

COURT OF APPEALS  
DIVISION II

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

STATE OF WASHINGTON  
BY       E        
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NO. 39017-5-II (Consolidated)

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THE SUQUAMISH TRIBE; KITSAP CITIZENS FOR RURAL  
PRESERVATION; and JERRY HARLESS,

Appellants,

v.

CENTRAL PUGET SOUND GROWTH  
MANAGEMENT HEARINGS BOARD; and  
KITSAP COUNTY,

Respondents.

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REPLY BRIEF OF APPELLANTS  
SUQUAMISH TRIBE, ET AL.

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Melody L. Allen	David A. Bricklin	Jerry L. Harless
WSBA No. 35084	WSBA No. 7583	P.O. Box 8572
Suquamish Tribe	Bricklin Newman	Port Orchard, WA 98366
18490 Suquamish Way	Dold, LLP	(360) 271-2642
Suquamish, WA 98392	1424 Fourth Ave.,	Pro Se
(360) 394-8488	Suite 1015	
Attorney for Appellant	Seattle, WA 98101	
Suquamish Tribe	(206) 621-8868	
	Attorney for Appellant	
	Kitsap Citizens for	
	Rural Preservation	

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## I. INTRODUCTION

This reply addresses Appellants Suquamish Tribe, Kitsap Citizens for Rural Preservation, and Jerry Harless (“Appellants”) appeal of Kitsap County’s (“County”) Comprehensive Plan under the Growth Management Act, RCW 36.70A.

The County asserts that standard of the review for this appeal makes it “impossible to reverse the Board’s decision below” because the GMA gives discretion to counties in how they plan for growth and that growth boards must grant deference to counties in how they plan.<sup>1</sup> The County is wrong. Neither the legislature nor the courts have granted unbridled deference to the County or the growth boards under the GMA. While the County may balance priorities and options for action with full consideration of local circumstances under RCW 36.70A.3201, deference ends when a county’s actions fail to meet the goals and requirements of the GMA and are “clearly erroneous.” *Thurston County v. Western Wash. Growth Mgmt. Bd.*, 164 Wn.2d 329, 340, 190 P.3d 318 (2008). Appellants have met their burden to show that the Board’s decision affirming the County’s actions fail to meet the goals and requirements of the GMA.

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<sup>1</sup> Response at 20-22. (The County’s Opening Brief is abbreviated hereafter as “Resp.”).

## II. ARGUMENT

### A. THE BOARD ERRED BY AFFIRMING THE COUNTY'S REDUCTION OF MINIMUM URBAN DENSITIES

It is undisputed that Kitsap County reduced the minimum permitted density ranges within two very large residential zoning districts, Urban Low Residential and Urban Cluster Residential of urban growth areas from five dwellings (du) per acre to four du/acre.<sup>2</sup> Appellants assert and dissenting Board Member Margaret A. Pageler agrees that the Board majority used an invalidated bright-line rule to affirm that four dwellings per acre is “an appropriate urban density.”<sup>3</sup> The Supreme Court has consistently held that Growth Management Hearings Boards do not have the authority under the GMA to adopt “bright-line” rules to establish urban and rural densities. *Thurston County*, 164 Wn.2d at 358-359; *Viking Properties v. Holm*, 155 Wn.2d 112, 129-130, 118 P.3d 322 (2005).

The County's principal response to Appellants' allegation that this is an error of law is to falsely accuse Appellants of arguing that four du/acre is an inappropriate urban density. The County contends that we, too, are espousing a bright line rule, though drawing the bright line at a different point, i.e., at some unstated density greater than four du/acre.

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<sup>2</sup> CP 107, AR 55 (Final Decision & Order or “FDO”) at 13 (App.2 of Op. Br.).

<sup>3</sup> Op. Br. 19-21; App.2 (FDO) at 67.

The County dedicates five pages of its reply assailing this straw man.<sup>4</sup>

But Appellants have offered no such argument to either the Board or to the Courts.

Rather, in the context of urban densities, we present two arguments. One argument is focused on the County's decision: a twenty percent *reduction* in density is inconsistent with GMA goals, and policy language of the County's Comprehensive Plan to *increase* density, and directly contradicts documented trends in urban development on the ground. The error of law attaches to the contradictory *direction of change* to allowed densities and its inconsistency with the County's own Comprehensive Plan, not a specific numerical threshold.

The other argument is focused on the Board's decision: rather than analyze the merits of our first argument, the Board woodenly applied a four du/acre "bright line" test and stopped its "analysis" there. *Viking* demands a more fact-specific analysis. The Board erred in failing to provide it.

1. The Board expressly applied an invalidated bright line rule.

It is undisputed that the Board affirmed the County's reduction of the minimum permitted density ranges within two very large residential

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<sup>4</sup> Resp. at 32-36.

zoning districts, Urban Low Residential and Urban Cluster Residential of urban growth areas from five dwellings (du) per acre to four du/acre.<sup>5</sup> Appellants assert and dissenting Board Member Margaret A. Pageler agrees that the Board majority used an invalidated bright-line rule to affirm that four dwellings per acre is “an appropriate urban density”<sup>6</sup> consistent with the Supreme Court’s decision that Growth Management Hearings Boards do not have the authority under the GMA to adopt “bright-line” rules to establish urban and rural densities. *Thurston County*, 164 Wn.2d at 358-359; *Viking*, 155 Wn.2d at 129-130.

The County asserts that because the Board’s decision did not use the specific words “bright line” when citing to *Bremerton I*<sup>7</sup> that the Board’s use of the four du/acre bright line threshold test is merely a “coincidence of fact”<sup>8</sup> and then credits Appellants with making the connection to *Bremerton I*.<sup>9</sup> It is the Board, not Appellants who cite to the precise “bright line” language of *Bremerton I* to support its decision:

At the outset, the Board acknowledges that 4 du/ac is an “appropriate” urban density; it is not low-density sprawl. In fact, the County is correct in noting that since 1995, 4 du/ac has been an approved and accepted minimum urban density for Kitsap County. *See Bremerton v.*

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<sup>5</sup> AR 55 (FDO) at 13 (App.2).

<sup>6</sup> Op. Br. 19-21; AR 55 (FDO) at 67 (App. 2).

<sup>7</sup> *Bremerton v. Kitsap County (Bremerton I)* 1995 WL 903165 (1995); AR 55 (FDO) at 49-50 (App. 2).

<sup>8</sup> Resp. at 25-26.

