW 36.70A.080.

³⁴ RCW 36.70A.070, RCW 36.70A.170, RCW 36.70A.050.

³⁵ RCW 36.70A.070(5)(c).

A variety of rural densities is required.³⁶ For example, in Kitsap County the Court of appeals upheld the following comprehensive plan designations as complying with the GMA: The Interim Rural Forestry (IRF) designation with a density of one dwelling unit per 20 acres, the Urban Reserve designation with a density of one dwelling unit per 10 acres, the Rural Residential designation with a density of one dwelling unit per five acres, and the Rural Protection designation with a density of one dwelling unit per 10 acres.³⁷

Step 5: Adopt development regulations to carry out the comprehensive plan and other steps to implement the plan.³⁸ Development regulations are controls placed on development or land use activities by a county or city, including, but not limited to, zoning ordinances, critical areas ordinances, shoreline master programs, official controls, planned unit development ordinances, subdivision ordinances, and binding site plan ordinances together with any amendments.³⁹ The adopted development regulations must be consistent with and implement the comprehensive plan.⁴⁰

³⁶ RCW 36.70A.070(5)(b).

³⁷ *Manke Lumber Co., Inc. v. Central Puget Sound Growth Management Hearings Bd.*, 113 Wn. App. 615, 625, 53 P.3d 1011, 1016 (2002).

³⁸ RCW 36.70A.040(4)(d).

³⁹ RCW 36.70A.030(7).

⁴⁰ RCW 36.70A.040(4)(d).

Step 6: Evaluate and update the comprehensive plan and development regulations.⁴¹ Cities and counties must review and evaluate their comprehensive plans and development regulations for effectiveness on an ongoing basis.⁴² GMA counties and the cities within the GMA counties must review their comprehensive plans and development regulations every seven years and, if needed, update them so the plans and development regulations comply with the GMA.⁴³

There are two aspects of this *evaluate and update* step that are primarily at issue in this case. First, local governments must review their urban growth areas every ten years. This review is in the context of reviewing and revising, if necessary, non-compliant GMA planning provisions. The specific provision at issue in this case is RCW 36.70A.215 (3), which reads:

(3)(a) Each county that designates urban growth areas under RCW 36.70A.110 shall review, at least every ten years, its designated urban growth area or areas, and the densities permitted within both the incorporated and unincorporated portions of each urban growth area. In conjunction with this review by the county, each city located within an urban growth area shall review the densities permitted within its boundaries, and the extent to which the urban growth occurring within the county has located within each city and the unincorporated portions of the urban growth areas.

⁴¹ RCW 36.70A.130.

⁴² *Id.*.

⁴³ *Id.*.

(b) The county comprehensive plan designating urban growth areas, and the densities permitted in the urban growth areas by the comprehensive plans of the county and each city located within the urban growth areas, shall be revised to accommodate the urban growth projected to occur in the county for the succeeding twenty-year period. The review required by this subsection may be combined with the review and evaluation required by RCW 36.70A.215.

The timing of when this ten year update must occur is at issue in this case.

Second, the more populous Puget Sound-centered counties are required to regularly conduct Buildable Lands Analysis to determine whether on-the-ground development is occurring in ways consistent with the comprehensive plan polices adopted by the County.⁴⁴ If not, then the County is required to adopt *reasonable measures* as alternatives to expanding an urban growth area.⁴⁵ These measures must be “reasonably likely to increase consistency within the subsequent five years.”⁴⁶

GMA Compliance: There is no state or local agency to oversee local government compliance with the goals and requirements of the Growth Management Act:

[T]he GMA does not require state administrative approval of local plans and regulations. Thus, local fidelity to GMA

⁴⁴ RCW 36.70A.215.

⁴⁵ RCW 36.70A.215(4).

⁴⁶ *Id.*

goals is not systematically enforced, but depends upon appeals to the Growth Boards and the courts.⁴⁷

Under this system citizen groups and plain citizens; such as Kitsap Citizens for Responsible Planning, the Suquamish Tribe, Jerry Harless, and Futurewise; bear the brunt of assuring that city and county comprehensive plans comply with the Growth Management Act. Futurewise was in fact formed to help effectively implement the GMA.

The GMA created three Growth Management Hearings Boards to hear and decide appeals alleging that the comprehensive plans, development regulations, and shoreline master programs are not in compliance with the GMA.⁴⁸ Kitsap County is within the jurisdiction of the Central Puget Sound Growth Management Hearings Board.⁴⁹ The members of the Board are appointed by the Governor to six year terms. They must meet the following qualifications.

Each growth management hearings board shall consist of three members qualified by experience or training in matters pertaining to land use planning and residing within the jurisdictional boundaries of the applicable board. At least one member of each board must be admitted to practice law in this state and at least one member must have been a city or county elected official. Each board shall be appointed by the governor and not more than two members at the time of appointment or during their term shall be

⁴⁷ Richard L. Settle, *Washington's Growth Management Revolution Goes to Court*, 23 SEATTLE U. L. REV. 5, 48 -- 49 (1999).

⁴⁸ RCW 36.70A.280(1)(a).

⁴⁹ RCW 36.70A.250(1)(b).

members of the same political party. No more than two members at the time of appointment or during their term shall reside in the same county.⁵⁰

The boards operate under rules of practice and procedure adopted through notice and comment rule-making.⁵¹ Now that we have summarized the board requirements of the GMA, we briefly discuss the facts of this appeal.

V. STATEMENT OF FACTS AND PROCEDURAL HISTORY

As an important part of the iterative GMA planning process, Kitsap County, as required, issued a Buildable Lands Analysis in August 2002. This analysis looked at actual on-the-ground development happening in Kitsap County and compared it with the comprehensive plan policies and the development patterns envisioned therein. This analysis identified significant inconsistencies between the development that has occurred since the adoption of the county-wide planning policies and the county and city comprehensive plans and development regulations and what was envisioned in those policies and plans and the planning goals and the requirements of the GMA. These inconsistencies include:

- Fifty-five percent of the residential housing units were built in the rural area.⁵² The report identifies as one of the reasons as “the large

⁵⁰RCW 36.70A.260(1).

⁵¹ RCW 36.70A.270(7).

⁵² *Kitsap County Buildable Lands Analysis: 1995-1999* p. 2 & p. 74 (August 2002).

number of smaller, nonconforming lots of record. Until these parcels are fully absorbed, the County may face obstacles in directing new growth towards urban areas.”⁵³

- The density in the rural area averaged one housing unit per acre.⁵⁴

In the event of such inconsistencies, the County is required to adopt *reasonable measures* that are reasonably likely to reduce the inconsistency in the subsequent five year period.⁵⁵ The County failed to do this and failed to even recognize that an inconsistency existed.

As a result, the County’s inactions were challenged in an appeal filed with the Central Puget Sound Growth Management Hearings Board. In its *Final Decision and Order* (FDO), issued on August 9, 2004, the Hearings Board found that the Buildable Lands Analysis clearly demonstrated that an inconsistency between on-the-ground development patterns and Kitsap County Comprehensive Plan policies existed, and that such inconsistencies required the County to adopt and implement *reasonable measures* to address the inconsistency.⁵⁶ However, the Hearings Board also ruled that because the County had until December 1, 2004 to adopt the reasonable measures, the challenge was untimely.⁵⁷

In partial response to the Board’s decision that the Buildable Lands Analysis demonstrated inconsistencies that required *reasonable*

⁵³ *Buildable Lands Analysis* p. 3.

