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COURT OF APPEALS, DIVISION II  
OF THE STATE OF WASHINGTON

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BRINNON GROUP and BRINNON MPR OPPOSITION,  
Appellants,

v.

JEFFERSON COUNTY, STATESMAN GROUP OF COMPANIES,  
LTD, et al.  
Respondents.

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APPELLANTS' REPLY BRIEF CORRECTED

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**I. INTRODUCTION AND SUMMARY OF THE CASE**

**A. The Constitutional Writ Issues**

Appellants Brinnon Group and Brinnon MPR Opposition (collectively “Brinnon”) challenge Jefferson County Ordinance No. 01-0128-8 (“Ordinance”)<sup>1</sup> because Jefferson County (“County”) did not substantially comply with the statutory procedural requirements of the Planning Enabling Act (“PEA”).<sup>2</sup> Because of such noncompliance, the County did not have authority to adopt the Ordinance. It is well established that in adopting an ordinance, a county’s substantive violation of the statutory procedural requirements that govern its exercise of discretion is contrary to law.<sup>3</sup> The remedy for adopting an ordinance in a manner contrary to law is to void the ordinance.<sup>4</sup> On this basis the Ordinance establishing the Brinnon Master Planned Resort (“MPR”) should be voided.

One substantive procedural violation was the failure of the County Board of County Commissioners (“BOCC”) to remand to the County Planning Commission (“Commission” or “PC”) for a public hearing and recommendation when the BOCC decided to add an MPR “text amendment”

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<sup>1</sup>Clallam County Clerk’s Papers (“CCP”) at 320 to 345 (“CCP 320-45”); Thurston County Clerk’s Papers (“TCP”) at 135 to 160. Appendix to Petitioners’ Opening Brief at page A-100 to A-125 (“A-100 to A-125”). The Superior Court Transcripts (Reports of Proceedings) are referenced as “CT” for Clallam County and “TT” for Thurston County. The certified administrative record from the Western Washington Growth Management Hearings Board (“Growth Board”) is referenced as “AR” and the Growth Board Hearing Transcript is referenced as “GT.”

<sup>2</sup>The County plans under both the PEA and the Growth Management Act (“GMA”) and must substantially comply with both statutes when adopting comprehensive plan amendments. Appellants’ Opening Brief (“Op. Br.”) at 27-28. The relevant PEA provisions are provided in Appendix A-1 to A-5 hereto.

<sup>3</sup>Op. Br. at 31-32.

<sup>4</sup>Id. at 34-35.

to the County's comprehensive plan.<sup>5</sup> The purpose of this "text amendment" was to define in the comprehensive plan, the scale, intensity, and type of uses allowed and required inside the proposed MPR.<sup>6</sup> The BOCC first proposed a "text amendment" after all opportunity for public comment was closed.<sup>7</sup> Because of the BOCC's failure to remand, the PC did not have an opportunity to advise the BOCC regarding the language to be used in this "text amendment." The public did not have any opportunity to comment to the PC or BOCC regarding this "text amendment." There was not substantial compliance with the PEA requirement for a remand to the PC for a public hearing and recommendation.<sup>8</sup>

The BOCC adopted "map amendment" ("BOCC adopted map") was substantively different from the PC recommended "map amendment" ("PC map") and the BOCC committed a similar substantive procedural violation when it failed to remand the BOCC proposed map changes to the PC for a public hearing and recommendation.<sup>9</sup>

The failure of the BOCC to remand to the PC for an additional public hearing was an extremely important flaw in the public process. The public was becoming very concerned about the harms that the project could do to the surrounding Brinnon community and to Hood Canal. At the previous

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<sup>5</sup>The remand and a PC public hearing are required by RCW 36.70.430. Op. Br. at 30. The required procedure and the BOCC's failure to substantially comply with this procedure is discussed in the Op. Br. at 7-8, Note 41.

<sup>6</sup>Op. Br. at A-115.

<sup>7</sup>Comment closed on 12-7-07. Op. Br. at 2. The BOCC "text amendment" was introduced on 1-14-08. Id. at 41.

<sup>8</sup>Id. at 7-8, Note 41.

<sup>9</sup>The inconsistencies between the BOCC adopted map and the PC map are outlined in the Op. Br. at 10, Note 48; See Op. Br. at 30 for requirements of RCW 36.70.430. See also Appendix A-4 for the full text of RCW 36.70.430.

hearings before the BOCC and PC, it was difficult for the public and PC members to understand the scope of the proposed comprehensive plan amendment. The section labeled “Chapter 1-The Proposal” in the EIS was 17 pages long.<sup>10</sup> But these 17 pages did not explicitly identify any map or text as the proposed comprehensive plan map or text amendments.<sup>11</sup>

In fact, there is no map in the whole EIS identified as the proposed comprehensive plan “map amendment.”<sup>12</sup> There is no text identified in the whole EIS as the proposed “text amendment.” The other major document distributed to the public before the Ordinance was adopted was the 9-5-07 Staff Report.<sup>13</sup> This document had a proposed “map amendment”<sup>14</sup> but this map is different from any in the EIS.<sup>15</sup> This Staff Report does not quote text for any proposed MPR “text amendment.”<sup>16</sup> The original application<sup>17</sup> was available in the project file. It included a proposed map amendment and a proposed text amendment but these proposed amendments were not consistent with anything in the EIS and so were no longer relevant when the EIS was issued.<sup>18</sup>

It was unfair to the public and to the PC, that neither Statesman nor the Staff provided to the public and PC a clearly identified proposed map and text comprehensive plan amendment for the MPR that was consistent with

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<sup>10</sup>AR 1754 at 1-1 to 1-17.

<sup>11</sup>Id.

<sup>12</sup>“The Proposed Master Plan” in the EIS (AR 1754 at page 1-4) is a map with a substantial amount of information but there is nothing to suggest what parts of this map were intended to be the comprehensive plan “map amendment.”

<sup>13</sup>AR 1385-1423.

<sup>14</sup>AR 1423.

<sup>15</sup>AR 1754.

<sup>16</sup>AR 1385-1423.

<sup>17</sup>AR 313-58.

<sup>18</sup>Compare AR 313-58 with AR 1754.

the EIS. It was also unfair to the public and to the PC that the alternatives to the Proposal in the EIS 1) did not have clearly identified proposed map and text amendments, and 2) did not include any alternative with lower environmental cost<sup>19</sup> such as an alternative without a golf course and with more natural amenities.

If there would have been reasonable alternatives with lower environmental cost and if the proposed map and text amendments for the Proposal and each alternative had been clearly identified, the public and the PC would have been able to focus their comments and review on issues relevant to the amendment of the comprehensive plan. Had the BOCC remanded its new clearly identified BOCC proposed text and map amendments to the PC, the public and PC could have focused their review on these proposed amendments and made specific recommendations of ways to improve the BOCC proposal to benefit the public interest.

The PEA provision, RCW 36.70.440, provides that after the remand, the BOCC can adopt the BOCC original proposal or any PC recommendation without further public process. Had the BOCC complied with the PEA statutes that govern its exercise of discretion, it is likely that the MPR comprehensive plan amendment would have better served the public interest.

There was not substantial compliance with the statutory procedural requirements in the PEA that govern the County's exercise of discretion in adopting MPR comprehensive plan amendments. The adoption was contrary to law. Therefore the Ordinance should be voided. There is no means other

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<sup>19</sup>See Op. Br. at 47-54.

than a Constitutional Writ to address this claim from the Complaint that the BOCC planning under the PEA adopted comprehensive plan amendments without legal authority.<sup>20</sup> As it states in the Opening Brief at 33,

The sole question raised in the Summary Judgment Motion was whether Brinnon has some other means to seek review of the claim raised in the Complaint. There is no other means and the Clallam Court erred when it found otherwise.

Brinnon requests that this Court reverse the Summary Judgment decision. To promote judicial efficiency, Brinnon also requests that this Court address the purely legal issue and find that the BOCC planning under the PEA and GMA did not substantially comply with the statutory procedural requirements of RCW 36.70.430 such that it acted without authority and contrary to that law such that the Ordinance is voided.

**B. The Administrative Appeal**

The Comprehensive Plan of the County emphasizes that amendments to the Comprehensive Plan must conform to:

The requirements of the Washington State Growth Management Act, Chapter RCW 36.70A and the State Planning Enabling Act, Chapter RCW 36.70.<sup>21</sup>

The proposed MPR is a site-specific comprehensive plan amendment.<sup>22</sup> The general requirement in the comprehensive plan regarding “process” for a site-specific amendment is:

The Department of Community Development will process the amendment pursuant to the procedures contained within Chapter 36.70 RCW [PEA] and the Jefferson County development regulations.<sup>23</sup>

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<sup>20</sup>Op. Br. at 32.

<sup>21</sup>AR 374 (Appendix A-6 hereto) (Appendix A-145 to Op. Br.)

<sup>22</sup>AR 376 (Appendix A-8 hereto) (Appendix A-146 to Op. Br.).

<sup>23</sup>AR 376-77 (Appendix A-8 and A-9 hereto) (Appendix A-146 and A-147 to Op. Br.).