<sup>9</sup> *Id.*

*Kitsap County*, CPSGMHB Case No. 95-3-0039c, Final Decision and Order, (Oct. 6, 1995). What, then, is the basis for Petitioners' complaint? Doesn't the County have discretion to plan for and regulate land use within the parameters of the Act?<sup>10</sup>

....

Just as the Board agreed with the County in regard to urban density, the Board here also agrees with the County on its methodology. The LCA largely rests upon a residential density assumption of 4 du/ac, which, as the Board has stated *supra*, is an "appropriate" urban density.<sup>11</sup>

This was no "coincidence in fact." The Board majority resurrected and relied on an invalid "bright line" rule as the sole basis for its decision. The fact that the Board did not use the phrase "bright line" does not change the fact that it committed an error of law prohibited by the Supreme Court in *Thurston County* and *Viking*. The Board's dissenting member expressly recognized the use of the majority's "bright line" rule to reach its decision.<sup>12</sup>

In addition, the County attempts to shift the meaning of the four du/acre "bright line" as though it were crafted specifically for the local conditions of Kitsap County. In *Bremerton I*, however, the Board adopted this "bright line" as a "general rule" which applies to four counties and

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<sup>10</sup> AR 55 (FDO) at 13 (App. 2).

<sup>11</sup> *Id.* at 17.

<sup>12</sup> *Id.* At 67.

one hundred-plus cities in its jurisdiction.<sup>13</sup> For all these reasons, the Board’s use of an invalidated bright-line rule to establish an “appropriate urban density” is an error of law.

2. Upholding a reduction in minimum density is not supported by substantial evidence in the record.

The County’s action of *reducing* urban density by twenty percent is contrary to substantial evidence in the record and the GMA goals and local circumstances that all point to *increasing* densities. The dissenting Board Member also saw the obvious, neither “the Board nor the parties can take refuge in a ‘bright line’ urban density measure when *cogent facts* point in another direction. . . . It [Kitsap County] . . . seeks to hide behind an outdated ‘bright line.’”<sup>14</sup>

The County attempts to minimize the reduction in density to show that “several other urban densities were increased.”<sup>15</sup> The County fails to respond to the cogent facts that (1) the reduction in density occurred in the two largest residential zoning districts (Urban Low Residential and Urban Cluster Residential) and account for 69 percent (14,409 of 20,688 acres)

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<sup>13</sup> The Central Puget Sound Board’s geographic jurisdiction is King, Pierce, Snohomish and Kitsap counties, and the cities now or subsequently located within those counties. WAC 242-02-030 (1) (b). For example, the *Viking* case involved the City of Shoreline within King County.

<sup>14</sup> App.2 (FDO) at 67 (emphasis added).

<sup>15</sup> Resp. at 28.

of the County's gross urban residential land area;<sup>16</sup> (2) the reduction in density accounts for 74 percent (2,711 of 3,639 acres) of the net developable land designated for urban growth in the County's unincorporated urban growth areas; and (3) between 2000 and 2005 the density achieved on average in the County was an average of 5.6 du/acre, a 45 percent increase from 1999 -2003.<sup>17</sup>

The County also cites to several unsupported statements from the Environmental Impact Statement ("EIS") as "evidence" in support of its twenty percent reduction in minimum urban density. While these bare statements are in accord with the County's conclusions, they do not constitute substantial evidence because these statements are mere conclusions authored by County staff without supporting facts.

First, the County claims that the reduction from five du/acre to four du/acre is "consistent with the cities' municipal plans."<sup>18</sup> This claim is at odds with the County's own EIS which stated that leaving the density at five du/acre "would be consistent with municipal plans in the county. . . .

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<sup>16</sup> By contrast, the two zones for which maximum densities were increased comprise less than 7% of urban land supply (457 acres of Urban High added to 794 acres of Urban Medium nets to 6.7% of the 18,566 total acres of urban residential land). Resp. at Tab 63, Vol. II FEIS at 3.2-3.

<sup>17</sup> App.2 (FDO) at HOM Ex. 1; Post-HOM Exs. 1, 2; CP 261, AR 93 at #31052, 83, App. 7 (Buildable Lands Report).

<sup>18</sup> Resp. at 24, 28.

In most cases land use designations along the boundaries between incorporated and unincorporated areas are consistent and compatible.”<sup>19</sup>

The County’s response also ignores that reducing densities to four du/acre puts the County’s plan at odds with the planning by the County’s largest city, the City of Bremerton.<sup>20</sup> Bremerton’s land use plan calls for a density of seven du/acre.<sup>21</sup> Existing development already averages five du/acre.<sup>22</sup> Again, the County’s litigation position is at odds with the words of its own EIS, which recognized the inconsistency if the County lowered its density to four du/acre:

There are, however, differences between the City of Bremerton plan and proposed land use classifications in the Central Kitsap, East Bremerton, West Bremerton and SKIA UGAs.<sup>23</sup>

Thus, the substantial evidence in the record actually shows that the County’s action made its plan *less* consistent with the planned density of its largest city and had little or no affect on its consistency with the other, much smaller cities.

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<sup>19</sup>Resp. at Tab 63, Vol. II, FEIS at 3.2-86

<sup>20</sup> In 2000, Bremerton had a population of 37,258, more than double that of Port Orchard (7,693) and Poulsbo (6,813) combined. *See* Resp. at Tab 63.1, Vol. II FEIS at 2-15, 2-16.

<sup>21</sup> CP 106, AR 32, #29761 (Op. Br. at App.8).

<sup>22</sup> Resp. at Tab 63, Vol. II, FEIS at 3.2-86.

<sup>23</sup> *Id.*

Next, the County claims that the reduction in density “reflected the majority of the community vision as voiced through the community planning process.”<sup>24</sup> This conclusion is based on an undocumented claim in the EIS that “[c]itizen groups, such as those in Silverdale and Central Kitsap, have lobbied for densities lower than 5 dwelling units per acre to maintain neighborhood character.”<sup>25</sup> But the EIS only acknowledges the Silverdale Subarea Citizen Advisory Committee, makes no mention of a Central Kitsap group, and includes no evidence for the County’s lobbying claim.<sup>26</sup> Appellants alone outnumber this “majority.” One voice becomes a majority when it supports the County’s position.

The County’s third unsupported claim is that the reduction of minimum density from five du/acre to four du/acre will “provide a greater variety of housing types.”<sup>27</sup> Neither the County’s response brief nor the EIS explains how this is so. In fact, both densities are typical of single-family detached housing on individual lots—the housing types that “will dominate at 75% of new units” according to the EIS.<sup>28</sup> Thus, lowering density will simply create more of the most prevalent, larger lots and do

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at Vol. II (FEIS) at 5-8 (Response to Comment 3), 5-78 (Response to Comment 25).