⁵⁴ *Buildable Lands Analysis* p. 84.

⁵⁵ RCW 36.70A.215(4).

⁵⁶ *Bremerton v. Kitsap County*, CPSGMHB Case No. 04-3-0009c, *Final Decision and Order*, August 9, 2005, p. 55.

⁵⁷ *Id.*

measures, the County adopted Resolution 158-2004 on October 25, 2004.⁵⁸ This Resolution, adopted as an addendum to the *Buildable Lands Analysis*, purports to *list* reasonable measures to address the inconsistencies. The problem is that the Resolution *only* lists, but does not “*adopt*” or “*implement*” reasonable measures that have a reasonable likelihood of addressing the inconsistencies raised by the BLR. Instead, the Resolution contains a list of pre-existing provisions from the County zoning code and direction to staff to do more work. Indeed this Resolution is nothing more than a cross-reference to the existing zoning code and sub area plans. This can be plainly see in Attachment A which lists the existing Kitsap County Code provision and Sub area Plan that made up the already adopted reasonable measures.⁵⁹ The resolution instead merely points out regulations that existed during the period that the targeted inconsistent growth occurred.

The County’s action in adopting Resolution 2004-158 was timely appealed to the Central Board. In that case, as here, the County argued that RCW 36.70A.215 only required the County to address inconsistencies on land within the UGA and that it could therefore ignore the

⁵⁸ Kitsap County Resolution No. 158-2004 Providing an Addendum to the Buildable Lands Analysis Report for Reasonable Measures p.2 (October 25, 2004).

⁵⁹ Kitsap County Resolution No. 158-2004, Attachment “A” Kitsap County Reasonable Measures pp. 1 -- 3 (October 25, 2004).

overdevelopment of its *rural* land. The Board disagreed with this interpretation of the GMA, finding that:

The review and evaluation program established by RCW 36.70A.215(2) is required to “encompass land uses and activities *both within and outside of urban growth areas* and provide for annual collection of data on *urban and rural* land uses, development, critical areas and capital facilities.” The legislature reasonably intended, when adopting this language, that counties and cities use the data collected concerning *rural* development to inform the strategies they would implement to increase the consistency of their growth plans.⁶⁰

The Board, however, failed to rule on whether the *reasonable measures* adopted by the County were *reasonably likely* to increase consistency over the subsequent five years, as required by the statute. Instead, the Board found that annual monitoring by the County and a 2007 Report expected from the Washington Department of Community Trade and Economic Development would be sufficient, even though these are not events that could be subject to challenge and the Board’s review.⁶¹

A second issue raised in *Harless v. Kitsap County* before the Board, and also before this Court, is the timing of the County’s required ten-year review of its Urban Growth Area. The Board conducted a detailed analysis of the legislative history of the ten-year update

⁶⁰ *Harless v. Kitsap County*, CPSGMHB Case No. 04-3-0031c, Final Decision and Order, June 28, 2005, p. 25.

⁶¹ *Id.*, p. 24.

requirement and also harmonized the requirement with other provisions of the GMA. After concluding that right-sizing of UGAs is one of the keys to effective GMA implementation, the Board ruled that the ten-year requirement began to run, as it did for all GMA planning counties, in July of 1994 and that the deadline was December 1, 2004. The Board therefore rejected the County's interpretation that the ten year clock began to run only when a jurisdiction ultimately adopted a compliant comprehensive plan.⁶²

Both the County and Board-petitioners timely appealed the Board's ruling to Thurston County Superior Court. The Honorable Chris Wickham upheld the Board's ruling on the timing of the ten-year UGA review and reversed the Board's ruling on the adequacy of the pre-existing reasonable measures listed in Resolution 2004-158 and the Board's failure to consider whether the measures were *reasonably likely* to increase consistency within five years. The County subsequently sought direct review from this Court.

⁶² *Id.*, pp. 29-36.

VI. ARGUMENT

A. **Review of RCW 36.70A.130(3), the GMA as a whole, legislative history and underlying policy clearly show that the ten-year UGA review timeline began to run on July 1, 1994 and not upon the adoption of a compliant comprehensive plan.**

1. **The Statutory Deadline for Completion of UGA Sizing and Density Updates is Clear.**

Was the Central Board correct in determining that the County's ten year obligation to review and update its urban growth areas began to run with the statutory deadline for the County's initial comprehensive plan rather than when the County actually adopted a compliant comprehensive plan? As discussed above, the provision at issue reads as follows:

(3)(a) Each county that designates urban growth areas under RCW 36.70A.110 shall review, at least every ten years, its designated urban growth area or areas, and the densities permitted within both the incorporated and unincorporated portions of each urban growth area. In conjunction with this review by the county, each city located within an urban growth area shall review the densities permitted within its boundaries, and the extent to which the urban growth occurring within the county has located within each city and the unincorporated portions of the urban growth areas.

(b) The county comprehensive plan designating urban growth areas, and the densities permitted in the urban growth areas by the comprehensive plans of the county and each city located within the urban growth areas, shall be revised to accommodate the urban growth projected to

occur in the county for the succeeding twenty-year period. The review required by this subsection may be combined with the review and evaluation required by RCW 36.70A.215.⁶³

The County contends that RCW 36.70A.130 is clear on its face, therefore, County argues that the rules of statutory construction do not allow for examining legislative history or intrinsic aids to assist with interpreting the statute. The County goes on to read into the statute non-existent language that supposedly allows the County to conclude that the ten years only begins to run upon the County's adoption of a GMA compliant comprehensive plan, no matter when that might be.⁶⁴

Whether a statute is clear on its face or is ambiguous is a legal issue that is for the Court to determine. The Court of Appeals in *Nelson v. Appleway Chevrolet, Inc.*, 129 Wash.App. 927, 121 P.3d 95 (Div. 3) 2005, cited two cases from this Court on this subject, and held that a statute is ambiguous if "susceptible to two or more reasonable interpretations," but "a statute is not ambiguous merely because different interpretations are conceivable."⁶⁵ In this case, RCW 36.70A.130(3) doesn't explicitly state that the ten years begins to run from the July 1, 1994 deadline to adopt implementing development regulations. However, this does not therefore

⁶³ RCW 36.70A.130(3).

⁶⁴ County's Opening Brief, pp. 52-61.

⁶⁵ *State v. Hahn*, 83 Wash. App. 825, 831, 924 P.2d 392 (1996).

mean that the provision is ambiguous. The court must discern and carry out the intent of the legislature, but must also avoid a literal interpretation leading to an absurd result.⁶⁶ When read in its entirety and analyzed in light of the legislative history and other relevant provisions of the GMA, as the Growth Board did, timing becomes clear. Then, the interpretation urged by the County, allowing a County to wait until whenever it adopts a Comprehensive Plan and development regulations that survive all challenges and are deemed compliant, makes no sense.