Based on these provisions in the Comprehensive Plan, the Western Washington Growth Management Hearings Board (“Growth Board”) concluded:

where the County has imposed the requirements of the Planning Enabling Act upon itself as part of its process for adopting site specific plan amendments pursuant to RCW 36.70A.140, the Board has jurisdiction to review whether the County has complied with these provisions as a means of satisfying the GMA’s public participation program provisions.<sup>24</sup>

Earlier in this brief (supra at 1-5) Brinnon discusses the failure of the BOCC to remand its proposed new “text amendment” and map changes to the PC as required by RCW 36.70.430. For its Constitutional Writ, Brinnon’s claim is that the Ordinance should be voided because the BOCC did not substantially comply with the PEA procedural statutes that govern the exercise of its discretion. For its administrative appeal, Brinnon’s claim is that the failure of the County to hold a public hearing required by RCW 36.70.430 is a substantial violation of the County’s adopted GMA public participation program such that the County did not comply with “the spirit of the [GMA] program and procedures.”<sup>25</sup> In 1000 Friends of Washington v. McFarland, 159 Wn.2d 165, 149 P.3d 616, 618 (2006), the Court emphasized that because the “State had established elaborate procedures for public participation” in the GMA, that GMA enactments are not subject to initiatives and referendums. This Court should emphasize the importance of

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<sup>24</sup>TCP 24, L. 23-29 (Op. Br. at A-54).

<sup>25</sup>Op. Br. at 37-44. The GMA public participation requirement is provided in RCW 36.70A.140 (Appendix A-10 hereto). This requirement is made applicable to comprehensive plan amendments by RCW 36.70A.070(preamble) which states, “A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140.”

public participation in GMA enactments and find that the failure to remand to the PC for a public hearing and recommendation required by RCW 36.70.430 did not comply with RCW 36.70A.140, the GMA public participation statute. This Court should remand back to Growth Board for its determination regarding invalidity consistent with this Court's Opinion.<sup>26</sup>

This Court should find non-compliance with the GMA regarding two other issues addressed in the Opening Brief. First, the County has two currently adopted comprehensive plan land use designation maps, one on page 3-45 of the comprehensive plan and one in Figure BR-3 of the Brinnon Subarea Plan.<sup>27</sup> For the MPR site, the first comprehensive plan map directs that all development shall be urban MPR development and the second map directs that all development shall be rural residential with a maximum density of 1 unit per 5, 10, or 20 acres.<sup>28</sup> The first map allows development that the second map prohibits. This Court should find the Growth Board erred by not finding the new MPR designation internally inconsistent with the rural residential designations in said Figure BR-3 in violation of RCW 36.70A.070(preamble) which states, "The plan shall be an internally consistent document and all elements shall be consistent with the future land use map."<sup>29</sup>

Second, this Court should find that the MPR text amendment does not set limits on non-residential building intensities to serve as the blueprint for

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<sup>26</sup>Op. Br. at 44.

<sup>27</sup>Op. Br. at 45.

<sup>28</sup>Id.

<sup>29</sup>Op. Br. at 45-46.

future development regulations.<sup>30</sup> This violates RCW 36.70A.070(1) which states that the land use element “shall include . . . building intensities.”<sup>31</sup> The only way to include “building intensities” is for each land use designation in the land use element to limit building intensities. Because the County has failed to limit non-residential building intensities in the MPR amendment, this Court should find non-compliance with RCW 36.70A.070(1) and find the Growth Board erred in finding otherwise.<sup>32</sup>

The last issues in the administrative appeal address errors the Growth Board made when it found the County complied with the State Environmental Policy Act (“SEPA” - chapter 43.21C RCW as implemented by chapter 197-11 WAC). In the Opening Brief, Brinnon shows that the EIS is inadequate because it does not have alternatives that can both feasibly attain or approximate the proposal’s objectives and do so at a lower environmental cost as required by WAC 197-11-440(5)(b).<sup>33</sup> In the Opening Brief, Brinnon also showed that the County violated WAC 197-11-660(1) because the County did not cite to specific identifiable policies to justify each of the SEPA mitigating restrictions.<sup>34</sup> When this Court finds a violation of SEPA, it should remand to the Growth Board for a determination regarding invalidity consistent with this Court’s Opinion.<sup>35</sup> This Court is also asked to review a procedural issue involving whether the Growth Board erred in failing, in a Reconsideration Order, to consider new and more precise

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<sup>30</sup>Op. Br. at 46-47.

<sup>31</sup>Id.

<sup>32</sup>Id.

<sup>33</sup>Id. at 47-54.

<sup>34</sup>Id. at 54-55.

<sup>35</sup>Id. at 55.

argument based on evidence previously submitted with the Opening Brief when the Growth Board is obligated by RCW 36.70A.320(3) to consider “the entire record before the board.”<sup>36</sup>

**C. The Judicial SEPA Appeal Under RCW 43.21C.075**

Brinnon filed a judicial SEPA appeal under the authority of RCW 43.21C.075.<sup>37</sup> If this Court finds a serious violation of SEPA, Brinnon requests that this Court find that the County did not have authority to adopt the Ordinance.<sup>38</sup> With such a finding, this Court should void the Ordinance.<sup>39</sup>

**II. REPLY TO COUNTY AND STATESMAN’S STATEMENTS**

**A. Reply To County Preliminary Statement**

The County states that it plans under the GMA<sup>40</sup> but it actually plans under the GMA and PEA. The County states that the MPR comprehensive plan amendments were only the first of five steps.<sup>41</sup> However, this first step was to include all comprehensive plan amendments.<sup>42</sup> The County asks whether a county legislative decision can comply with the GMA but violate the PEA.<sup>43</sup> Of course this must be true or the PEA statute would be superfluous.<sup>44</sup> The County, in essence, asks what the BOCC must do before it can adopt a comprehensive plan amendment.<sup>45</sup> The answer is simple. The

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<sup>36</sup>Id. at 56-60.

<sup>37</sup>Id. at 60.

<sup>38</sup>Id.

<sup>39</sup>Id.

<sup>40</sup>Brief of Respondent Jefferson County with Respect to the Request for a Constitutional Writ (“Co. Br.”) at 1. The comprehensive plan requires all its amendments to be processed pursuant to the PEA. Appendix at A-6 and A-7 to A-8 hereto.

<sup>41</sup>Co. Br. at 1.

<sup>42</sup>AR 1006.

<sup>43</sup>Co. Br. at 2.

<sup>44</sup>Lutheran Day Care v. Snohomish County, 119 Wn.2d 91, 829 P.2d 746 (1992) (“Statutes should not be interpreted in such a manner as to render any portion meaningless, superfluous, or questionable.”)

<sup>45</sup>Co. Br. at 2.

BOCC must exercise its discretion in substantial compliance with the statutes and ordinances which govern its exercise of discretion and which give it authority to act.<sup>46</sup>

**B. Reply To County Statement Of Facts**

The County states as a fact that the MPR comprehensive plan amendments adopted by the BOCC “tracked in substance” the Statesman 2006 application.<sup>47</sup> Whatever the County means, by “tracked in substance,” the amendments adopted were substantially different from the amendments proposed in the 2006 application. One could equally say that all, but the no-action, alternatives in the EIS “tracked in substance” the 2006 application but there are substantial differences between these alternatives as well.

The County admits that the PC majority recommendation did not include any proposed “text” amendment but that text “similar in substance” to what was in the 2006 application and EIS was included in the Ordinance.<sup>48</sup> The PEA is explicit. If the PC majority does not recommend a text amendment, the BOCC authority to adopt a text amendment consistent with the PEA requires the BOCC to refer its proposed amendment to the PC for another public hearing and recommendation.<sup>49</sup> The BOCC acted contrary to law when it failed to make the required referral.

The County states that the “similar in substance” text was made part of the Ordinance pursuant to RCW 36.70.040 which authorizes the

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<sup>46</sup>Supra, this brief at 1-5; Op. Br. at 30-35.

<sup>47</sup>Co. Br. at 3.

<sup>48</sup>Co. Br. at 4-5.

<sup>49</sup>RCW 36.70.430 and -.440 (Appendix A-4 and A-5 hereto).

department to make “comments and recommendations.”<sup>50</sup> But RCW 36.70.040 does not authorize the department to recommend approval of text amendments to the BOCC with the authority of the PC.<sup>51</sup> Under Chapter 36.70 RCW, without a recommendation of approval by the PC, the department can only facilitate a different amendment by recommending that the BOCC use RCW 36.70.430 and -.440 to initiate a change.<sup>52</sup> This still requires a remand to the PC for another public hearing.

The County states that the PC majority recommendation included a map with internal zoning districts.<sup>53</sup> This is inaccurate. The PC map<sup>54</sup> was a comprehensive plan map not a zoning map and it included internal

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<sup>50</sup>Co. Br. at 5.