<sup>26</sup> *Id.* at 2-9, App. A, Public Involvement Summary at 5.

<sup>27</sup> Resp. at 24, 28.

<sup>28</sup> Resp. at Tab 63, Vol. II FEIS at 3.2-6.

nothing to increase variety by encouraging creation of the scarcer (and more affordable) smaller urban lots.

In contrast to the paucity of “evidence” to support the County’s decision to reduce urban density, the record is replete with professional, academic and field studies which illustrate and quantify the comparative impacts of various housing densities with regard to the GMA’s goals of housing affordability, efficient service provision and environmental protection. Far from merely “citing to their own letters” as the County alleges,<sup>29</sup> Appellants cite to a volume and quality of professional literature that even the Board found to be “very impressive” and “certainly persuasive evidence”<sup>30</sup> to demonstrate how the County’s decision to lower densities would substantially interfere with the Goals of the Act.

#### B. THE LAND CAPACITY ANALYSIS DOES NOT COMPLY WITH THE GMA

1. The “bright line” rule as applied to the Land Capacity Analysis is an error of law.

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<sup>29</sup> Resp. at 27.

<sup>30</sup> AR 55 (FDO) at 13-14 (App. 2). The Board acknowledged citation to “numerous exhibits in the record.” The County falsely asserts that Appellants cite only to “their own letters in support of a higher density and that “they claim their ‘evidence’ is the *only* evidence in the record supporting minimum density.” Resp. at 27. Appellants rely on numerous documents in the record including those cited by the County. Appellants did provide evidence in the record in the form of published studies not letters of “planning philosophy.”

In the context of the Land Capacity Analysis, Appellants argue that basing the future density assumption for the next twenty years on the absolute minimum allowed when the County-documented trend is forty percent higher (i.e. the County's use of four du/acre as opposed to 5.6 du/acre up from 3.8 over five years) is clearly erroneous, particularly in light of County policy language that directs further *increases* in urban densities.

Appellants contend, and we believe the Supreme Court agrees that there is no authority in the GMA for the Board or the County to endow any particular density, whether four du/acre or some other number, with special "bright line" significance. Rather, the "appropriateness" of a given permitted or predicted density must be determined in the context of the goals and requirements of the GMA, the County's record of local circumstances (including observed density trends) and consistency with other County GMA policies.

The Board's use of a numerical bright line threshold to dismiss the Land Capacity Analysis ("LCA") issue would be an error even if bright line rules were legitimate for evaluating zoning districts. The use of an urban density factor in the LCA is a prediction of future land use patterns, not a policy statement of what is an "appropriate" density. The Board did not consider the validity of the County's density assumption in its LCA

but ended all review at the conclusion that four du/ac is a magic number above all reproach.<sup>31</sup>

2. There is no substantial evidence in the record to support the use of minimum density in the Land Capacity Analysis.

The County seeks to shield its LCA from judicial review because “the GMA does not prescribe a specific methodology for conducting a land capacity analysis.”<sup>32</sup> Appellants are not criticizing the methodology the County chose, but pointing out a clearly erroneous factor in that methodology. But the deference afforded to the County by the GMA does not extend to transgressing the laws of mathematics or to disregarding full consideration of local circumstances.

The County based its massive expansion of Urban Growth Areas on a LCA that predicts all future residential growth will occur at the absolute minimum permitted density of four du/acre.<sup>33</sup> In our Opening Brief, Appellants show that the County’s EIS and Buildable Lands Report (“BLR”) document current development trends of 5.6 du/acre on a five-

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<sup>31</sup> App. 2 (FDO) at 17.

<sup>32</sup> Resp. at 4-5, 8, 16.

<sup>33</sup> As the County notes in its Response (page 4) there are other, higher density residential zones but they comprise less than six percent of urban residential lands and so the impact of minor increases to their allowable density is *de minimus* in comparison with the UL and UCR zones which comprise 70 percent. See Resp. at Tab 63, Vol. II FEIS at 3.2 at 3.2-34 (the sum of 457 acres of Urban High and 794 acres of Urban Medium divided by 18,566 acres total urban residential land yields 6.7 percent.

year upward trend for these same zoning districts.<sup>34</sup> The County responds that the BLR is irrelevant for estimating future UGA capacity because it documents past trends while the LCA predicts forward trends.<sup>35</sup> To the County, the past is not relevant to the future and this is therefore, the source of the County's clear error.

In the context of the 1997 Legislative statement of intent, the GMA states that:

Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances.

RCW 36.70A.3201.

In striking down the Boards' use of "bright lines" in *Viking* and *Thurston County*, the Supreme Court redirected counties, cities and the Hearings Boards to the mandatory consideration of "local circumstances" to establish appropriate densities. *Viking*, 155 Wn.2d at 130.

The BLR is a County-authored document that is required by the GMA for the purpose of quantifying certain local circumstances, specifically trends in urban densities occurring on the ground in the last several years.<sup>36</sup> As such, it is the best available evidence of local circumstances surrounding growth and development trends.

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<sup>34</sup> Op. Br. at 32.

<sup>35</sup> Resp. at 30-32.

<sup>36</sup> RCW 36.70A.215.

The County's insistence that urban density trend data in the BLR is irrelevant to the analysis of future urban land needs because it looks back in time rather than forward is also clearly erroneous on its face because the ten-year update requirement of RCW 36.70A.130 (3) requires a "review" of densities currently permitted in UGAs.<sup>37</sup> In using the word "review" the Legislature expressly directed counties to consider recent urban development trends updating their plans for the future.

RCW 36.70A.130 (3) expressly authorizes the ten-year update and the Buildable Lands reviews to be combined, recognizing their inherent relevance to one another. Furthermore, in its Comprehensive Plan and Countywide Planning Policies, the County explicitly combines the Buildable Lands Program and Land Capacity Analysis into a single process and methodology.<sup>38</sup>

It is only by turning a blind eye to the urban density trend documented in its BLR that the County can estimate remaining land capacity using a density prediction that is 33 percent lower than its self-documented local circumstances. There is no evidence in the record to support an assumption that density trends will nose dive by 33 percent. In

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<sup>37</sup> *Merriam-Webster's Collegiate® Dictionary, Eleventh Edition* defines "review" as "[a] usually critical look at a past event [e.g.] a review of yesterday's football game gave us a lot of good ideas on how to improve for the next one."

<sup>38</sup> App. 1, Vol. 1 (Comprehensive Plan) at 2.8 – 2.9.

fact, the County does not actually believe this lowball prediction any more than Appellants do.