2. The Rules of Statutory Construction Require that the Relevant Statutory Provisions be Read as a Whole

In the recent case Colby v. Yakima County⁶⁷, the Court of Appeals set forth several basic rules of statutory construction in stating that:

Statutory and municipal code interpretation is a question of law. Our review is therefore de novo. “We must construe legislative enactments to carry out their manifest intent.” The statute must be read as a whole, giving effect to all its terms and harmonizing related provisions wherever possible.⁶⁸

Therefore one must first review the entire statute, including the statutory provisions referenced in RCW 36.70A.130(3) to understand and carry out what was intended by this statute.

⁶⁶ *State v. Watson*, 146 Wash.2d 947, 955, 51 P.3d 66 (2002).

⁶⁷ 136 P.3d 131 WL 1529204, Wash. App. Div. 3, June 6, 2006.

⁶⁸ *Id.* (internal cites omitted)

This is precisely the analysis undertaken by the Board in its FDO in *Harless v. Kitsap County*. The analysis, on pages 30-36 of the FDO, cannot be improved on and is excerpted in Appendix A of this brief.

Note that, first of all, the Board was acting properly and within its authority in analyzing and interpreting RCW 36.70A.130(3), the specific provision requiring the ten-year UGA update. In looking at this provision, the other GMA provisions concerning UGAs, the importance of proper sizing of UGAs under the GMA and the lack of significant legislative amendments of the provision, the Board concluded:

The Board finds that in the course of almost-annual amendments to the GMA from 1990 to 2005, there has been no change in the timetable for UGA reviews. Central Puget Sound counties and cities were required to adopt their county-wide planning policies, comprehensive plans, and development regulations and establish their urban growth areas by July 1994 and review their UGAs comprehensively “at least every ten years” thereafter.

The Board further finds that the legislature has amended GMA deadlines from time to time, expressly allowing CTED to grant certain specific extensions, in recognition of the complexity of analysis and public process that may be involved, but there has been no such statutory extension or authority granted to CTED concerning the required UGA review.

Therefore, the Board concludes that the Act required Kitsap County to conduct its .130(3) UGA review by no later than December 1, 2004.⁶⁹

⁶⁹ FDO, p. 35.

Moreover, the Board based its analysis on sound policy reasons based, looking at the role of UGAs in the effective implementation of the GMA:

There are important policy reasons for a consistent timeline for UGA review. Cities and counties need to coordinate their planning for urban growth, and allowing the dates for review cycles to begin when plans are brought into GMA compliance would quickly result in the kind of “uncoordinated and unplanned” land use that GMA was enacted to prevent. RCW 36.70A.010. “It is in the public interest that ... local governments ... cooperate and coordinate with one another in comprehensive land use planning.” *Id.* Allowing tardy or non-compliant plans to “reset the clock” undermines that coordination.

The UGA review cycle also fits well with the OFM population forecasts and the buildable lands review cycle. The population forecasts are based on the census data available early each decade. The buildable lands review and evaluation program is on a five-year cycle, beginning in 2002 and every five years thereafter, to assess actual development trends in a county and its cities. RCW 36.70A.215(2)(b). This leads logically into an assessment of the appropriate sizing of the Urban Growth Area. Urban Growth Area review “may be combined with” the buildable lands review. RCW 36.70A.130(3).⁷⁰

The consequence of the County’s preferred ten year timeline to the GMA policies described by the Board can be clearly seen in the

⁷⁰ *Id.*, pp. 35-36.

implementation. The County's 1998 Comprehensive Plan relied on the Office of Financial Management's (OFM) 20 year population growth projection only for the period 1992 through 2012.⁷¹ The County never moved forward its 20 year planning horizon as is contemplated by RCW 36.70A.130(3). The ten-year review requirement was adopted to assure that counties re-evaluated their plans based on more current population projections before the population projections became too stale, e.g., within ten years. By waiting until 2008 to re-evaluate, Kitsap County will be relying on population projections that are sixteen years old. No authority, legislative amendment to the GMA or rules of statutory interpretation allow the County to establish its own deadline and avoid a timely and meaningful (ten-year) review of its planning assumptions just because it was tardy in adopting a GMA compliant plan. The County's interpretation of the Act would frustrate legislative intent evidenced by a reading of all relevant parts of the Act.

Finally, The County further argues that it relied on the Department of Community, Trade and Development (CTED) interpretation that the ten-year UGA sizing and density review was not due on December 1, 2004, but due 10 years after the County's GMA Compliant Plan was

⁷¹ AR Tab 25, at 15

adopted.⁷² The problem is that it is the Board, not CTED that is charged with reviewing plans and regulations for GMA compliance when challenged. There is no authority that allows either CTED to provide legal opinions or advice on these matters, or for the County to rely on such.

The Board was within its authority in determining that the timeline for the ten year UGA review required by RCW 36.70A.130(3) began running on July 1, 1994. Although the RCW 36.70A.130(3) does not state this explicitly, the Board's analysis of related GMA provisions and the underlying policies was sound and within its statutory authority and should be affirmed by this Court.

B. The County is Required to Adopt Reasonable Measures to Address Development Inconsistent with the Comprehensive Plan.

The GMA was adopted in 1990 because of widespread recognition that local governments were not adequately planning for growth.

“[U]ncoordinated and unplanned growth, together with a lack of common goals expressing the public's interest in the conservation and the wise use of our lands, pose a threat to the environment, sustainable economic

⁷² County's Opening Brief, p. 61.

development, and the health, safety, and high quality of life enjoyed by residents of this state.”⁷³

The GMA was adopted to require local governments to address a wide variety of land use and environmental issues in their planning process. But the point of the GMA is not just to develop nice sounding plans that accumulate dust on municipal bookshelves. Rather, the intent of the Act is to require thoughtful and coordinated land use planning, resulting in change on the ground. Local governments are directed not just to adopt plans, but also to implement them with the adoption of development regulations.⁷⁴ The mandated development regulations are “controls” placed on development and the land use activities.⁷⁵ Thus, the new GMA Comprehensive Plans, as implemented through the mandatory development regulations, are intended to “control” future land development activity in a manner that would effectuate the Legislature’s land use planning goals. Among those legislative goals are the goals to reduce “sprawling, low-density development” and to encourage development in urban areas.⁷⁶

⁷³ RCW 36.70A.010.

⁷⁴ RCW 36.70A.040.

⁷⁵ RCW 36.70A.030(7).

⁷⁶ RCW 36.70A.020(1) and (2).

Moreover, the Legislature recognized that growth management is, at best, an inexact science. The Legislature anticipated that the initial plans and regulations would not be perfect and further adaptations would be necessary. Further, changing economic and sociological circumstances would compel re-examination of the new GMA plans and regulations.