<sup>51</sup>RCW 36.70.020(6) defines the “comprehensive plan” as policies “approved and recommended by the planning agency or initiated by the board and approved by motion.” Appendix A-11 hereto. RCW 36.70.020(13)(b) defines the “planning agency” as “a department . . . together with its planning commission.” Appendix A-11 hereto. The role of “approval of the comprehensive plan or of any amendment” by the planning agency is explicitly given to the planning commission. RCW 36.70.400 (Appendix A-4 hereto). Pursuant to Chapter 36.70 RCW, there are only two ways to amend a comprehensive plan. It may be done if “approved and recommended” by the planning commission and adopted with no substantive changes by the BOCC or new amendments or changes may be “initiated” by the BOCC perhaps after a department recommendation. RCW 36.70.020(6); RCW 36.70.430 and -.440. While the BOCC does not typically adopt amendments by “motion” it is harmless error to adopt by ordinance or resolution. Key to the legal analysis in this case, there is no authority in Chapter 36.70 RCW for department approval to substitute for commission approval when forwarding a recommended amendment to the BOCC. If there is not commission approval and recommendation consistent with RCW 36.70.400, then the only way to process an amendment under Chapter 36.70 RCW is for the BOCC to initiate an amendment and follow the procedures in RCW 36.70.430 and -.440. RCW 36.70.020(6). These procedures require a remand to the commission for another public hearing and recommendation. RCW 36.70.430. After a recommendation is received from the commission, the BOCC may adopt any recommendation of the commission or may adopt its proposed amendments as initiated. RCW 36.70.440. The County comprehensive plan requires site specific amendments, such as the one under review, to be processed pursuant to Chapter 36.70 RCW and local development regulations. Appendix A-9 hereto. The local development regulations give the duty to recommend approval of comprehensive plan amendments to the commission and not to the department. Appendix A-12 to A-16 hereto.

<sup>52</sup>Supra, this brief at 11, Note 51.

<sup>53</sup>Co. Br. at 5.

<sup>54</sup>Op. Br. at A-128.

comprehensive plan land use districts that are functionally different from zoning districts.<sup>55</sup>

The County argues in its “fact” section, that the Ordinance included text amending the Plan which reflected the PC recommendation and dovetailed with the proposal in the EIS.<sup>56</sup> As previously admitted by the County, the PC recommendation did not include any text amendment.<sup>57</sup> The BOCC simply does not have authority to choose what level of detail it will adopt in a text amendment without any opportunity for review by either the PC or the public. The text amendment is the blueprint for future development inside the MPR and any BOCC initiated amendment deserves careful review by the PC and by the public.<sup>58</sup>

The County argues in its “fact” section that the BOCC-approved map “reflected technical corrections approved by the PC.”<sup>59</sup> These map corrections were more than technical corrections and they were not approved by the PC.<sup>60</sup> The corrections were initiated by the BOCC and the BOCC failed to remand to the PC for another required public hearing.

The County blames Brinnon for challenging that the BOCC acted in a manner contrary to law when it adopted the Ordinance.<sup>61</sup> The right of the BOCC to legislate under the PEA and GMA is restricted by the statutory procedural requirements in the PEA and GMA, and the County acts contrary to law when it does not, as in the instant case, substantially comply with those

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<sup>55</sup>Op. Br. at 43-44; Op. Br. at 9, Note 43, at 10, Note 48, and at 13, Note 57 (Finding 14).

<sup>56</sup>Co. Br. at 5.

<sup>57</sup>*Supra*, this brief at 10.

<sup>58</sup>Op. Br. at 46, at 7-8, Note 41, and at 11-12, Note 53.

<sup>59</sup>Co. Br. at 5.

<sup>60</sup>Op. Br. at 10, Note 48.

<sup>61</sup>Co. Br. at 6.

procedural requirements. The BOCC may not legislate if it ignores the statutory requirements that give it the authority to legislate.

**C. Reply To Statesman Introduction**

Respondent Statesman states that the Clallam Superior Court refused to issue the requested writs.<sup>62</sup> There was never an application for writs noted up to the Clallam Court. The Clallam Court dismissed the case based on Statesman's Summary Judgment Motion.<sup>63</sup> The sole question raised in the Summary Judgment Motion was whether Brinnon had some other means to seek review of the claim raised in the Complaint.<sup>64</sup> Statesman errs when it suggests Brinnon must show that the Clallam Superior Court abused its discretion in failing to issue the requested writs.<sup>65</sup> The Clallam Court did not refuse to issue writs but instead granted a Summary Judgment Motion. The standard of review for a Summary Judgment Motion is provided in the Opening Brief at 26-27. This Court should review de novo the legal issue of whether Brinnon had some other means to seek review of the claim raised in the Complaint. That claim is that the BOCC, planning under the PEA, did not have legal authority to adopt the comprehensive plan amendments because it did not substantially comply with the PEA procedural requirements.<sup>66</sup>

**D. Reply To Statesman Counterstatement of the Issues**

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<sup>62</sup>Statesman's Response Brief ("Dev. Br.") at 1.

<sup>63</sup>CCP at 189.

<sup>64</sup>Op. Br. at 33. Note 152 in the Op. Br. at 33 should have cited to CCP at 189.

<sup>65</sup>Dev. Br. at 2.

<sup>66</sup>Op. Br. at 32.

Statesman misstates the second issue in its Counterstatement of the Issues,<sup>67</sup> when it asks if the Clallam Court abused its discretion. The correct statement asks this Court to review the Summary Judgment legal issue de novo per the standard of review presented in the Opening Brief at 26-27.

**E. Reply To Statesman Counterstatement of the Case**

Statesman states that the first phase of a five phase process “is limited to determining whether the size and scope of the proposal is generally consistent with the BSAP.”<sup>68</sup> While this is one element of the first phase, this phase is described in the record as being the phase that completes all necessary comprehensive plan amendments.<sup>69</sup> The comprehensive plan text is extremely important in GMA planning because it serves as the blueprint for future development regulations.<sup>70</sup> The current non-specific text amendment adopted by the BOCC without any input from the PC or public can accommodate the proposed project but is broad enough to accommodate Disneyland North with 890 residential high rise hotel units<sup>71</sup> or a variety of other projects with even more adverse impacts. The public has the right to protect the Brinnon community by seeking, through an additional public hearing, to have a more detailed text amendment blueprint in the comprehensive plan.

Statesman argues that its application material included a map of the proposed MPR boundary, referring to AR 1522.<sup>72</sup> But this map is called

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<sup>67</sup>Dev. Br. at 2.

<sup>68</sup>Dev. Br. at 4. Statesman offers no citation for why it believes this is the scope of phase 1 of the five phase process. See Dev. Br. at 9 citing to AR 1643 to AR 1659.

<sup>69</sup>AR 1006

<sup>70</sup>Op. Br. at 46, at 7-8, Note 41, and at 11-12, Note 53.

<sup>71</sup>Op. Br. at 11-12, Note 53.

<sup>72</sup>Dev. Br. at 5. This map from the application was described supra, this brief at 3.

“Attachment - 5 Site Map of the Land” and it is not clear what part of this map is the proposed MPR map amendment. Statesman argues that the “DEIS included a map of the proposed MPR boundary” at AR 1715.<sup>73</sup> Statesman argues that the boundaries of the BOCC adopted map “are identical to the map identified in the DEIS.”<sup>74</sup> But this is not true.<sup>75</sup> Statesman also argues that the text amendment approved by the BOCC “captures the substance of the proposal as described in the DEIS.”<sup>76</sup> This also is not true.<sup>77</sup>

Statesman argues that the PC recommended “approval of designating the MPR proposal evaluated in the DEIS.”<sup>78</sup> This is not true. Nowhere in the PC recommendation does it mention it is approving the proposal evaluated in the DEIS.<sup>79</sup> In fact, the PC was so confused about what it was approving that it refers to the proposed comprehensive plan amendment as a “rezone” which it is not.<sup>80</sup> If the PC was confused, so was the public and another hearing on the BOCC proposed text amendment and map changes would have gone a long way toward providing clarity to the PC and the public so that review could be focused on the substance of the comprehensive plan amendments and not on the master site plan presented in the EIS.

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<sup>73</sup>Dev. Br. at 6. This map from the application was described supra, this brief at 3, Note 12. This map did not make the scope of the proposed MPR map amendment clear to the public.

<sup>74</sup>Dev. Br. at 6.

<sup>75</sup> While the boundaries in the BOCC adopted map are the same as the “boundaries” in this DEIS map, nowhere in the DEIS does it state that the proposed MPR map amendment is limited to the boundaries of this DEIS map. The boundaries are visually one of the least emphasized elements of this DEIS map.

<sup>76</sup>Dev. Br. at 6.

<sup>77</sup>“Chapter 1-The Proposal” in the DEIS was 17 pages long. Much of the relevant “substance” in this 17 pages was not captured in the BOCC approved text amendment.

<sup>78</sup>Dev. Br. at 7.

<sup>79</sup>See Op. Br. at A-126 to A-128 for the full majority PC recommendation. In particular, note that the proposed map amendment approved and signed by the PC does not reflect the previously referenced map in the DEIS. See Op. Br. at 9, Note 43. The PC intended to approve its version of the map amendment and intended to approve no text amendment.

<sup>80</sup>See quote from the PC recommendation in the Dev. Br. at the bottom of page 7.

Statesman argues that the BOCC removed the land use designations on the PC proposed map because zoning would occur in a future phase.<sup>81</sup> “Land use designations” or “land use districts” are planning terms that refer to comprehensive plan enactments as opposed to “zoning districts” that refer to development regulations.<sup>82</sup> It is a substantial change to remove land use district designations from a comprehensive plan map.<sup>83</sup> Statesman points out that the department recommended during the public hearing that the BOCC alter the PC map.<sup>84</sup> It is the proper role for the department to recommend that the BOCC initiate an amendment but the statutory procedural requirements of the PEA must be followed.<sup>85</sup> Statesman calls other changes to the PC map “technical corrections.”<sup>86</sup> But changing the land use designation on approximately 20 acres of land in five ownerships can not be considered a “technical correction” and instead it is a substantive change to the PC recommendation that requires referral back to the PC.