[T]he 4 du/ac remains a *minimum* density, and some areas within these zones will develop at a maximum density.\*

\*In fact, it is logical that most developers will endeavor to reach the highest density on a parcel in order to maximize profits.<sup>39</sup>

We agree. This far more credible prediction of future development patterns aligns well with the observed trend of steadily increasing densities.

Finally, the County offers the peculiar argument that other Land Capacity Analysis factors such as the population forecast and market factor were known to be unrealistically low and underestimating the density prediction was necessary to offset these errors.<sup>40</sup> This is another *post hoc* litigation rationale invented by counsel. The County did not offer this justification at the time it acted and the County cites no evidence in the record to support this newly fabricated claim. The County's actions are presumed valid. RCW 36.70A.320. No one (including the County) ever challenged these other assumptions. Thus, it is improper for the County's attorneys to now speculate that the County's planners chose to use an erroneous density factor to compensate for population projection

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<sup>39</sup> Resp. at 24, 31 (*italics and footnote in original*).

<sup>40</sup> Resp. at 5-8, 39-40.

and market factors it knew to be erroneous in hopes that the errors would cancel one another out. Yet that appears to be the argument put forth in the County's brief.

C. THE COMBINED IMPACT OF THE COUNTY'S  
URBAN DENSITY AND LAND CAPACITY ERRORS

The combined effect of reducing allowable urban density by twenty percent and then calculating urban land capacity as though all new development for the next twenty years will occur at this new minimum density *grossly oversizes the UGAs*. Using the hypothetical land capacity analysis from the County's Response,<sup>41</sup> the disproportionate impact of these errors can be illustrated.

If the density floor had remained at five du/acre rather than four, a total of 80 acres rather than 100 would be needed to support the same number of dwellings. Subtracting the 63.75 acres of available land in the example would require a net addition of only 16.25 rather than 36.75 acres to the UGA, less than half as much. In other words, the County doubled the UGA expansion by artificially reducing the carrying capacity of the land through a paper exercise.

The contrast is even more stark if the Land Capacity Analysis truly reflected the full consideration of local circumstances as the Legislature

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<sup>41</sup> Resp. at 7.

intended (RCW 36.70A.3201) and predicted future development would occur at the recently observed 5.6 dwellings per acre. The gross land “need” would be 69 acres. Given 63.75 available acres already within the UGA, the need to expand would be only 5.25 acres. By using the new minimum density in its calculations, the County exaggerated the need to expand the UGA by a factor of seven ( $36.75 \div 5.25 = 7$ ) in its own hypothetical example.

The County claims that understating urban land capacity and thus over-sizing UGAs is a “conservative” approach.<sup>42</sup> The County bases this theory on two false premises.

The first is a distorted interpretation of the requirement to ensure that the urban land supply is sufficient for twenty years of growth.<sup>43</sup> The County believes that a requirement to ensure sufficient land supply can only be satisfied by predicting that future development will only occur at minimum authorized densities, thus maximizing the size of the UGA. But this ignores that development and planning are dynamic processes. Not all growth predicted for the next twenty years will occur in the next year or two or five. The GMA requires the County to monitor growth trends and adapt the UGA as warranted by new information.<sup>44</sup> Therefore, the County

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<sup>42</sup> Resp. at 8, 37-38.

<sup>43</sup> Resp. at 3, 7-8, 17, 35.

<sup>44</sup> RCW 36.70A.130; RCW 36.70A.215.

need not be so concerned that all future development will be at the extreme low end of the allowed range and that, therefore, the land supply will be used up faster than thought. If that unlikely scenario were to start to unfold in the first five or ten years of the planning period, the County still would have ample time to expand its UGA before all available land in the UGA was consumed.

The second false premise is the flip side of the first—the County’s contention that “If the land is actually developed at higher densities, making more land available than needed for the projected population, it will be addressed in the next ten year update.”<sup>45</sup> This misplaced rationale ignores the fact that it is far more practical to expand a UGA than to retract one. In ten years, an oversized UGA will be checker-boarded with pockets of urban growth and extensions of capital facilities such as roads, water and sewer lines. Vested development permits and city annexations also complicate the ability to reduce an excess of urban land supply once it has been created. An excessively oversized UGA is very difficult to reduce and will likely encourage sprawl. The courts and the Hearings Boards have recognized that a UGA can be too large and that this will result in sprawl, thwarting the Goals of the GMA.<sup>46</sup>

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<sup>45</sup> Resp. at 8

<sup>46</sup> See Op. Brief at 33, citing to *Thurston County*.

In contrast, if future growth were to outpace the plan, incremental expansion of the UGA is relatively simple to achieve and can be done as frequently as once per year.<sup>47</sup> Clearly an urban land supply calculated using a realistic density prediction, i.e. one based on observed local circumstances such as 5.6 du/ac in the County, is a far more “conservative” approach than a bloated urban land supply based on a density prediction even the County does not believe.<sup>48</sup>

1. The Board’s decision does not address issues of internal plan inconsistency.

The GMA requires that Comprehensive Plans be internally consistent documents, i.e. one policy provision may not thwart another. RCW 36.70A.070. While the Board’s decision<sup>49</sup> and the County’s response<sup>50</sup> both acknowledge that the Appellants raised the issue of internal Plan inconsistencies, neither offers resolution of the issue.

When the County amended its Comprehensive Plan to reduce minimum urban densities for the vast majority of its urban land supply, the County created inconsistencies with numerous Comprehensive Plan policies which direct the County to increase urban densities.<sup>51</sup> The root of

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<sup>47</sup> RCW 36.70A.130(2)(a).

<sup>48</sup> Resp. at 24, 31.

<sup>49</sup> App. 2 (FDO) at 16.

<sup>50</sup> Resp. at 32.

<sup>51</sup> E.g. “reasonable measures” and other policies adopted within the Comprehensive Plan and enumerated. *See* CP 106, AR 42 at 56-57.

this inherent inconsistency lies in the antonymous verbs “decrease” and “increase.”

Despite the promise of a more detailed analysis, (“At the outset...”<sup>52</sup>), the Board never looked past its bright line rule to consider internal inconsistency, apparently concluding that its bright line trumps all other GMA considerations.

The County does not respond to the irreconcilable conflict between competing policies of the County’s Comprehensive Plan: several that direct increases in urban density and one that drops urban density by twenty percent.