Consequently, from the very beginning the Legislature mandated periodic reviews.⁷⁷ These reviews constitute a monitoring system by which local governments are compelled to determine whether their plans and development regulations are having the intended effect. RCW 36.70A.215 requires Puget Sound-centered Counties, including Kitsap to set up monitoring programs and conduct analysis of development and buildable lands to determine whether on-the-ground development is achieving goals and policies set by the Comprehensive plan.⁷⁸ Ergo, Kitsap County is required to monitor *actual* land development occurring *subsequent* to the adoption its comprehensive plan and regulations and compare that on-the-ground development with the development envisioned in the County's GMA-compliant comprehensive plans and development regulations.⁷⁹

⁷⁷ RCW 36.70A.130.

⁷⁸ RCW 36.70A.215.

⁷⁹ *Id.*

Importantly for this case, this monitoring program is not just for academic or educational purposes. Rather, the Legislature requires that the County use the results of that monitoring to refine their plans and regulations. If the monitoring reveals “inconsistencies” between development envisioned by the plans and development occurring on the ground, then “reasonable measures” must be adopted by the local government to address the inconsistencies. Moreover, the “reasonable measures” must be “reasonably likely” to “increase consistency during the subsequent five year period.”⁸⁰

When local governments fail to heed the results of their own monitoring programs and refuse to take or adopt *reasonable measures* to address inconsistencies, they frustrating the essence of the GMA.

1. Kitsap County’s Buildable Lands Report established that occurring development was inconstant with the County’s comprehensive plan.

The monitoring report required of Kitsap County every five years is known as a Buildable Lands Report (BLR).⁸¹ As the foregoing discussion demonstrates, the Buildable Lands Report is both a backward-looking and a forward-looking instrument. It looks back over the past five years to determine whether new growth is consistent with the county’s and

⁸⁰ RCW 36.70A.215(4).

⁸¹ RCW 36.70A.215

cities' plans. If inconsistencies are found, it looks forward five years to identify, adopt and implement measures which are reasonably likely to increase consistency over that period.⁸²

Kitsap County's 2002 Buildable Lands Report documented several inter-related inconsistencies between observed, on-the-ground growth patterns and the County's GMA Comprehensive Plan and Countywide Planning Policies. For example:⁸³

- 49 % of new growth locating in cities and Urban Growth Areas, compared to a Countywide Planning Policy (CPP) directing 5/6 or 83.3% of new growth to cities and UGAs.⁸⁴
- Average residential densities in UGAs of 3.89 dwellings per acre, compared to the 5-9 dwellings per acre designated in the Comprehensive Plan.⁸⁵
- Average residential densities occurring in rural areas of 1 dwelling per acre, compared to the maximum of 1 dwelling per five acres designated in the Comprehensive Plan.⁸⁶
- An excess of urban land supply over that needed to accommodate the growth projected through 2012.⁸⁷

The BLR identified an overabundance of pre-existing small vested rural lots as a likely factor leading to these inconsistencies.⁸⁸ RCW

⁸² *Id.*

⁸³ Countywide Planning Policies are developed jointly by the county and cities within the county to facilitate coordination of their respective individual comprehensive plans. RCW 36.70A.210

⁸⁴ Kitsap County Buildable Lands Analysis, 1995-2000 at 2 and 73

⁸⁵ Kitsap County Buildable Lands Analysis, 1995-2000 at 81 and 84

⁸⁶ Kitsap County Buildable Lands Analysis, 1995-2000 at 3, 67, 81 and 84

⁸⁷ Kitsap County Buildable Lands Analysis, 1995-2000 at 83 (note that the table in the County's BLR. evaluates the adequacy of land supply to meet "current trends" and four units per acre, not the actual planned densities of five units per acre and more. The planned minimum of five units per acre yields a 25% excess of land over the documented four units per acre.

36.70A.215 therefore requires that the County adopt reasonable measures to address in a meaningful way (reasonably likely to cure) the inconsistencies and causes identified in the BLR. The Board agreed when it both recognized the inconsistencies and correctly concluded that the RCW 36.70A.215(4) requires the County to address the inconsistencies through the adoption and implementation of *reasonable measures*.⁸⁹

However, Kitsap County did not identify, adopt or implement any measures to address these inconsistencies. The County explains this failure in three ways, claiming that:

1. There are no inconsistencies;
2. These are not the kind of inconsistencies the Legislature required to be addressed; and,
3. The existing plan and zoning provisions which have failed to produce consistency can now be retroactively designated as “reasonable measures” to satisfy GMA requirements for the adoption of new curative measures.

We now address the fallacy of these contentions below, using the same framework as the County did in its Opening Brief.

⁸⁸ Kitsap County Buildable Lands Analysis: 1995-2000 at 68

⁸⁹ See *Bremerton v. Kitsap County*, CPSGMHB Case No. 04-3-0009c, Final Decision and Order, August 9, 2004.

2. RCW 36.70A.215 requires the County to address inconsistencies both within the UGA and in Rural areas.

RCW 36.70A.215(4) and (2) read together clearly includes a requirement that the County adopt and implement reasonable measures to address over-development in rural areas, particularly if it is a cause of under-development within the UGA. RCW 36.70A.215(2)(a) reads:

(2) The review and evaluation program shall:

(a) Encompass land uses and activities *both within and outside of urban growth areas and provide for annual collection of data on urban and rural land uses,* development, critical areas, and capital facilities to the extent necessary to determine the quantity and type of land suitable for development, both for residential and employment-based activities;⁹⁰

In contrast, the County offers an illogical reading of this requirement that limits its duties to identifying and redressing problems only if they originate in urban areas.⁹¹ The County tries to make the illogical reasonable by dismissing RCW 36.70A.215(2) as merely “process.”⁹²

The County’s statutory analysis fails because the “at a minimum” requirements in RCW 36.70A.215(3) cannot be read alone. Indeed, they are stated to be “minimum” requirements.

⁹⁰ emphasis added.

⁹¹ County’s Opening Brief, pp. 24-32.

⁹² *Id.*, p. 29

RCW 36.70A.215(2) specifies that the “review and evaluation program *shall* encompass land uses and activities *both within and outside of urban growth areas...*” Subsection 2 also requires the County to remedy inconsistencies found in this evaluation of land development activities “within and outside of urban growth areas:”

Provide for the amendment of the county-wide policies and county and city comprehensive plans as needed to remedy an inconsistency *identified through the evaluation required by this section*, or to bring these policies into compliance with the requirements of this chapter.⁹³

The duty to amend planning policies is clearly not limited to addressing inconsistencies identified in subsection 3, nor would it make sense if it did. Rather, this duty to amend planning policies applies broadly to any inconsistency “identified through the evaluation required by this *section*”, *i.e.*, the entirety of RCW 36.70A.215. Thus, this duty to adopt curative planning policies applies to inconsistencies identified as a result of the review and evaluation program which “encompass[es]” inconsistencies arising “both within and outside of urban growth areas.”

The County’s argument is illogical because it ignores the fact that urban growth and rural growth are inextricably intertwined. As reflected in Kitsap County’s Buildable Land Report, the ability of Kitsap County to

⁹³ RCW 36.70A.215(2)(d) (emphasis supplied).

achieve desired densities in urban parts of the County is being undermined by too much growth in rural areas.⁹⁴ In developing the review program required by RCW 36.70A.215, the Legislature recognized this interrelationship. While the program was designed to determine whether urban densities were being achieved, the Legislature recognized that this could not be fully evaluated (or shortcomings remedied) without examining “land uses and activities both within and outside of urban growth areas.” RCW 36.70A.215(2)(a). If the required review documents too much growth occurring in rural areas (and therefore sapping development from the urban areas), then the County must amend its land use policies “as needed to remedy” to cure the problem.⁹⁵

3. The Buildable Lands Report documents development inconsistent with the comprehensive plan is occurring within the UGA as well as in rural areas.