Statesman argues that Brinnon was able to comment on the deficiencies of the proposal.<sup>87</sup> Brinnon did comment that there was no PC proposed text amendment.<sup>88</sup> But without authority under the statutory procedural requirements of the PEA, the BOCC adopted a “text amendment”

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<sup>81</sup>Dev. Br. at 9-10.

<sup>82</sup>See Op. Br. at 42-43.

<sup>83</sup>Id.

<sup>84</sup>Dev. Br. at 10.

<sup>85</sup>Supra, this brief at 11, Note 51.

<sup>86</sup>Dev. Br. at 10. In Note 7 on this page, Statesman argues that it was a PC technical error to include the Voetberg, Dowd and Stevens properties in the MPR designation. The PC had authority to include these properties because they were included in the BSAP alternative in the EIS. AR 1754 at page 1-3. According to Statesman’s argument, it was a technical error for the BOCC to include the 15.2-acre DNR leased tidelands in the MPR because these tidelands were not included in the MPR application. AR 1512.

<sup>87</sup>Dev. Br. at 11.

<sup>88</sup>Op. Br. at 19.

without referral to the PC for a public hearing, Brinnon never got to comment to the BOCC about the PC proposed map amendments.<sup>89</sup>

Statesman argues that neither the Clallam Court action nor the Growth Board appeal argued that the MPR was inconsistent with the JCCP or BSAP.<sup>90</sup> Statesman is wrong.<sup>91</sup> Statesman characterizes primary challenges by Brinnon as procedural or addressing “technical irregularities.”<sup>92</sup> In Clallam Court, Brinnon brought a fundamental challenge that the BOCC adopted the Ordinance without authority and contrary to law such that the Ordinance should be voided. In the administrative appeal, Brinnon brings a fundamental challenge that the BOCC violated the spirit of the GMA public participation program and the County made serious SEPA errors and additional substantive errors in meeting GMA requirements. In the Thurston Court appeal, Brinnon challenges that the serious SEPA errors should result in this Court voiding the Ordinance. None of Brinnon’s challenges are based on mere “technical irregularities.”

Statesman argues in a substantial portion of its brief that there are violations of the PEA that Brinnon raised in its Verified Complaint to the Clallam Court that are similar to issues raised before the Growth Board.<sup>93</sup> Statesman then argues that the Clallam Court concluded the Growth Board had provided an adequate remedy at law and refused to issue the

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<sup>89</sup>The PC proposed map amendments were issued on 1/8/08 (Op. Br. at 22), over a month after the BOCC formally closed the public comment period on 12/7/07 (Op. Br. at 21).

<sup>90</sup>Dev. Br. at 11.

<sup>91</sup>Op. Br. at A-67 to AR-74. Brinnon continues to challenge that the adopted MPR map amendment on page 3-45 of the comprehensive plan is internally inconsistent with BSAP Figure BR-3. *Supra*, this brief at 7.

<sup>92</sup>Dev. Br. at 11.

<sup>93</sup>Dev. Br. at 11-17.

requested writs.<sup>94</sup> It bears repeating the reply to this claim that Brinnon provided earlier in this brief:

There was never an application for writs noted up to the Clallam Court. The Clallam Court dismissed the case based on Statesman's Summary Judgment Motion.<sup>95</sup> The sole question raised in the Summary Judgment Motion was whether Brinnon had some other means to seek review of the claim raised in the Complaint.<sup>96</sup> Statesman errs when it suggests Brinnon must show that the Clallam Superior Court abused its discretion in failing to issue the requested writs.<sup>97</sup> The Clallam Court did not refuse to issue writs but instead granted a Summary Judgment Motion. The standard of review for a Summary Judgment Motion is provided in the Opening Brief at 26-27. This Court should review de novo the legal issue of whether Brinnon had some other means to seek review of the claim raised in the Complaint. That claim is that the BOCC, planning under the PEA, did not have legal authority to adopt the comprehensive plan amendments because it did not substantially comply with the PEA procedural requirements.<sup>98</sup>

Supra, this brief at 13. Brinnon did not intend to pursue the writ on any other issue except this identified claim but it intends to seek to void the Ordinance because of the lack of authority by the BOCC to adopt.

### **III. REPLY ARGUMENT**

#### **A. Standard Of Review - Clallam Court Case**

The Clallam court decided a Summary Judgment Motion and this Court reviews de novo the legal issue of whether the claim identified immediately above could be raised in another forum.<sup>99</sup> Statesman argues that a decision to not issue a writ is reviewed for an abuse of discretion.<sup>100</sup>

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<sup>94</sup>Id. at 16.

<sup>95</sup>CCP at 189.

<sup>96</sup>Op. Br. at 33. Note 152 in the Op. Br. at 33 should have cited to CCP at 189.

<sup>97</sup>Dev. Br. at 2.

<sup>98</sup>Op. Br. at 32.

<sup>99</sup>Op. Br. at 26-27.

<sup>100</sup>Dev. Br. at 41.

However, Brinnon never noted up an application for a writ and the Clallam court was not asked to decide if a writ should issue.<sup>101</sup> Therefore “abuse of discretion” is not the correct standard for reviewing the decision on Statesman’s Summary Judgment Motion.<sup>102</sup>

**B. Clallam Court Error (Issue No. 1)**

As described in the Opening Brief, the Clallam court made an error of law in granting the Summary Judgment Motion.<sup>103</sup>

In response, the County argues that Brinnon’s goal is “nullification” of the Ordinance.<sup>104</sup> Brinnon’s actual goal is to be able to have a forum to raise the claim that the County adopted the Ordinance under the PEA without authority and contrary to law such that the Ordinance should be void.<sup>105</sup> The County claims this was not raised in the Verified Complaint.<sup>106</sup> However, under the heading “Constitutional Writ of Certiorari” the Verified Complaint states:<sup>107</sup>

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<sup>101</sup>Supra, this brief at 13, quoted on 18; Op. Br. at A-28 to A-31.

<sup>102</sup>The cases cited by Statesman do not support its claim that the abuse of discretion standard applies to the review of the Clallam court decision. In Snohomish County v. State Shorelines Hearings Bd., 108 Wn. App. 781, 785, 32 P.3d 1034 (2001) abuse of discretion was the standard because the County requested and the Court refused to grant a writ. In San Juan Fidalgo Holding Co. v. Skagit County, 87 Wn. App. 703, 713-14, 943 P.2d 341 (1997) abuse of discretion was used because the trial court had denied Petitioner’s request to issue a constitutional writ. Also in Concerned Women v. Arlington, 69 Wn. App. 209, 221, 847 P.2d 963 (1993) it states that, “The court did not abuse its discretion in denying the request for a constitutional writ.” These cases are all distinguished because Brinnon had not noted up an application for a writ at the time Statesman’s Summary Judgment Motion was granted. The abuse of discretion standard is explained in the Op. Br. at A-17. The Clallam court did abuse discretion because he did not indicate in his Memorandum Opinion Re Motion to Dismiss (Op. Br. at A-32 to A-37) that he understood the fundamental difference between the claim to the Growth Board and the claim in the Constitutional Writ. See supra, this brief at 6-7.

<sup>103</sup>Op. Br. at 27-33; supra, this brief at 1-5.

<sup>104</sup>Co. Br. at 7.

<sup>105</sup>Op. Br. at 27-33; supra, this brief at 1-5.

<sup>106</sup>Co. Br. at 7-8.

<sup>107</sup>CCP 315-16. There is no other claim raised under the Constitutional Writ section of the Verified Complaint. CCP 315-16, sec. 10.4 to 10.12.

- 10.5 There is no other adequate remedy at law to raise issues related to compliance with Chapter 36.70 RCW [PEA] when a legislative Comprehensive Plan Amendment is adopted by a County.
- 10.12 Plaintiffs request that this Court find that Jefferson County acted contrary to law when it did not follow the statutory rules that governed the exercise of its discretion.

The County claims that because Brinnon could make claims before the Growth Board that would lead to “nullification,” other claims (that can not be addressed by the Growth Board or by judicial review of the Growth Board decisions) that would lead to “nullification” should not be allowed.<sup>108</sup> The sole issue raised in the Summary Judgement Motion was whether the claim that the BOCC adopted the Ordinance without authority under the governing PEA statutes could be challenged in another forum.<sup>109</sup> Brinnon has demonstrated that this specific claim may not be raised in another forum and therefore the Summary Judgment Motion was granted in error.<sup>110</sup>

Statesman argues that the procedural components in the PEA must be construed in harmony with the GMA for a County planning under both statutes.<sup>111</sup> But that harmony must ensure that both statutes “carry out their intended legislative purpose.”<sup>112</sup> This Court should understand that it is possible for counties to plan under the PEA or plan under other authority.<sup>113</sup>

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<sup>108</sup>Co. Br. at 8-10. In this section of its brief, the County challenges the case law presented by Brinnon. While the subject matter was different in the cited cases, the governing law is the same and applies to the instant case.

<sup>109</sup>Op. Br. at 27-33; *supra*, this brief at 1-5.

<sup>110</sup>*Id.*

<sup>111</sup>Dev. Br. at 43.

<sup>112</sup>Op. Br. at 27, Note 126.