In the context of the Land Capacity Analysis, the internal inconsistency is between the County’s prediction that future development over the next twenty years will not exceed the new minimum of four du/acre and the observed and County-documented actual development trend which is on an upward trajectory from 3.8 du/acre in 1995 to 5.6 du/acre in 2005. That glaring inconsistency is exacerbated by the policy language in the Comprehensive Plan which directs even greater increases in urban density.<sup>53</sup>

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<sup>52</sup> App. 2 (FDO) at 13.

<sup>53</sup> *Id.* at 13, 16-17, 67 (citing Comprehensive Plan (App.1 at Vol. I, 2-9)).

D. THE RURAL WOODED INCENTIVE PROGRAM  
PROMOTES ILLEGAL SUBURBAN GROWTH IN RURAL  
AREAS AND FAILS TO MEET THE GOALS AND  
REQUIREMENTS OF THE GMA

The County defends the Board’s finding that the **Rural** Wooded Incentive Program (“RWIP”) is GMA compliant on the grounds that the GMA allows clustering and “innovative techniques;” that open space requirements guarantee that the suburban-style development will not be characterized by urban growth; and that the development standards and monitoring program are the saving grace for preserving rural character. The County’s defenses, however, do not rescue the RWIP’s fatal flaws.

The County emphasizes repeatedly that the GMA allows clustering and other innovative techniques in rural areas. The County claims that Appellants’ argument “misapprehends the very nature of a cluster program – in order to preserve integrated open space, there will *always* be a more dense area where homes are clustered.”<sup>54</sup> But the Act does not allow clustering without limitation. The Act allows clustering and other “innovative techniques” *only* if it does not result in developments that are “characterized by urban growth” and *only* if the developments “preserve rural character.” RCW 36.70A.050 (b); RCW 36.70A.030 (16); RCW 36.70A.110 (1) (growth outside urban growth areas “can only occur if it is

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<sup>54</sup> Resp. at 43-44.

non urban in nature’).

The issue before the Court is whether the Rural Wooded ordinance allows development in rural areas at urban and suburban densities that is characteristic of urban growth. That should be an easy question to answer.

It is easy to contemplate the type of clustering that the legislature intended when it authorized clustering in rural areas. For instance, in a rural area with zoning of one dwelling per five acres, a development on ten acres could be clustered so that two dwellings were clustered on two acres, leaving eight acres in open space. The two clustered dwellings would not be “characterized by urban growth” because the visual impact would be negligible, there would be no increased need for urban services, and there would be no significant impact on infrastructure. This type of “clustering” would be consistent with the GMA’s allowance for *some* clustering in rural areas.

While a clustering ordinance might allow clusters consisting of more than two houses on city size lots and still not authorize subdivisions that are “characterized by urban growth,” at some point, the subdivision “clusters” become too large and too common and the development is “characterized by urban growth.” As the Board stated in an earlier case:

[W]hile no clear breaking point is evident in the information presently before the Board, it is only logical that, at some point along the continuum of potential project size and intensity, the

quantitative dimension of cluster development in a rural area must have qualitative urban growth consequences.<sup>55</sup>

Exactly where the breaking point is, is not clear, but it is not necessary for this Court to determine the exact location of that line for this appeal. All this Court need do is determine whether the ordinance allows subdivisions any of which would fall on the “urban growth” side of that line. If this ordinance allows any developments that would be “characterized by urban growth,” or does not “preserve rural character,” the ordinance violates the GMA and the Board’s decision must be reversed.

1. Bare assertions fail to rebut the Board’s use of an invalidated bright line rule to define rural density.

The County argues that because the Board did not use the phrase “bright line rule” in its decision, the Board did not apply a bright line rule.<sup>56</sup> In *Thurston County*, however, the Supreme Court found that “[a]lthough the Board did not explicitly adopt a five acre bright-line rule, such a rule was implicit in its decision because of the way the issue regarding rural densities was framed.” *Thurston County*, 164 Wn.2d at 358, fn. 20.

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<sup>55</sup> *Kitsap Citizens for Rural Preservation et al. v. Kitsap County*, 1994 WL 907904 at 12 (1994).

<sup>56</sup> Resp. at 35.

As in *Thurston County*, the Board’s use of a “bright line” rule in this case is implicit in the Board’s decision because of the way in which the issue regarding rural density is framed. The Board characterized “a net residential density of 1 du/5 acres – [as] a rural, not urban density, . . . consistent with preserving the rural character.”<sup>57</sup> This was a bright line characterization by the Board. The Board did not analyze the types of clustered developments on small lots allowed by the ordinance and determine whether they would constitute “urban growth” or destroy (not preserve) “rural character.” The Board simply declared that a density of one du per five acres is a “rural” density. This was a bright line ruling bereft of any analysis.

Further, in *Thurston County*, the Court held:

Whether a particular density is rural in nature is a question of fact based on the specific circumstances of each case. . . . The Board . . . must on remand, consider local circumstances and whether these densities are not characterized by urban growth and preserve rural character.

*Thurston County*, 164 Wn. 2d at 359-360. Here, the Board never looked to local circumstances but simply applied a bright line rule.

The County, embracing a bright line posture itself, contends that “Five acre lots are clearly rural parcels under any planning principle.”<sup>58</sup>

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<sup>57</sup> App. 2 (FDO) at 36.

<sup>58</sup> Resp. at 35.

This ignores, of course, that under the ordinance hundreds of lots smaller than five acres can be created in multiple clusters close to one another. Whether *that* pattern of development constitutes “urban growth” or would destroy “rural character” is not determined by whether five acre lots meet a bright line rule or not.

The Board’s decision is an error of law and must be remanded because “[t]he GMHB, as a quasi-judicial agency, lacks the power to make bright-line rules regarding maximum rural densities.” *Thurston County*, 164 Wn. 2d at 358-359.

2. The Legislature did not establish a “balancing test” authorizing urban growth in rural areas as long as it was “offset” by other benefits.

Contrary to the County’s assertion that “Appellants have turned the substantial evidence standard on its head,”<sup>59</sup> our Opening Brief shows that substantial evidence in the record fails to support the Board’s decision that this urban-suburban cluster development ordinance “*accommodate[s] appropriate rural densities and uses that are not characterized by urban growth and are consistent with rural character.*” RCW 36.70A.070 (5) (b) (emphasis added).

The GMA was intended to avoid leap-frog development, including

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<sup>59</sup> Resp. at 48. The legal issues on appeal and the evidence in the record have nothing to do with Appellants “planning philosophy” as asserted by the County.

subdivisions springing up in the midst of rural areas. The County, however, suggests that the Legislature created a balancing test that would allow urban growth in rural areas as long as other benefits (specifically, open space) were provided. The County states, “any negative aspect of this ‘compact rural development’ is more than offset by the benefit of preserving rural open space.”<sup>60</sup> But the County provides absolutely no analysis or citation to any statute to support this imagined “balancing test” provision because none exists in the GMA.