Throughout the history of *Bremerton II* and *Harless* before the Hearings Board and the courts, the County has persisted in mischaracterizing the findings of its BLR and the Board as a single inconsistency affecting only rural land and rural growth. There is in fact no issue that the BLR demonstrated substantial rural development at

⁹⁴ Kitsap County Buildable Lands Analysis: 1995-2000 at 68.

⁹⁵ RCW 36.70A.215(2)(d).

densities that were both inappropriate for rural land and were inconsistent with the County's comprehensive plan policies.⁹⁶

But the Buildable Lands Report also documented inconsistencies *within* the UGA. The BLR showed that a far lower proportion of growth was locating in Urban Growth Areas (UGAs) than contemplated by the County and as reflected in its Comprehensive Plan. For example, cities and UGAs were allocated 38% and 29% of new growth, respectively (33018 and 24865 of ,86,624)⁹⁷ but received only 25%.⁹⁸ The Report also documented development in urban areas at much lower densities than sought by the Plan. *Average* densities of new development are well below the *minimum* densities set forth in the County's Plan.

For example, in the Central Kitsap UGA the 95 single-family residential units permitted in the UL 5-9 units per acre zone averaged only 2.64 units per acre, barely half the minimum allowed density.⁹⁹ In that same UGA, 63 units of multifamily development were permitted at an average density of 0.65 units per acre, a mere fraction of the 10 and 19

⁹⁶ Kitsap County Buildable Lands Analysis: 1995-2000 at 3, 67, 81 and 84.

⁹⁷ Kitsap County Buildable Lands Analysis: 1995-2000 at 12.

⁹⁸ *Id.*, at 2.

⁹⁹ Kitsap County Buildable Lands Analysis: 1995-2000 at 47.

unit per acre minimums.¹⁰⁰ The Report is filled with such gross inconsistencies and unrestrained sprawl (see pages 18-58).

The County points to an oversupply of vested sprawl-sized lots in the rural area as the cause of these inconsistencies, but claims that the County's hands are tied, as these are vested lots. The County ignores, however, that its own Plan contains a policy calling for aggregation of such substandard lots, but the County refuses to either implement or rescind this policy.

The County's 1998 Plan included policy RL-3 which:

"recognizes the substantial number of existing lots located in the designated Rural Areas as a result of past practices. Existing capacity is significantly greater than the rural target population allocation for the 20-year planning period."¹⁰¹ Policy RL-3 goes on to specify that Kitsap County will research and evaluate possible incentives that would be used to encourage the aggregation of existing small lots in the rural area."¹⁰² Given that past subdivision patterns and current market forces will lead too much growth into rural areas, Kitsap County's mission -- as reflected in its own planning documents -- is to develop policies and regulations that will attract more of that growth into urban areas.

¹⁰⁰ *Id.*

¹⁰¹ Comprehensive Plan (AR Tab 68) at 67.

¹⁰² *Id.*

Effective implementation of the County's Plan *requires* action to deal with the nonconforming lots in rural areas. Various policies and regulations are available to the County to stem those market forces and generate land development patterns more in keeping with the social consensus reflected in the County's Comprehensive Plan and the State's GMA goals. The County could, for example, adopt policies to encourage aggregation of sub sized rural lots. The County could adopt policies to establish a program to transfer development rights from sub-sized rural lots into urban areas. The County could adopt policies and programs to create various tax and other financial incentives to encourage more growth in urban areas and less on sub-sized rural lots.

It is not necessary for the Court to determine which of these (or other) policies and programs are best suited to Kitsap County's situation. That is a determination that should be made, in the first instance, by Kitsap County. But Kitsap County should not be able to evade its duty to adopt reasonable measures by pretending that the inconsistencies do not exist or that they are beyond Kitsap County's control (or, as is debated in the consolidated appeal, that the County's existing zoning code adequately addresses these problems).

4. There is no statutory basis for the County’s argument that the BLR at issue shouldn’t count in determining whether reasonable measures are required because it covered years that the County’s plan was out of compliance.

In the face of overwhelming evidence that actual growth is occurring in contradiction to the County’s GMA planning framework, the County argues that the BLR itself did not cover a relevant time period for evaluating the County’s plan.¹⁰³ If accurate, this is a clear admission that the County did not comply with the intent or letter of RCW 36.70A.215 because it produced a useless BLR.

However, this claim, too, fails under scrutiny. The County has been required to plan under the GMA since its inception in 1990 and to have had a compliant comprehensive plan and development regulations adopted by July 1, 1994. The County cannot now use its failure to timely comply with RCW 36.70A.040 to excuse its failure to achieve the goals of the Act. The County also makes the incredible claim that the BLR demonstrates that it is achieving “acceptable” urban densities. This claim is supported, not by comparing the *average* new development density of 3.89 units per acre with the *minimum* planned density of 5 units per acre,

¹⁰³ County’s Opening Brief, p. 33.

but by comparing it with other counties and past CPSGMHB findings of minimum acceptable densities.¹⁰⁴

The problem with this argument is that RCW 36.70A.215 directs Kitsap County to evaluate actual growth trends, not in light of other counties or CPSGMHB recommendations, but in light of Kitsap County's *own* CPPs and Comprehensive Plan. The lowest urban residential designation in the County's Plan requires a minimum density of five dwellings per acre. If all new development just met this minimum, the average density of new development would be five units per acre. In the more likely case that some new development exceeded the minimum, the average would be greater than five units per acre. In contrast, the BLR documented average densities of less than four units per acre. A documented average of less than 80% of the minimum is clearly inconsistent with the County's Plan.

The County's argument that *Viking Properties v. Holm*¹⁰⁵ precludes the Board from making determinations based upon a 4 du/acre standard is therefore a red herring.¹⁰⁶ The inconsistencies are with the County's own policy, not interpretations of the Hearings Board. The County does not

¹⁰⁴ County's Opening brief, p. 31.

¹⁰⁵ *Viking Properties v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005)

¹⁰⁶ *Id.*, p. 32.

explain its logic in concluding that an *average* of 3.89 (below a *minimum* of 4) is “consistent” or “acceptable.”

5. Because the County adopted no *reasonable measures* in response to its BLR, but instead merely listed existing regulations that may have actually contributed to the inconsistency, the Superior Court did not err in finding that the Board’s ruling was not supported by substantial evidence.

On appeal, Thurston County Superior Court determined that the County did not adopt any reasonable measures pursuant to RCW 36.70A.215(4), but instead retroactively labeled existing provisions of its Plan and Zoning Code as “reasonable measures” even though those provisions had demonstrably failed to produce growth patterns consistent with the County’s Plan. The County now claims that the Court failed to afford it the “deference” to essentially do nothing to address the low density sprawl which is the predominant growth pattern in the County.