<sup>113</sup>*Durocher v. King County*, 80 Wn.2d 139, 143, 492 P.2d 547 (1972) (“RCW 36.70 is the enabling statute which provides authority for, and the procedures to be followed by, a county in adopting and administering a comprehensive plan and zoning code.”) A county may choose to use other planning procedures. *Saldin Sec. v. Snohomish*, 80 Wn. App. 522, 533, 910 P.2d 513 (1996) (“counties may elect to operate under the provisions of the [PEA]”).

The GMA requires some counties to comply with the GMA and other counties may choose to comply with the GMA.<sup>114</sup> So some counties may plan only under the PEA, others may plan only under the GMA and some, like Jefferson County plan under both the PEA and GMA. This Court should find that counties planning under both the PEA and GMA must substantially comply with the statutory procedural requirements of both statutes in order to have authority to adopt comprehensive plan amendments.<sup>115</sup>

Statesman argues that the Clallam court did not abuse its discretion when it refused to Issue the Writ.<sup>116</sup> But the issue argued before the Court was not whether the writ should issue but rather whether Statesman's Summary Judgment Motion should be granted. The standard of review for a Summary Judgment Motion was presented in the Opening Brief at 26-27.

Statesman claims that Brinnon had two arguments before the Clallam court: 1) Growth Board cannot review for compliance with the PEA; and 2) Growth Board cannot void the Ordinance.<sup>117</sup> But these were not the arguments presented to the Clallam Court at the Summary Judgment hearing.<sup>118</sup> The issue before this Court is whether Brinnon had any other

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<sup>114</sup>RCW 36.70A.040.

<sup>115</sup>Statesman cites to RCW 36.70.020(11) addressing "official controls." Dev. Br. at 42-43. Official controls do not include comprehensive plan amendments. Under the PEA, official controls generally are governed by RCW 36.70.550 to -.670 while comprehensive plan amendments generally are governed by RCW 36.70.320 to -.450.

<sup>116</sup>Dev. Br. at 43-47.

<sup>117</sup>*Id.* at 44.

<sup>118</sup>The argument presented at the Summary Judgment Hearing was "in adopting the Ordinance the County acted in a manner contrary to law in violation of the statutory rules [PEA provisions] that govern the County's exercise of discretion when adopting a comprehensive plan amendment." Op. Br. at 4, Note 24. This is the allegation presented in the Verified Complaint for the Constitutional Writ. CCP 315-16. This allegation cannot be reviewed either by the Growth Board or by a court conducting an administrative review of the Growth Board Orders. Op. Br. at 4-5, Notes 26 to 30. This issue can only be addressed by a Constitutional Writ.

forum to hear the allegation that the BOCC acted without authority and contrary to law when it adopted the Ordinance without substantial compliance with the statutory procedural requirements of the enabling legislation in the PEA such that the Ordinance must be voided. As described in the Opening Brief, this allegation can only be addressed by a Constitutional Writ.<sup>119</sup>

**C. This Court Should Reach The Issue (Issue No. 2)**

The County claims that Brinnon would read the PEA in a manner that would vitiate the public participation rules of the GMA.<sup>120</sup> The County claims it is Brinnon’s position that:<sup>121</sup>

if a local government achieves anything less than perfect and complete compliance with the PEA, then despite GMA-compliance, the Ordinance passed in the context of a GMA directive or provision would still be declared void for procedural shortcomings pursuant to a constitutional writ.

Here the County is not arguing that the summary judgment ruling should be upheld, but rather is arguing “on the merits” that violation of the PEA should not lead to voiding of the Ordinance. The County mischaracterizes Brinnon’s “on the merits” claim. Brinnon has not asserted that “perfect and complete compliance with the PEA” is required to have a valid ordinance. Brinnon’s position “on the merits” is that there must be substantial compliance with the PEA<sup>122</sup>.

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<sup>119</sup>The Dev. Br. at 45, Note 23, argues that Brinnon cites no authority that the Growth Board does not have jurisdiction over the PEA. First, that was an unchallenged finding of the Growth Board and so is a verity on appeal. Op. Br. at A-54. Second, the jurisdiction of the Growth Board is defined in RCW 36.70A.280(1) and does not include jurisdiction over the PEA.

<sup>120</sup>Co. Br. at 11-14.

<sup>121</sup>*Id.* at 11.

<sup>122</sup>Op. Br. at 28-29 and 34; supra, this brief at 2 and 5.

Brinnon argues that the GMA standard for public participation that local governments comply with “the spirit of the [GMA] program and procedures”<sup>123</sup> should be interpreted to be a “substantial compliance” requirement.<sup>124</sup> Thus Brinnon argues that a County planning under both the PEA and GMA must substantially comply with the statutory procedural requirements in the PEA and independently substantially comply with the public participation requirements in the GMA.

The County argues that compliance with the GMA public participation requirements should preclude consideration of whether a county substantially complies with the statutory procedural requirements of the PEA.<sup>125</sup> Because the County plans under both the PEA and the GMA, it is not appropriate to “read out” the requirement for PEA compliance and only consider GMA compliance because this would make superfluous the PEA provisions that govern the County’s exercise of discretion to adopt the Ordinance.<sup>126</sup> The common law remedy, at least since 1974, for failing to substantially comply with the statutory procedural requirements of the PEA is to void the ordinance.<sup>127</sup> Contrary to the County’s argument, there is nothing in the GMA that suggests that the Legislature intended to abandon this remedy.<sup>128</sup>

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<sup>123</sup>RCW 36.70A.140 (Appendix A-10 hereto).

<sup>124</sup>Op. Br. at 38

<sup>125</sup>Co. Br. at 11-14.

<sup>126</sup>Supra, this brief at 9-10 and Note 44; Our Lady of Lourdes v. Franklin Cy., 120 Wn.2d 439, 842 P.2d 956 (1993) (“Repeals by implication are disfavored.”)

<sup>127</sup>Op. Br. at 4. Note 24, citing to Byers v. Bd. of Clallam Cy. Comm’rs, 84 Wn.2d 796, 799-803, 529 P.2d 823 (1974).

<sup>128</sup>See Chapter 36.70A RCW.

The County argues that substantial compliance with the PEA would strip the BOCC “of their [sic] discretionary legislative power.”<sup>129</sup> The Legislature has not given the County unfettered discretionary power to adopt comprehensive plan amendments. A county planning under the PEA and GMA must substantially comply with the statutory procedural requirements of both statutes in order to have authority to exercise its discretion in planning.

Statesman argues that the PEA requirement for an additional hearing if the BOCC initiates a text amendment or map change should be excused if the GMA does not also require an additional public review for the same change.<sup>130</sup> RCW 36.70A.035(2)(a) is a GMA section that requires an opportunity for public comment if the BOCC makes a change after public comment is closed. RCW 36.70A.035(2)(b) states that this additional public comment “is not required under (a) of this subsection” if certain conditions are met. The clear language of subsection (2)(b) only exempts a change from the requirements of subsection (2)(a) and does not exempt a county planning under the PEA from the requirements in RCW 36.70.430 and -440. A county planning under the GMA and PEA is required to have a higher level of public participation than is required for a county only planning under the GMA.

Statesman argues that the Legislature did not intend to compromise the “GMA by subjecting it to a more rigorous standard under other planning

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<sup>129</sup>Co. Br. at 13.

<sup>130</sup>Dev. Br. at 46-47.

statutes.”<sup>131</sup> It was the County and not the Legislature that adopted a more rigorous standard by choosing to process comprehensive plan amendments under both the GMA and the PEA.

**D. Standard Of Review - Thurston Court Case**

The standard of review is adequately addressed in the existing briefing.<sup>132</sup>

**E. Growth Board Error RCW 36.70A.140 (Issue No. 3)**

Statesman begins by mischaracterizing Brinnon’s GMA public participation claims.<sup>133</sup> Statesman next seeks an interpretation from this Court that RCW 36.70.400 does not direct a commission to set out exact language changes for a commission approved “text amendment.”<sup>134</sup> RCW 36.70.400 provides that the commission motion “shall refer expressly to the maps, descriptive, and other matters [for example, a figure] intended by the commission to constitute the . . . amendment.”<sup>135</sup> These “maps, descriptive, and other matters” should convey, to any person who reads them, the exact changes to the comprehensive plan that are intended. If, as in the instant case, a commission only signifies approval of a general description not intended to be the language of a text amendment, then any precise language

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<sup>131</sup>Dev. Br. at 46-47.

<sup>132</sup>Op. Br. at 35-37 and Dev. Br. at 18-19 and at 31-33.

<sup>133</sup>Dev. Br. at 19. Statesman wrongly claims Brinnon argues that the PC violated RCW 36.70.400. See Dev. Br. at 19. Statesman also wrongly claims Brinnon argues that the BOCC merely corrected “technical errors” in the PC Map. Id. Instead Brinnon claims that the BOCC violated RCW 36.70A.140 when it failed to remand to the PC for a public hearing required by RCW 36.70.430 when the BOCC initiated a “text amendment” and when the BOCC initiated significant changes to the PC recommended “map amendment.”

<sup>134</sup>Id. at 20-23. The full text of RCW 36.70.400 is provided in Appendix A-4 hereto.

<sup>135</sup>The word “amendment” is not defined in the PEA but the dictionary defines it as “a change made by correction, addition, or deletion.” Webster’s New Universal Unabridged Dictionary (2003).

proposed by the BOCC should be considered a change initiated by the BOCC and be subject to referral under RCW 36.70.430.