The Ordinance’s requirement for open space adjacent to new subdivisions in rural areas does not change the character of the subdivisions themselves. The County emphasizes that the suburban-style subdivisions authorized by the Rural Wooded ordinance will be adjacent to large areas of protected open space, but it fails to explain how the presence of open space in the vicinity of a suburban/urban subdivision makes the subdivision any less urban. Indeed, open space or not, the suburban-style subdivisions authorized by the ordinance are exactly the type of development in rural areas that the Legislature sought to avoid when it adopted the GMA.

Visually, these subdivisions would be incongruous islands of urban development in a rural sea. There is no substantial evidence in the record

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<sup>60</sup> *Id.*

to show otherwise.<sup>61</sup> One of the GMA's prime goals was to do away with these scattershot urban intrusions into rural areas. RCW 36.70A.020 (2); RCW 36.70A.070 (5), and RCW 36.70A.110 (1). Yet, the Rural Wooded ordinance authorizes exactly what the GMA intended to avoid.

3. Bare assertions do not rebut the Board's miscalculation of rural density using the entire parcel formula.

Density calculations are a mathematical abstraction. Development is "characterized by urban growth" depending on such things as its impact on the land, its visual quality, and its impact on public facilities and services. Attempting to reduce the evaluation to a numeric calculation is fraught with danger. The Board's and County's density calculations here show just how that game can be played.

The GMA requires that new development in rural areas be consistent with rural character and not constitute urban growth. RCW 36.70A.070. The Act's focus is on the density of the new development, not the density of land not being developed. If density calculations are to be useful, they must be based on the land being developed, not on the land *not* being developed.

Under the County's "rural residential" zone, a density of one unit per five acres is allowed. That zone allows one home on a five acre lot

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<sup>61</sup> Resp., Tab 63, Vol. I (Comp. Plan); Vol. II (FEIS). The County's response fails to point to any evidence in the record because none exists.

and would not typically require urban services. Conversely, under the Rural Wooded ordinance a subdivision of 25 homes, each on an 8000 square foot lot, looks urban (or suburban). If, as allowed by the ordinance, those 25 homes are located on five acres, they would have a density of five units per acre. The public service needs of those 25 homes and their visual impact is a function of the small lots packed in close to one another. Those primary impacts do not vary as a function of whether there are other undeveloped lands in the vicinity. The primary visual and public service impacts remain. (Indeed, to a certain extent, isolating a suburban-style subdivision in the midst of otherwise undeveloped lands can exacerbate these impacts. The visual incongruity is all the more stark and the inefficiencies of attempting to provide urban facilities and services are greater.)

These are the kinds of evaluations which inform the decision as to whether the development patterns allowed by the RWIP ordinance are “characterized by urban growth.” We sometimes summarize these development patterns by referring to their “density,” but density calculations are subject to manipulation that can hide the essential character of the developments being analyzed.

Consider, for example, the scenario above of a 25 home subdivision on five acres. The basic density calculation would result in a

density of five homes per acre. Now, suppose you calculated the density taking into account not just the five acres developed with houses, but also another 120 acres of adjacent woodlands. By including those woods in the density calculation, you could conclude that the density of the subdivision was only one home per five acres. The essential qualities of the subdivision would not have changed at all. But by including the adjacent woods in the calculation, the mathematical abstraction of the development would change dramatically—from five homes per acre to one home per five acres.

The County foisted just this kind of mathematical manipulation on the Board and continues with that effort in this appeal. The Board's decision is contrary to its own test articulated in the decision on appeal under *KCRP I*:

The 'true test of whether' a development regulation results in urban growth is to determine what the regulation permits to be 'physically constructed on the ground, in the real world' and 'how that potential outcome squares with the Act's definition of urban growth.'<sup>62</sup>

The County and the Board used both developed and undeveloped land in the density calculations to water down the density to sound more rural (one unit per five acres). This is not the physical reality on the ground.

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<sup>62</sup> App.2 (FDO) at 37 (citing *KCRP I*, 1994 WL 907885 at 11).

The County offers no principled rationale for this mathematical gamesmanship. Instead, it relies on conclusory statements:

To give effect to the purpose of the cluster program, the total acreage of the parcel must be counted, including both open space and the developed area.<sup>63</sup>

The County fails to explain, though, why the open space “must be counted” in calculating density and, more fundamentally, why a density calculation that includes open space provides a definitive characterization of the development’s urban and rural qualities. Given that the Act’s focus is on the qualities of and impacts flowing from the developed land, a density calculation focused just on the developed land would provide a far more useful insight.

The County then changes course and argues that the density calculation does not matter after all. (“In any event, so long as it retains its rural character, it does not matter what the resulting density is.”<sup>64</sup> Here, we agree, in part. The density calculation may provide some useful information (if done correctly), but, in the end, it is the development’s qualities and impacts that determine whether it constitutes impermissible urban growth in a rural area. The Board never addressed that issue, instead focusing exclusively on the allowed densities (and the improperly

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<sup>63</sup> Resp. at 52.

<sup>64</sup> *Id.*

calculated densities, at that). This Court should remand this issue consistent with *Thurston County* and *Viking*.

4. The County misplaces its reliance on decision criteria to preserve rural character.

The County asserts that “there are specific provisions designed to ensure the preservation of rural character and to prevent urban development” that must be shown “as part of the application process.”<sup>65</sup> “[R]ural character is painstakingly protected by strict regulations in the RWIP.”<sup>66</sup> The County’s assertions are empty promises, not guarantees that the development standards will save rural character. The Board erroneously left the preservation of rural character to the County Hearing Examiner(s) on an individual application basis, instead of first assessing whether the ordinance as a whole guarantees rural preservation as required by the GMA. By leaving these critical decisions to the discretion of the Hearing Examiner, the County also effectively avoids scrutiny by the Hearings Board, which has no role in reviewing individual project decisions. *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 181-182, 4 P.3d 123 (2000). In turn, citizens are deprived of their right to have the Hearings Board determine whether the ordinance violates GMA requirements. (An appeal of an examiner’s decision goes to superior

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<sup>65</sup> Resp. at 50.

<sup>66</sup> *Id.* at 51.

court.) *See* RCW 36.70C.