The County states that “the GMA does not define ‘reasonable measures.’ “They are construed to be planning measures implemented to increase urban densities.”¹⁰⁷ But RCW 36.70A.215(4) clearly requires more when it adds that reasonable measures must have the substantive effect of being “reasonably likely to increase consistency

¹⁰⁷ *Id.*, p. 42.

within the subsequent five years.” The County’s selective definition of reasonable measures ignores this requirement. The County’s interpretation would instead render the requirement meaningless.

The County’s listing of pre-existing “reasonable measures” in Resolution 2004-158 is clearly not in response, as is required, to the inconsistencies identified in the BLR. Instead, Resolution 2004-158 lists regulations that were in place and operative while the inconsistencies developed and festered. It defies logic that simply leaving measures in place that have a demonstrated lack effectiveness could be considered “reasonably likely” to have different results in the next five years. This comes perilously close to Albert Einstein’s definition of insanity: doing the same thing over and over, expecting different results. Judge Wickham was therefore correct when he ruled that the Board’s order on this issue was not supported by substantial evidence in the record.

Judge Wickham was also correct in ruling that the Central Board had abdicated its responsibility by failing to determine whether the reasonable measures adopted were *reasonably likely* to increase consistency over the subsequent five year period, as required by the statute.

As Judge Wickham found, “Presenting a litany of prior measures taken when those measures have obviously not achieved the desired result is contrary to the intent of the statute which is to adopt measures over time which will achieve certain goals.”¹⁰⁸

Moreover, the record contains nothing to suggest any analysis by the County of the reasonable likelihood of these so-called measures to increase consistency between actual growth patterns and the County’s Plan. Quite simply, the County performed no such analysis and put nothing in the record to be challenged. Now the County objects to the analysis of the petitioners below because we do not cite extensively to this non-existent record. The evidence offered by the petitioners below is the only evidence in the record relating to the likely effectiveness of these post-hoc measures.

7. Conclusion: Reasonable Measures

Kitsap County prepared a Buildable Lands Analysis and Report that showed a dramatic inconsistency between the on-the-ground growth that was occurring in the County, both inside and outside of the UGA, and the development patterns that were supposed to occur according to the County’s adopted comprehensive plan. The fact of the inconsistencies

¹⁰⁸ Thurston County Superior Court, Mem. Dec., Dec. 21, 2005).

triggered an obligation by the County to adopt *reasonable measures* that would apply to both urban and rural lands and that were reasonably likely to cure the inconsistency within five years.

Instead, in response the County conducted no analysis to determine what reasonable measures might be effective to cure the inconsistency. Instead, the County adopted a list of pre-existing ordinances that were in fact in place during the time the inconsistencies developed.

Judge Wickham of Thurston County Superior Court was therefore correct when he ruled that there was no substantial evidence in the record to support the decision that the County had adopted reasonable measures that were reasonably likely to have a positive effect within the subsequent five years. The Superior Court should therefore be affirmed and the Board's decision reversed.

V. CONCLUSION

For the foregoing reasons, respondents request that this Court affirm the Hearings Board and Thurston County Superior Court on the issue of the timing of the ten-year UGA review and reverse the Board and uphold the Superior Court on the issue of whether the County has adopted GMA compliant *reasonable measures*. Respondents further request that

this Court remand these matters back to the Hearings Board for action
consistent with this Court's ruling.

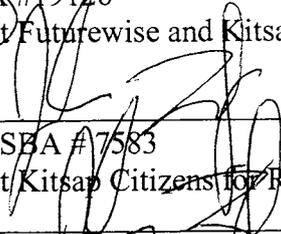
RESPECTFULLY SUBMITTED this 10th Day of July, 2006



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Planning

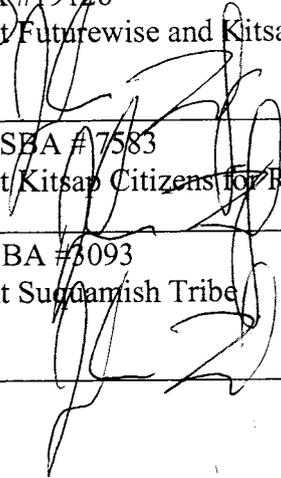
Per authorization



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Per authorization



MARK BUBENIK, WSBA #3093

Attorney for Respondent Suquamish Tribe

Per authorization

JERRY HARLESS

Respondent Pro se

APPENDIX A

argues that the Subsection (4) language requiring review every seven years and the Subsection (3) language requiring review every ten years cannot be reconciled, and so its reliance on CTED is reasonable. County Response 6, at 7.

In reply, Harless contends that the County's reading of .130 conflicts with both .040 and with .110. Kitsap cannot claim surprise, Harless argues, because other Central Puget Sound counties and cities have reviewed their UGAs in consideration of the 2004 deadline. Harless Reply 6, at 2; Harless PHB 6, at 12.

According to Harless, Kitsap County is asking for a unique exception to the GMA planning schedule, which neither the Board nor CTED can grant. CTED technical bulletins are not the law, Harless points out, citing Board precedents,²⁰ and in this FAQ, CTED acknowledged that its advice was merely its own "logical interpretation" of a statutory provision that "does not specify a starting date for calculating the ten-year deadline." Harless Reply 6, at 4; *see* Ex. A to County Response 6.

The purpose of .030(3) UGA review, Harless submits, is to roll the 20-year planning period forward for an additional ten years "to accommodate the urban growth projected to occur in the county for the succeeding twenty-year period" [RCW 36.70A.130(3)]; the Board's Order of Validity did not "reset that clock." Harless points out that Kitsap's first plan and UGA designation, as rewritten in 1998 and declared valid in 1999, was still a plan based on OFM's 1992 population forecast and designed to accommodate population projections for 1992-2012. That planning now needs to be rolled forward, based on OFM 2002 numbers, to cover the period 2002-2022. Kitsap adopted the extended population forecast in its 2004 CPP amendments [Harless PHB 6, at 5; Ordinance 327-2004] but has not done the land capacity analysis and review necessary to re-size its urban growth areas. Delaying the County's ten-year UGA update until 2008 or 2009, Harless argues, would contradict the RCW 36.70A.110 requirement for a twenty-year plan. Harless Reply 6, at 3-4.

Board Discussion

The requirement that urban growth should be directed to designated urban growth areas is one of the main organizing principles of the GMA's approach to managing growth. "The Act contains five core substantive mandates. . . . *First*, new growth must be concentrated in Urban Growth Areas (UGAs). . . ." ²¹ Richard L. Settle, *Washington's Growth*

regulation affecting UGAs, the starting date for calculating the ten year deadline period should begin to run when the board files its order lifting invalidity in response to actions taken by the county." County Response 6, Ex. A, at 5.

²⁰ *Citing King County v. Snohomish County*, CPSGMHB Case No. 03-3-0011 Order on Reconsideration and Clarification (Dec. 15, 2003), at 4; *Bear Creek*, CPSGMHB Case No. 95-3-0008c, Order on Supreme Court Remand (June 15, 2000).