Statesman argues that the PC approved “the proposal” and that the only “proposal” was in the DEIS.<sup>136</sup> But Statesman’s interpretation is inconsistent with the facts because the PC approved and signed the PC map amendment and this PC map is inconsistent with the maps in the EIS “proposal.”<sup>137</sup>

Statesman argues that the BOCC initiated text amendment “incorporates all of the material items discussed in the DEIS and the PC summary.”<sup>138</sup> The reduction of the 146 page DEIS and 3 page PC summary recommendation to one paragraph clearly cannot incorporate all material items. Statesman argues that exact compliance is not required by RCW 36.70A.140.<sup>139</sup> This is true. But in the instant case where the BOCC initiated a “text amendment” and initiated substantial changes to the PC recommended map, that all required an additional public hearing under RCW 36.70.430, and because no opportunity for additional public comment was provided, this Court should find that “the spirit of the [County’s public participation] program and procedures” was violated and the Growth Board erred in finding compliance.

Statesman argues that RCW 36.70.430 only applies when the BOCC seeks to “initiate” a change.<sup>140</sup> However under this statute a BOCC change

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<sup>136</sup>Dev. Br. at 21.

<sup>137</sup>The PC Map is in the Op. Br. at A-128. The “proposal” is described in the EIS in AR 1754 at pages 1-1 to 1-17.

<sup>138</sup>Dev. Br. at 22.

<sup>139</sup>Dev. Br. at 22-23.

<sup>140</sup>Id. at 23.

to a PC recommendation is considered initiating a change.<sup>141</sup> Here the changes initiated are material and required referral.<sup>142</sup>

Statesman asserts that the adoption of the GMA statute RCW 36.70A.035(2) is relevant to the issue of the BOCC failing to hold an additional public hearing as required by the PEA statute RCW 36.70.430.<sup>143</sup> As described supra at 24, the County in choosing to plan under the PEA and GMA has set a higher standard for its public participation program.

Statesman in its Brief at 26-28 continues its mantra that the changes initiated by the BOCC are not material and are technical corrections and Brinnon's claim that the BOCC failed to remand for an additional public hearing required by the PEA are just "hypertechnical procedural violations." This Court should not be fooled. These are substantial issues and an additional public hearing and a new PC recommendation on the BOCC changes should lead to a better project more protective of the public interest.

**F. Invalidity Re: RCW 36.70A.140 (Issue No. 4)**

If this Court finds noncompliance with RCW 36.70A.140, it should remand to the Growth Board for its determination regarding invalidity consistent with this Court's Opinion.

**G. Growth Board Error RCW 36.70A.070 (Issue No. 5)**

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<sup>141</sup>RCW 36.70.430 (Appendix A-4 hereto).

<sup>142</sup>The material nature of the changes is discussed in the Op. Br. at 7-11, Notes 40-50, and at 40-44.

<sup>143</sup>Dev. Br. at 24-26.

Statesman again mischaracterizes Brinnon's argument.<sup>144</sup> Statesman apparently has not even looked at Figure BR-3<sup>145</sup> in the Brinnon Subarea Plan ("BSAP") before it made its argument that the "BSAP shows where an MPR could be located."<sup>146</sup> Figure BR-3 shows existing land use designations on the MPR site to be rural residential while the Ordinance map shows existing land use designations on the MPR site to be the urban MPR designation. The Growth Board erred in finding these maps consistent and finding no violation in the internal consistency requirement of RCW 36.70A.070(preamble).

**H. Growth Board Error RCW 36.70A.070(1) (Issue No. 6)**

RCW 36.70A.070(1) requires the MPR to have non-residential building intensities defined in the comprehensive plan.<sup>147</sup> The Growth Board relied on future development regulations to limit these building intensities.<sup>148</sup> The problem is that the statute requires these limits to be in the comprehensive plan to serve as a blueprint for the development regulations.<sup>149</sup> Statesman argues that the Growth Board also relied upon the MPR goals and policies to control development.<sup>150</sup> But the policies cited by Statesman do not control non-residential building intensities.<sup>151</sup>

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<sup>144</sup>Dev. Br. at 28. Statesman claims that Brinnon seeks invalidity because the BOCC adopted map amendment is internally inconsistent with Figure BR-3 in the BSAP. Brinnon seeks only a finding of noncompliance and not invalidity on this issue.

<sup>145</sup>Op. Br. at A-144.

<sup>146</sup>Dev. Br. at 29 (emphasis in original).

<sup>147</sup>Op. Br. at 46-47.

<sup>148</sup>Op. Br. at A-74 to A-75.

<sup>149</sup>Op. Br. at 46.

<sup>150</sup>Dev. Br. at 30; Op. Br. at A-74.

<sup>151</sup>Statesman cites several policies: LNP 24.6 - As pointed out in TCP 105-06, facilities can be used by day visitors so non-residential facilities are unlimited in intensity by this policy. LNP 24.1 does not limit intensity when it states that the MPR "may" contain urban growth. On a scale of 0 to 100 in intensity, this policy allows 0 to 100 and doesn't set any limits. LNP 24.5 only addresses residential development and not non-residential building intensities. LNP 24.9 only addresses the aesthetics of non-residential development (blending with the natural setting) but does not set any limits on area, height, or scale of non-residential

**I. Growth Board Error WAC 197-11-440(5)(b) (Issue No. 7)**

Statesman’s first argument is that an alternative with a smaller footprint is not required.<sup>152</sup> Brinnon agrees. However when both alternatives allow the proposed project “plus” more intensive new development outside the boundaries of the proposed project, then it should be obvious that the alternatives are not going to have lower environmental cost.

Statesman’s second argument is that alternatives are adequate if they have greater impacts in some areas but fewer impacts in others citing to King County v. Cent. Puget Sound Bd. (“King Cty.”), 138 Wn.3d 161, 184, 979 P.2d 374 (1999).<sup>153</sup> But this is not the test for lower environmental cost in King Cty. Reasonable alternatives must have overall “intermediary impacts between the proposed [project] and the ‘no action’ alternative.”<sup>154</sup> In King Cty. there were two “intermediary” alternatives, the one-acre and the five-acre alternatives, and the one-acre alternative was characterized by the fact finder “as a ‘midpoint’ between the [project] and the rural five-acre alternative.”<sup>155</sup> In the instant case no one, neither the PC nor the BOCC,<sup>156</sup> found either alternative “intermediary” and the EIS Summary itself states that the proposal, BSAP, and Hybrid “alternatives all have similar impacts.”<sup>157</sup> Both

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buildings or the total of such buildings. The text amendment only addresses residential development and does not address non-residential building intensity. There is no adopted MPR goal or policy that satisfies the requirement of RCW 36.70A.070(1) that limits on non-residential building intensity be included in the comprehensive plan blueprint.

<sup>152</sup>Dev. Br. at 34.

<sup>153</sup>Dev. Br. at 35.

<sup>154</sup>King Cty. at 183.

<sup>155</sup>Id. at 183-84.

<sup>156</sup>See Ordinance (Op. Br. at A-100 to A-125) and PC report (Id. at A-126 to A-128.)

<sup>157</sup>AR 1754 at xxvi

alternatives allow the proposed project plus increased development on adjacent properties with increased impacts.<sup>158</sup>

Statesman offers only two very minor potential decreased impacts for the BSAP alternative and none for the Hybrid alternative.<sup>159</sup> The substantial increased impacts from additional development outside the proposal boundary means that the alternatives are not “at lower environmental cost.”

Statesman argues that Brinnon’s claim is inadequate because Brinnon has not identified additional impacts or unmitigated impacts.<sup>160</sup> This is not relevant. The issue before this Court is whether the EIS is adequate in identifying reasonable “intermediary” alternatives which would have a lower environmental cost and approximate the proposal’s objectives. The EIS does not have such alternatives and so this Court should find the EIS inadequate.

**J. Growth Board Error WAC 197-11-660(1) (Issue No. 8)**

Statesman argues that Levine only requires evidence in the record that the County “considered” identifiable policies in attaching mitigation conditions.<sup>161</sup> Brinnon agrees. However, the Ordinance fails to cite to specific identifiable policies for each mitigating condition or cite to the record

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<sup>158</sup>Op. Br. at 49.

<sup>159</sup>Dev. Br. at 35. Statesman argues that the wells for the BSAP alternative could be placed farther upland to reduce “any limited risk” of groundwater intrusion “as a result of increased water demand of the larger BSAP model.” The BSAP model uses more water than the proposal and the increased groundwater risk can be minimized by well placement. This is not a reduced impact. Statesman argues that some septic systems north of the proposal will be eliminated but the EIS states this will have no different material impact on the aquifer which includes the water in Hood Canal. The higher density allowed with sewer will generate more stormwater runoff north of the proposal and that is why the EIS concludes there will be no material impact to the aquifer. AR 1754 at 4-19.

<sup>160</sup>Dev. Br. at 36.

<sup>161</sup>Dev. Br. at 38 citing to Levine v. Jefferson County, 116 Wn.2d 575, 807 P.2d 363 (1991).

where such information can be found. There is no evidence in the record that associates the mitigation conditions with identifiable policies.<sup>162</sup>

Statesman further argues that this is just a procedural error.<sup>163</sup> But SEPA is a procedural statute and this error was sufficient in Levine to reverse the County's action.<sup>164</sup> Statesman then argues that Brinnon was not prejudiced by this error.<sup>165</sup> But Brinnon has standing to bring its challenges and need not show prejudice for each issue raised.<sup>166</sup>

**K. Invalidation Re: SEPA (Issue No. 9)**

If this Court finds noncompliance with SEPA, it should remand to the Growth Board for its determination regarding invalidity consistent with this Court's Opinion.