The Board's decision places complete reliance on hearing examiners to use eight decision criteria in the ordinance to approve each individual project under the RWIP.<sup>67</sup> But half of those "criteria" are irrelevant because the ordinance requires the hearing examiner to consider only four of them to "preserve rural character": a. Clustering of development as applicable; b. Preservation of critical areas, resource areas, groundwater recharge, and natural features; c. Provision for a coordinated, comprehensive, interconnected, and integrated system of Permanent Open Space; and d. Placement of structures, circulation systems and utilities that minimize impervious surfaces and the alteration of the land and also responds to physical characteristics of the property.<sup>68</sup>

Although a hearing examiner is required to evaluate other decision criteria,<sup>69</sup> these other "criteria" are either advisory and/or are irrelevant to the preservation of rural character as prescribed in the ordinance.<sup>70</sup>

For example, the County claims to achieve compliance with RCW 36.70A.070(15)(g)<sup>71</sup> when the only mandatory requirements that could be required by the hearing examiner are the internal and external buffer

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<sup>67</sup> App. 2 (FDO) at 43, fn. 15; *See* App. 7, Ex. A at 8, KCC 17.301.080H.

<sup>68</sup> Resp. Br. at 38; App. 7, Ex. A, KCC 17.301.080H 4.

<sup>69</sup> App. 7, Ex. A at KCC 17.301.080E; KCC 17.301.080 H.1.

<sup>70</sup> Resp. at App. E.

<sup>71</sup> Compatibility with the use of the land by wildlife and for fish and wildlife habitat.

widths, maximum number of units in cluster, and compliance with the County's Critical Areas Ordinance ("CAO") and other code provisions. All urban and rural developments in the County are required to comply with the CAO. There is no requirement in the CAO that developments in rural areas avoid being "characterized by urban growth."

All other development standards cited by the County use advisory, not mandatory, language, *i.e.*, using words like "encouraged," "encouraged where practical" and "should be."<sup>72</sup>

Finally, reliance on the State Environmental Policy Act ("SEPA") will not serve as an effective check and balance to guide the hearing examiner to protect rural character.<sup>73</sup> Nothing in SEPA or the CAO prohibits urban growth in rural areas or requires protection of rural character.

5. The Court must consider the entire scope of developments allowed by the ordinance.

The County asserts that speculation is not the basis for reversal.<sup>74</sup> But the parties and this Court must consider the development patterns that may arise county-wide under the ordinance to evaluate whether it allows development that the GMA intends to prohibit in rural areas. If the

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<sup>72</sup> App. 7 at Ex. A, KCC 17.301.080.E.5, E.6, E.9, E.11.

<sup>73</sup> Resp. at 45.

<sup>74</sup> Resp. at 52.

ordinance allows *any* development that would constitute “urban growth” or conflict with “rural character,” then the ordinance must be revised. Appellants cannot object to the ordinance’s terms later, during the processing of an individual permit application. At that time, it is too late for parties to challenge the validity of the ordinance. *Wenatchee Sportsmen*, 141 Wn.2d at 169. Only now, when the ordinance is freshly minted is it subject to review by the Board and courts. *Id.*; *See also* RCW 36.70A.300 (5).<sup>75</sup> The Board does not have jurisdiction to make a ruling on any individual development permit application. RCW 36.70A.280 (1).

Appellants must challenge the fatal flaws in this ordinance now; otherwise such a flawed ordinance will later guide development in the last remaining rural lands in the County.

The issue is not whether we are “speculating” as to the specific development proposals that may later be submitted for review. The issue is to determine what type of development is allowed by this ordinance. If the ordinance allows developments that constitute impermissible “urban growth” or would impair “rural character,” the ordinance must be remanded, even though no specific project of that type has yet been proposed.

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<sup>75</sup> Appeals must be filed within 30 days of enactment of ordinance.

In addition, the County asserts that hearing examiner decisions made subdivision-by-subdivision will prohibit urban services in rural lands and therefore, urban services simply cannot occur.<sup>76</sup> Appellants are not arguing that one 20-acre parcel under the RWIP will require urban services. Here, the issue is the problem of cumulative impacts of dozens of these 25 home subdivisions creating hundreds of new urban sized lots in rural areas.<sup>77</sup> After many of these subdivisions are approved and hundreds of homes are built on these suburban lots, the need for urban services will become apparent and inevitable. This regulation allows 8,421 homes within 335 subdivisions of 25 homes each, throughout some of the most remote areas of the County or sited in close proximity to each other near urban areas. This entire scheme accommodates over 18,000 additional residents (at 2.5 person per du on average), nearly one-third of the County's expected twenty year total population growth. That scale of development cannot possibly be served by community wells, community septic systems, rural storm drain systems, and private roads. Again, the County fails to cite to substantial evidence in the record to show otherwise because none exists.

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<sup>76</sup> Resp. at 53.

<sup>77</sup> Appellants' Opening Brief provide an example of the type of development that could occur for large contiguous parcels rural lands owned by Pope Resources. See Op. Br. at 45-46.

The vesting problem coupled with the County's flawed monitoring program discussed *infra*, guarantees the County's "prohibition" on urban services will fail, resulting in the inevitable expansion of urban services to these misplaced urban subdivisions long before homes are built and the demand for urban services arises.

6. Monitoring of subdivision developments will not protect rural character due to vested rights.

The monitoring provisions in the ordinance are an after-the-fact alarm and contain fatal flaws that will not control the cumulative effect of RWIP development due to (1) vesting and impacts from development phases and approved applications that have not yet been manifested; and (2) the lack of a clear benchmark against which to monitor rendering the monitoring worthless.<sup>78</sup>

The County's response misleads by positing that the "stop and assess" program will preclude vesting because submittal of applications at the end of each 5,000 phase would be rejected.<sup>79</sup>

The ordinance allows two or more phases to be under development at the same time because of the provision in the ordinance that allows for the release of subsequent phases: "Final approval for Rural Wooded Incentive Program developments comprise more than 30 percent or 1,500

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<sup>78</sup> Op. Br. at 41-44.

<sup>79</sup> Resp. at 54.

acres, whichever is greater, of the total Phase acreage.”<sup>80</sup> In other words, to move to another phase of 5,000 acres, only 30 percent or 1,500 acres of the prior 5,000 acre phase need to be developed. Thus, for example, up to 2,000 homes on 10,000 acres could be vested long before monitoring results are available and, even then, the impacts from all of the subdivisions in the first phase may not manifest themselves because they might not even be built before the second phase is “released” by the County.<sup>81</sup> The flawed monitoring provision is too little too late.