²¹ "The required concentration of population in urban growth areas and the reciprocal prohibition of development at urban, or even suburban, densities in rural areas are the Act's two most central and pervasive goals. . . . By concentrating population in tightly limited UGAs, public facilities and services can be more efficiently provided, natural resource industries and environmentally critical areas can be protected, and options for future development can be preserved." *Id.* at 48.

Management Revolution Goes to Court, 23 Seattle University Law Review 5, at 12 (1999), emphasis supplied.

The GMA requires counties to “include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period.” RCW 36.70A.110(2). Counties are required to base the size of UGAs and development allowed within them on the Office of Financial Management (OFM) twenty-year population projections. RCW 36.70A.120; *Diehl v. Mason County*, 94 Wash. App. 645, 653, 972 P.2d 543 (1999). “At least every ten years,” the UGA designation process must be repeated for the succeeding twenty-year period, based on the most-recent OFM twenty-year forecast. RCW 36.70A.130(3).

The Board has reviewed the legislative history of the relevant GMA deadlines and the UGA review provision of RCW 36.70A.130(3), to determine *when* Kitsap County’s .130(3) UGA review must be done.

The Growth Management Act was adopted in 1990.²²

- Section 4(3) of S.H.B. 2929 [codified as RCW 36.70A.040] required the fastest growing counties [including Kitsap County among the four Central Puget Sound counties] to adopt compliant comprehensive plans by July 1, 1993.
- Section 12 [.120] required development regulations implementing the new comprehensive plans to be adopted within one year, or by July 1, 1994.²³
- Section 11 [.110] required the counties planning under the Act [including Kitsap County – a Central Puget Sound county] to designate urban growth areas. No deadline was specified here.
- Section 13(1) [.130(1)] called for “continuing evaluation and review” of adopted comprehensive land use plans and development regulations;
- Section 13(2) [.130(2)] provided that amendments should be considered no more frequently than once a year;
- Section 13(3) [.130(3)] required a review of urban growth areas at least every ten years. Set forth in full, the subsection provided:

(3) Each county that designates urban growth areas under section 11 of this act shall review, at least every ten years, its designated urban growth area or areas, and the densities permitted within both the

²² S.H.B. 2929; Laws of 1990, 1st Ex. Sess., ch. 17.

²³ Development regulations to protect resource lands and critical areas were to be adopted by September 1, 1991, with the provision that they might be amended to insure consistency when comprehensive plans and development regulations were subsequently adopted (July 1, 1993 and July 1, 1994). Section 6 [.060].

incorporated and unincorporated portions of each urban growth area. In conjunction with this review by the county, each city located within an urban growth area shall review the densities permitted within its boundaries, and the extent to which the urban growth occurring within the county has located within each city and the unincorporated portions of the urban growth areas. The county comprehensive plan designating urban growth areas, and the densities permitted in the urban growth areas by the comprehensive plans of the county and each city located within the urban growth areas, shall be revised to accommodate the urban growth projected to occur in the county for the succeeding twenty-year period.

Thus for Kitsap County, like all Central Puget Sound counties and cities, the original legislative scheme required GMA Plans to be adopted by **July 1, 1993** and implementing regulations to be adopted by **July 1, 1994**. Although county designation of UGAs was required, **when** was not clearly specified [arguably by July 1, 1993 if in the Plan or July 1, 1994 if in development regulations]. Nonetheless, the designated UGA was required to be reviewed at least every ten-years. *The only change to .130(3) since 1990 has been the addition in 1997 of a sentence allowing UGA review to be combined with the reviews and updates required by the Buildable Lands Review process established in that year and codified in RCW 36.70A.215.*

The 1991 legislative session²⁴ made no changes to the “at least every ten year” schedule for review of UGAs.

- Section 2 [.210] added a requirement for development of county-wide planning policies, with a deadline of September 1, 1992. This was to include policies to implement the UGA requirements of RCW 36.70A.011.
- Some flexibility was added to the schedule for comprehensive plan adoption; new section 15 (.045) allowed CTED to extend the comprehensive plan deadline for jurisdictions by not more than 180 days past the statutory due date in order to “facilitate expeditious review and interjurisdictional coordination.”

In 1993, the legislature summarized the requirements for counties required to plan under GMA [including Kitsap County, a Central Puget Sound county] in its revision to RCW 36.70A.040(3).²⁵ The inserted language specified the actions to be taken by GMA counties and cities, *amending some deadlines*. Actions required are: (1) adoption of countywide planning policies per RCW 36.70A.210²⁶; (2) designation and protection of critical areas and natural resource lands, under RCW 36.70A.170 and .060; (3) designation of UGAs pursuant to RCW 36.70A.110; and (4) adoption of comprehensive

²⁴ Laws of 1991, 1st Ex. Sess., ch. 32.

²⁵ Laws of 1993, 1st Sp. Sess., ch. 6, §1(3).

²⁶ The 1993 legislation amended the deadline for countywide planning policy adoption from September 1, 1991 to July 1, 1992. Section 4 [.210].

plans and implementing development regulations by **July 1, 1994** (with a clause allowing a six month extension for development regulations upon notice to CTED).

Significantly, RCW 36.70A.110, the UGA section, was amended to require GMA counties to adopt regulations designating interim urban growth areas by October 1, 1993, and final UGAs at the time of adoption of comprehensive plans, i.e., July 1, 1994.²⁷ However, no change was made to the requirement to review UGAs at least every ten years.

This basic framework has persisted, despite almost annual amendments to the GMA. *Comprehensive plans, including Final UGA designations, were to be adopted by July 1, 1994, and UGAs were to be reviewed at least every ten years.* Thus, the GMA required Kitsap County to adopt its Plan, including its designated UGAs, by July 1, 1994. Kitsap's UGA review could be not later than 10 years – July 1, 2004.

The **1994** legislative session responded to the Regulatory Reform Task Force Recommendations.²⁸ No changes were made to the July 1, 1994, deadline for adopting comprehensive plans and UGAs or the requirement for UGA ten-year review.

The **1995** legislative session added detail and exceptions to the public process and annual review provisions of RCW 36.70A.130(2) but retained the July 1, 1994, deadline for comprehensive plan adoptions and the requirement for review of UGAs at least every ten years.²⁹

The **1997** legislative session added the Buildable Lands Review provisions codified as RCW 36.70A.215.³⁰

- The first Buildable Lands Report (**BLR**) deadline was set at September 1, 2002, with annual monitoring and additional evaluation reports every five years.
- Section .130(1), requiring continuing review and evaluation of plans, was amended to add: “Not later than September 1, 2002, and at least every five years thereafter, a county or city shall take action to review, and if needed, revise its comprehensive land use plan and development regulations to ensure that the plan and regulations are in compliance with the requirements of this chapter. The review and evaluation required by this subsection may be combined with the review required by subsection (3) of this section.”
- Section .130(3), the ten-year UGA review, was also amended with the addition of the sentence: “The review required by this subsection may be combined with the review and evaluation required by section 25 [RCW 36.70A.215] of this act.”

²⁷ Laws of 1993, 1st Sp. Sess., ch. 6, §2(4).