**L. Growth Board Error On Reconsideration (Issue No. 10)**

The Respondents do not oppose Brinnon's position on this issue.

**M. Thurston Court Error Re: SEPA (Issue No. 11)**

The Respondents do not oppose Brinnon's position on this issue.

**IV. CONCLUSION**

Brinnon requests the relief identified in the Op. Br. Conclusion.

Dated this 1<sup>st</sup> day of March, 2010.

Respectfully submitted,

By:



Gerald B. Steel - #31084 - Attorney for Brinnon

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<sup>162</sup>Levine at 582 states, "There is no citation in the record to any identifiable agency policy upon which the restrictions were based, and there is no indication that the County actually considered any such policies." This is the situation with the Ordinance as well.

<sup>163</sup>Dev. Br. at 39.

<sup>164</sup>Levine at 582.

<sup>165</sup>Dev. Br. at 39.

<sup>166</sup>Op. Br. at A-83, para. 5. See Informed Citizens v. Columbia County, 92 Wn. App. 290, 294-97, 966 P.2d 338 (1998).

CERTIFICATE OF SERVICE

I certify that on the 5<sup>th</sup> day of March, 2010, I caused a true and correct copy of this certificate and Appellants' Motion to File a 32-page Reply Brief or in the Alternative to File Appellants' Reply Brief Corrected, and Appellants' Reply Brief Corrected to be served on the following by first class mail:

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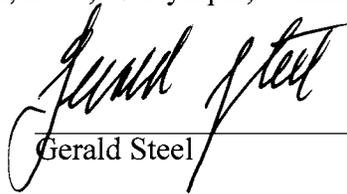
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Dated this 5<sup>th</sup> day of March, 2010, at Olympia, Washington.

  
Gerald Steel

# APPENDIX INDEX

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**36.70.320****Comprehensive plan.**

Each planning agency shall prepare a comprehensive plan for the orderly physical development of the county, or any portion thereof, and may include any land outside its boundaries which, in the judgment of the planning agency, relates to planning for the county. The plan shall be referred to as the comprehensive plan, and, after hearings by the commission and approval by motion of the board, shall be certified as the comprehensive plan. Amendments or additions to the comprehensive plan shall be similarly processed and certified.

Any comprehensive plan adopted for a portion of a county shall not be deemed invalid on the ground that the remainder of the county is not yet covered by a comprehensive plan. \*This 1973 amendatory act shall also apply to comprehensive plans adopted for portions of a county prior to April 24, 1973.

[1973 1st ex.s. c 172 § 1; 1963 c 4 §

36.70.320. Prior: 1959 c 201 § 32.]

**Notes:**

\*Reviser's note: "This 1973 amendatory act" refers to 1973 1st ex.s. c 172 § 1.

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**36.70.330****Comprehensive plan — Required elements.**

The comprehensive plan shall consist of a map or maps, and descriptive text covering objectives, principles and standards used to develop it, and shall include each of the following elements:

(1) A land use element which designates the proposed general distribution and general location and extent of the uses of land for agriculture, housing, commerce, industry, recreation, education, public buildings and lands, and other categories of public and private use of land, including a statement of the standards of population density and building intensity recommended for the various areas in the jurisdiction and estimates of future population growth in the area covered by the comprehensive plan, all correlated with the land use element of the comprehensive plan. The land use element shall also provide for protection of the quality and quantity of groundwater used for public water supplies and shall review drainage, flooding, and storm water run-off in the area and nearby jurisdictions and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute Puget Sound or waters entering Puget Sound;

(2) A circulation element consisting of the general location, alignment and extent of major thoroughfares, major transportation routes, trunk utility lines, and major terminal facilities, all of which shall be correlated with the land use element of the comprehensive plan;

(3) Any supporting maps, diagrams, charts, descriptive material and reports necessary to explain and supplement the above elements.

[1985 c 126 § 3; 1984 c 253 § 3; 1963 c 4 §

36.70.330. Prior: 1959 c 201 § 33.]

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**36.70.340****Comprehensive plan — Amplification of required elements.**

When the comprehensive plan containing the mandatory subjects as set forth in RCW

36.70.330 shall have been approved by motion by the board and certified, it may thereafter be progressively amplified and augmented in scope by expanding and increasing the general provisions and proposals for all or any one of the required elements set forth in RCW 36.70.330 and by adding provisions and proposals for the optional elements set forth in RCW 36.70.350. The comprehensive plan may also be amplified and augmented in scope by progressively including more completely planned areas consisting of natural homogeneous communities, distinctive geographic areas, or other types of districts having unified interests within the total area of the county. In no case shall the comprehensive plan, whether in its entirety or area by area or subject by subject be considered to be other than in such form as to serve as a guide to the later development and adoption of official controls.

[1963 c 4 § 36.70.340. Prior: 1959 c 201 § 34.]

**36.70.350****Comprehensive plan — Optional elements.**

A comprehensive plan may include --

- (1) a conservation element for the conservation, development and utilization of natural resources, including water and its hydraulic force, forests, water sheds, soils, rivers and other waters, harbors, fisheries, wild life, minerals and other natural resources,
- (2) a solar energy element for encouragement and protection of access to direct sunlight for solar energy systems,
- (3) a recreation element showing a comprehensive system of areas and public sites for recreation, natural reservations, parks, parkways, beaches, playgrounds and other recreational areas, including their locations and proposed development,
- (4) a transportation element showing a comprehensive system of transportation, including general locations of rights-of-way, terminals, viaducts and grade separations. This element of the plan may also include port, harbor, aviation and related facilities,
- (5) a transit element as a special phase of transportation, showing proposed systems of rail transit lines, including rapid transit in any form, and related facilities,
- (6) a public services and facilities element showing general plans for sewerage, refuse disposal, drainage and local utilities, and rights-of-way, easements and facilities for such services,
- (7) a public buildings element, showing general locations, design and arrangements of civic and community centers, and showing locations of public schools, libraries, police and fire stations and all other public buildings,
- (8) a housing element, consisting of surveys and reports upon housing conditions and needs as a means of establishing housing standards to be used as a guide in dealings with official controls related to land subdivision, zoning, traffic, and other related matters,
- (9) a renewal and/or redevelopment element comprising surveys, locations, and reports for the elimination of slums and other blighted areas and for community renewal and/or redevelopment, including housing sites, business and industrial sites, public building sites and for other purposes authorized by law,
- (10) a plan for financing a capital improvement program,
- (11) as a part of a comprehensive plan the commission may prepare, receive and approve additional elements and studies dealing with other subjects which, in its judgment, relate to the physical development of the county.

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[1979 ex.s. c 170 § 10; 1963 c 4 §  
36.70.350. Prior: 1959 c 201 § 35.]

**Notes:**

**Severability -- 1979 ex.s. c 170:** See note following RCW 64.04.140.

"Solar energy system" defined: RCW 36.70.025.

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**36.70.360**

***Comprehensive plan — Cooperation with affected agencies.***

During the formulation of the comprehensive plan, and especially in developing a specialized element of such comprehensive plan, the planning agency may cooperate to the extent it deems necessary with such authorities, departments or agencies as may have jurisdiction over the territory or facilities for which plans are being made, to the end that maximum correlation and coordination of plans may be secured and properly located sites for all public purposes may be indicated on the comprehensive plan.

[1963 c 4 §  
36.70.360. Prior: 1959 c 201 § 36.]

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**36.70.370**

***Comprehensive plan — Filing of copies.***

Whenever a planning agency has developed a comprehensive plan, or any addition or amendment thereto, covering any land outside of the boundaries of the county as provided in RCW

36.70.320, copies of any features of the comprehensive plan extending into an adjoining jurisdiction shall for purposes of information be filed with such adjoining jurisdiction.

[1963 c 4 § 36.70.370. Prior: 1959 c 201 § 37.]

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**36.70.380**

***Comprehensive plan — Public hearing required.***

Before approving all or any part of the comprehensive plan or any amendment, extension or addition thereto, the commission shall hold at least one public hearing and may hold additional hearings at the discretion of the commission.

[1963 c 4 §  
36.70.380. Prior: 1959 c 201 § 38.]

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**36.70.390**

***Comprehensive plan — Notice of hearing.***

Notice of the time, place and purpose of any public hearing shall be given by one publication in a newspaper of general circulation in the county and in the official gazette, if any, of the county, at least ten days before the hearing.

[1963 c 4 §

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36.70.390. Prior: 1959 c 201 § 39.]

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### **36.70.400**

#### ***Comprehensive plan — Approval — Required vote — Record.***

The approval of the comprehensive plan, or of any amendment, extension or addition thereto, shall be by the affirmative vote of not less than a majority of the total members of the commission. Such approval shall be by a recorded motion which shall incorporate the findings of fact of the commission and the reasons for its action and the motion shall refer expressly to the maps, descriptive, and other matters intended by the commission to constitute the plan or amendment, addition or extension thereto. The indication of approval by the commission shall be recorded on the map and descriptive matter by the signatures of the chair and the secretary of the commission and of such others as the commission in its rules may designate.