E. THE COUNTY’S “DISCRETE DOCUMENT” FAILS TO MEET GMA’S RURAL ELEMENT REQUIREMENTS

The GMA’s rural element requires a county to consider the *GMA goals and local circumstances* when “establishing patterns of rural densities and uses.” RCW 36.70A.070 (5)(a). A county is required to “develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of this chapter.” *Id.*

In our Opening Brief, Appellants cite to the County’s 2007 Buildable Lands Report that demonstrates that at least **30,069** existing nonconforming developments (at urban densities) exist in rural lands

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<sup>80</sup> App. 7, Ex. A at 3, KCC 17.301.080B.2.b; 8, KCC § 17.301.080 I. 1, 2. Phased development within an individual development project may be vested for a ten year period; vesting for five years with an option for an additional five year extension.

<sup>81</sup> *Id.*

near and adjacent to the Rural Wooded lands now eligible for subdivision development.<sup>82</sup> At least an additional 7,639 vacant non-conforming vested lots are ripe for further urban sprawl development.

The County falsely asserts that Appellants believe that non-conforming lots are eligible for RWIP development.<sup>83</sup> That is not the issue on appeal. The issue on appeal is whether substantial evidence supports the Board decision affirming the County's discrete document as GMA compliant when the Board committed an error of fact<sup>84</sup> and failed to consider problematic local circumstances in the record surrounding the rural lands in which RWIP developments will occur.

The GMA calls for consideration of these County-specific local circumstances in planning rural densities and uses. The County must consider these local circumstances if the GMA's goals and requirements are met. RCW 36.70A.070 (5) (b); *Thurston County*, 164 Wn. 2d at 353; *Viking*, 155 Wn.2d at 130.

While the characteristic of pre-existing parcelization of urban sprawl cannot be undone, there is no reason (and no authorization under the GMA) to exacerbate the problem by creating even more urban lots and subdivisions in the rural area. *Bremerton I*, 1995 WL

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<sup>82</sup> Op. Br. at 59-60, Table 1.

<sup>83</sup> Resp. at 42.

<sup>84</sup> See Op. Br. at 60-61.

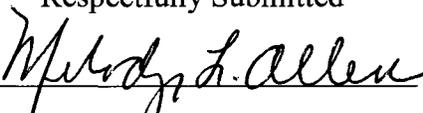
903165 at 56. The Board erred when it approved the County's "discrete document" which failed to consider this cumulative impact.

### III. CONCLUSION

Appellants have carried their burden of proof. For the reasons stated herein, and incorporating by reference Appellants' opening brief (at 49-50), Appellants request this Court to vacate the portions of the Board's Final Decision and Order dated August 15, 2007, Order on Motion for Reconsideration dated September 13, 2007, and Order Finding Compliance dated June 5, 2008, challenged herein; to remand issues to the Board that it failed to consider; and to provide such other relief as the Court deems reasonable.

Dated this 7<sup>th</sup> day of August, 2009.

Respectfully Submitted

By: 

Melody L. Allen, WSBA #35084  
Attorney for Appellant Suquamish Tribe  
18490 Suquamish Way  
P.O. Box 498  
Suquamish, WA 98392  
Telephone 360-394-8488  
Fax: 360-598-4293

By: David A. Bricklin - *must per authorization*

David A Bricklin, WSBA #7583  
BRICKLIN NEWMAN DOLD, LLP  
Attorneys for KCRP  
1001 Fourth Ave. #3303  
Seattle, WA 98154  
Telephone 206-264-8600  
Fax: 206-264-9300  
(Attorney for Appellant Kitsap Citizens for  
Rural Preservation)

By: Jerry L. Harless *must per authorization*

Jerry L. Harless,  
P.O. Box 8572  
Port Orchard, WA 98366  
Telephone 360-271-2642  
(Pro se)

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

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DIVISION II  
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STATE OF WASHINGTON  
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NO. 39017-5-II (Consolidated)

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THE SUQUAMISH TRIBE; KITSAP CITIZENS FOR RURAL  
PRESERVATION; and JERRY HARLESS,

Appellants,

v.

CENTRAL PUGET SOUND GROWTH  
MANAGEMENT HEARINGS BOARD; and  
KITSAP COUNTY,

Respondents.

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PROOF OF SERVICE

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Melody L. Allen	David A. Bricklin	Jerry L. Harless
WSBA No. 35084	WSBA No. 7583	P.O. Box 8572
Suquamish Tribe	Bricklin Newman	Port Orchard, WA 98366
18490 Suquamish Way	Dold, LLP	(360) 271-2642
Suquamish, WA 98392	1001 Fourth Ave.,	Pro Se
(360) 394-8488	Suite 3303	
Attorney for Appellant	Seattle, WA 98154	
Suquamish Tribe	(206) 621-8868	
	Attorney for Appellant	
	Kitsap Citizens for	
	Rural Preservation	

I, NEOMA BOURÉ, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am the legal secretary for the Office of the Suquamish Tribal Attorney. On the 7<sup>th</sup> day of AUGUST, 2009, I caused the REPLY BRIEF OF APPELLANTS SUQUAMISH TRIBE, ET AL.; MOTION FOR LEAVE TO FILE AN OVER LENGTH REPLY BRIEF APPELLANTS SUQUAMISH TRIBE, ET AL along with this PROOF OF SERVICE, to be served on the persons & addresses listed below in the manner indicated below:

Martha P. Lantz, Assistant Attorney General  
1125 Washington St. SE  
P.O. Box 40110  
Olympia, WA 98504-0110  
 By United States Mail  
 By Personal Service  
 By Email

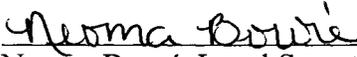
Shelley E. Kneip  
Lisa J. Nickel  
Kitsap County Deputy Prosecuting Attorney  
614 Division Street, MS-35-A  
Port Orchard, WA 98366-4676  
 By United States Mail  
 By Personal Service  
 By Email

David Bricklin  
Bricklin Newman Dold, LLP  
1001 Fourth Ave., Suite 3303  
Seattle, WA 98154  
 By United States Mail  
 By Personal Service  
 By Email

Jerry L. Harless  
P.O. Box 8572  
Port Orchard, WA 98366  
 By United States Mail  
 By Personal Service  
 By Email

Charles Maduell  
Clayton Paul Graham  
Davis Wright Tremaine LLP  
1201 3<sup>rd</sup> Ave., Ste. 2200  
Seattle, WA 98101-3045  
 By United States Mail  
 By Personal Service  
 By Email

DATED this 7<sup>th</sup> day of AUGUST, 2009.

  
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Neoma Bouré, Legal Secretary for  
Melody Allen