²⁸ Laws of 1994, ch. 249.

²⁹ Laws of 1995, ch. 347, §106.

³⁰ Laws of 1997, ch. 429, §10.

Together, the 1997 amendments **required**: 1) evaluation of on-the-ground development trends on a five-year cycle beginning September 2002 [.215]; and 2) a compliance review of comprehensive plans and development regulations on a five-year cycle also beginning September 2002 [.130(1)].

The 1997 amendments **allowed**: 1) the .130(1) compliance review to be combined with the .215 BLR review – or – they could be prepared separately, either way they were both still due in September of 2002; and 2) the .130(3) “at least every ten year UGA review” could be combined with the BLR. Thus, at its discretion, a Central Puget Sound county, including Kitsap County, could include its .130(3) UGA review with the September 2002 BLR report – or – prepare it separately in 2004 [*i.e. ten years after the 1994 plan deadline*].

From 1997 to 2002, counties could conduct three separate evaluations, with two due in 2002 and one in 2004, or counties could combine all three evaluations for 2002. [*i.e. conducting the .130(3) UGA evaluation early – at least every ten years.*]

The GMA was amended in 1998 and 2000, with no relevant changes to these sections.³¹

In 2002 the required compliance reviews of RCW 36.70A.130(1) were again modified by the legislature.³²

- The September, 2002, deadline for compliance reviews was deleted, and a new schedule was enacted as Subsection (4).
- A sentence was added to subsection (1) specifying that the compliance review “shall include ... consideration of critical area ordinances and ... an analysis of the population allocated to a city or county from the most recent ten-year population forecast by the office of financial management.”
- Subsection (2), which requires public process and annual amendments, was amended to clarify that the compliance reviews of subsection (1) would now be called “updates” and would be governed by the schedule in subsection (4).
- Subsection (4) set a new schedule for compliance reviews, with Central Puget Sound, including Kitsap County, comprehensive plan “updates” **due December 1, 2004.**
- The provision of .130(1) allowing the newly-scheduled “updates” or compliance reviews to be combined with the .130(3) UGA reviews was retained, as was the .130(3) sentence allowing UGA reviews to be combined with BLR’s.

Thus, the significant review schedule adjustments legislatively enacted in 2002 made virtually³³ no change to the “at least every ten year” UGA review requirement. In fact, it

³¹ Laws of 1998, ch. 171; Laws of 2000, ch. 36.

³² Laws of 2002, ch. 320, §1.

reinforced the logic of the underlying scheme of UGA reviews no more than 10 years after initial required adoption of Central Puget Sound jurisdiction comprehensive plans – including Kitsap County.

The GMA was amended again in the 2003, 2004 and 2005, with no changes relevant to this analysis.³⁴

The Board finds that in the course of almost-annual amendments to the GMA from 1990 to 2005, there has been no change in the timetable for UGA reviews. Central Puget Sound counties and cities were required to adopt their county-wide planning policies, comprehensive plans, and development regulations and establish their urban growth areas by July 1994 and review their UGAs comprehensively “at least every ten years” thereafter.

The Board further finds that the legislature has amended GMA deadlines from time to time, expressly allowing CTED to grant certain specific extensions, in recognition of the complexity of analysis and public process that may be involved, but there has been no such statutory extension or authority granted to CTED concerning the required UGA review.

Therefore, the Board concludes that the Act required Kitsap County to conduct its .130(3) UGA review by no later than December 1, 2004.³⁵

There are important policy reasons for a consistent timeline for UGA review. Cities and counties need to coordinate their planning for urban growth, and allowing the dates for review cycles to begin when plans are brought into GMA compliance would quickly result in the kind of “uncoordinated and unplanned” land use that GMA was enacted to prevent. RCW 36.70A.010. “It is in the public interest that ... local governments ... cooperate and coordinate with one another in comprehensive land use planning.” *Id.* Allowing tardy or non-compliant plans to “reset the clock” undermines that coordination.

The UGA review cycle also fits well with the OFM population forecasts and the buildable lands review cycle. The population forecasts are based on the census data available early each decade. The buildable lands review and evaluation program is on a five-year cycle, beginning in 2002 and every five years thereafter, to assess actual development trends in a county and its cities. RCW 36.70A.215(2)(b). This leads

³³ The GMA deadline for adopting Plans, including final UGAs, was July 1, 1994. Ten years later is July 1, 2004. The 2002 amendments arguably added 6 months to this review since December 1, 2004 is the new deadline.

³⁴ Laws of 2003, ch. 299; Laws of 2004, ch. 206; Laws of 2005, ch. 423.

³⁵ As the Board stated in *Bremerton II*, Order on Reconsideration (Sept. 16, 2004), at 8: “The Board reads RCW 36.70A.130 to require that on or before December 1, 2004 (.130(4)(a)), Kitsap County’s planning cycle must be brought into the GMA sequence, using OFM’s most recent ten-year population forecast, (.130(1)(a)), evaluating its UGA boundaries and densities (.130(3)), and applying BLR findings to its UGA decisions (.130(3) and .215).”

logically into an assessment of the appropriate sizing of the Urban Growth Area. Urban Growth Area review “may be combined with” the buildable lands review. RCW 36.70A.130(3).

The Board finds and concludes that Kitsap County was required to review its Urban Growth Areas, pursuant to RCW 36.70A.130(3), within ten years after 1994, the statutory deadline for adopting its Plan and UGAs. Kitsap acknowledges that it has not conducted the UGA analysis and disputes the deadline. The Board finds that Kitsap County has **failed to act** to review its UGAs. The Board finds and concludes that Kitsap County has **not complied** with RCW 36.70A.130(3).

Findings of Fact and Conclusions of Law

The Board finds and concludes:

1. In the course of almost-annual amendments to the GMA, there has been no change in the timetable for UGA reviews. Central Puget Sound counties and cities were required to adopt their county-wide planning policies, comprehensive plans, and development regulations and establish their urban growth areas by July 1994 and review their UGAs comprehensively “at least every ten years” thereafter.
2. RCW 36.70A.130(3) required Kitsap County to “review, at least every ten years, its designated urban growth area or areas and the densities permitted within both the incorporated and unincorporated portions of each urban growth area” and to revise its designation of urban growth areas and permitted densities “to accommodate the urban growth projected to occur in the county for the succeeding twenty-year period.”
3. Kitsap County’s urban growth areas were initially required to be adopted on July 1, 1994, pursuant to RCW 36.70A.110(5) and RCW 36.70A.040(3); therefore the review of urban growth areas mandated by RCW 36.70A.130(3) was to have been completed by Kitsap County by no later than December 1, 2004.
4. The legislature has amended GMA deadlines from time to time, allowing CTED to grant specific extensions, in recognition of the complexity of analysis and public process that may be involved, but there has been no such statutory extension or authority granted to CTED concerning the required UGA review.
5. The Growth Management Act contains no provision allowing CTED to extend or adjust the UGA review deadlines established by RCW 36.70A.130(3).
6. Kitsap County acknowledges that it **did not** review its urban growth areas in 2004 and does not intend to conduct that review until 2008 or 2009. *See* Kitsap Response 6, at 4.