[2009 c 549 § 4117; 1963 c 4 §

36.70.400. Prior: 1961 c 232 § 2; 1959 c 201 § 40.]

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### **36.70.410**

#### ***Comprehensive plan — Amendment.***

When changed conditions or further studies by the planning agency indicate a need, the commission may amend, extend or add to all or part of the comprehensive plan in the manner provided herein for approval in the first instance.

[1963 c 4 §

36.70.410. Prior: 1959 c 201 § 41.]

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### **36.70.420**

#### ***Comprehensive plan — Referral to board.***

A copy of a comprehensive plan or any part, amendment, extension of or addition thereto, together with the motion of the planning agency approving the same, shall be transmitted to the board for the purpose of being approved by motion and certified as provided in this chapter.

[1963 c 4 §

36.70.420. Prior: 1959 c 201 § 42.]

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### **36.70.430**

#### ***Comprehensive plan — Board may initiate or change — Notice.***

When it deems it to be for the public interest, or when it considers a change in the recommendations of the planning agency to be necessary, the board may initiate consideration of a comprehensive plan, or any element or part thereof, or any change in or addition to such plan or recommendation. The board shall first refer the proposed plan, change or addition to the planning agency for a report and recommendation. Before making a report and recommendation, the commission shall hold at least one public hearing on the proposed plan, change or addition. Notice of the time and place and purpose of the hearing shall be given by one publication in a newspaper of general circulation in the county and in the official gazette, if any, of the county, at least ten days before the hearing.

[1963 c 4 §

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36.70.430. Prior: 1959 c 201 § 43.]

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**36.70.440*****Comprehensive plan — Board may approve or change — Notice.***

After the receipt of the report and recommendations of the planning agency on the matters referred to in RCW

36.70.430, or after the lapse of the prescribed time for the rendering of such report and recommendation by the commission, the board may approve by motion and certify such plan, change or addition without further reference to the commission: PROVIDED, That the plan, change or addition conforms either to the proposal as initiated by the county or the recommendation thereon by the commission: PROVIDED FURTHER, That if the planning agency has failed to report within a ninety day period, the board shall hold at least one public hearing on the proposed plan, change or addition. Notice of the time, place and purpose of the hearing shall be given by one publication in a newspaper of general circulation in the county and in the official gazette, if any, of the county, at least ten days before the hearing. Thereafter, the board may proceed to approve by motion and certify the proposed comprehensive plan or any part, amendment or addition thereto.

[1963 c 4 § 36.70.440. Prior: 1959 c 201 § 44.]

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**36.70.450*****Planning agency — Relating projects to comprehensive plan.***

After a board has approved by motion and certified all or parts of a comprehensive plan for a county or for any part of a county, the planning agency shall use such plan as the basic source of reference and as a guide in reporting upon or recommending any proposed project, public or private, as to its purpose, location, form, alignment and timing. The report of the planning agency on any project shall indicate wherein the proposed project does or does not conform to the purpose of the comprehensive plan and may include proposals which, if effected, would make the project conform. If the planning agency finds that a proposed project reveals the justification or necessity for amending the comprehensive plan or any part of it, it may institute proceedings to accomplish such amendment, and in its report to the board on the project shall note that appropriate amendments to the comprehensive plan, or part thereof, are being initiated.

[1963 c 4 §

36.70.450. Prior: 1959 c 201 § 45.]

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**36.70.460*****Planning agency — Annual report.***

After all or part of the comprehensive plan of a county has been approved by motion and certified, the planning agency shall render an annual report to the board on the status of the plan and accomplishments thereunder.

[1963 c 4 §

36.70.460. Prior: 1959 c 201 § 46.]

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framework that can be referenced when considering the merits of a land use issue--particularly where there are numerous competing goals, policies, or strategies. Appendix C contains charts that summarize the community's vision statements for each element.

### **Amending the Comprehensive Plan**

The Jefferson County Comprehensive Plan addresses long-range and County-wide issues that are beyond the scope of decisions on subarea, local or functional plans or individual development proposals. The Plan serves as a vital guide to the future and provides a framework for managing change. It is important that amendments to the Comprehensive Plan retain the broad perspectives articulated in the community vision statements, satisfy the goals, policies, and strategies of the Plan, and remain consistent with the intent of the Growth Management Act.

Amendments are to be justified through findings from monitoring of "growth management indicators" (i.e., population growth [actual v. projected], land capacity [actual v. projected], economic indicators [property values/comparative sales compared to statewide averages and local trends], changes in technology, needs, omissions or errors, or a declared emergency).

#### *Amendments to the Comprehensive Plan must conform to the following:*

- a. The requirements of the Washington State Growth Management Act, Chapter RCW 36.70A and the State Planning Enabling Act, Chapter RCW 36.70.
- b. Any proposed amendments to the Plan must be submitted by the County to the Washington State Department of Community, Trade and Economic Development at least 60 days prior to final adoption by the Board of County Commissioners (RCW 36.70A.106).
- c. Proposed amendments must be consistent with Federal and State laws, the Comprehensive Plan, the County-wide Planning Policy, related plans, and the comprehensive plans of other counties or cities with which the County has, in part, common borders or regulated regional issues (WAC 365-195-630[1]).
- d. Proposed amendments to the Comprehensive Plan will be considered on an annual basis (no more frequently than once per year), except when the following circumstances apply: (i) the initial adoption of a subarea plan that does not modify the comprehensive plan policies and designations applicable to the subarea, and (ii) the adoption or amendment of a shoreline master program pursuant to RCW 90.58. All proposals will be considered concurrently so the cumulative effect of the various proposals can be ascertained (WAC 365-195-630[2]). The County may consider adopting amendments more frequently than once per year if a declared emergency exists.
- e. Consistent with the timelines contained in the Growth Management Act (RCW 36.70A), the County must review all Urban Growth Area boundaries, as well as the densities permitted within both the incorporated and unincorporated portions of each Urban Growth Area. If necessary, the Urban Growth Area boundaries will be revised to accommodate the urban growth projected to occur in the County for the succeeding 20-year period.

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- f. Amendments or changes to natural resource lands and critical area designations should be based on consistency with one or more of the following criteria:
- Change in circumstances pertaining to the Comprehensive Plan or public policy.
  - A change in circumstances beyond the control of the landowner pertaining to the subject property.
  - An error in designation.
  - New information on natural resource land or critical area status (WAC 365-190-040[2][g]).

### **Comprehensive Plan Policy Amendments**

Policy amendments may be initiated by the County, or by other entities, organizations, or individuals through a petition submitted on forms provided by the County and subject to fees as determined by the BOCC. The merits of proposed policy amendments shall be measured against the petition submittal requirements contained in Jefferson County's adopted development regulations to ensure consistency in the review and decision-making process. In general, these requirements will address the following:

- a. A detailed statement of what is proposed to be changed and why.
- b. A statement of anticipated impacts to be caused by the change, including geographic area affected and issues presented.
- c. A demonstration of why existing Comprehensive Plan policies should not continue to be in effect or why existing policies no longer apply.
- d. A statement of how the amendment complies with the Comprehensive Plan's community vision statements, goals, policy and strategy directives.
- e. A statement of how functional plans and Capital Improvement Plans support the change.
- f. A statement of how the change affects implementing land use regulations (i.e., zoning) and the necessary changes to bring the implementing land use regulations into compliance with the Plan.
- g. A demonstration of public review of the recommended change.

### **Comprehensive Plan Map Amendments**

Comprehensive Plan Map amendments may be initiated by the County, or by other entities, organizations, or individuals through petitions. The boundaries separating the Urban Growth Area, Rural Areas and Natural Resource Lands designations are intended to be long-term and unchanging. Land use designations may be subject to minor refinements, but only after full public participation, notice, environmental review, and an official assessment of planning growth management indicators.

Amendments must comply with the same petition submittal requirements as policy amendments (see a-g above which are incorporated herein as a-g) and the additional following items:

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- a. A detailed statement describing how the map amendment complies with Comprehensive Plan land use designation criteria.
- b. Urban Growth Area boundary changes shall be supported by and dependent on population forecasts and allocated urban population distributions, existing urban densities and infill opportunities, phasing and availability of adequate services, proximity to designated natural resource lands and the presence of critical areas.
- c. Rural Areas and Natural Resource Land map designation changes shall be supported by and dependent on Growth Management Act criteria, population forecasts and allocated non-urban populations distributions, existing rural area and natural resource land densities, and/or infill opportunities. Natural Resource Land designations should also satisfy the criteria in Section 1 (f) above (WAC 365-190-040 [2][g]).

### **General Comprehensive Plan Amendments**

A general Comprehensive Plan amendment is a policy or land use designation which is applied to a broad class of situations and to a large number of parcels and persons that are not readily identifiable.

Petitions for a general amendment proposal are to be submitted to the Board of County Commissioners (Board) for consideration. The Board may or may not act on the proposal (petition) to amend the Comprehensive Plan. The Board is not required to take any action on such amendment proposals. A decision by the Board to initiate the plan amendment process is procedural only, and does not constitute a decision by the Board on whether the amendment will ultimately be approved.

### **Site-Specific Comprehensive Plan Amendments**

A site-specific comprehensive plan amendment is a policy or land use designation that is applied to a specific number of parcels which are in readily identifiable ownership. A proposal which formulates policy yet affects relatively few individuals will generally be characterized as a site-specific action.

Comprehensive Plan amendment proposals (petitions) which apply to a specific site, frequently in conjunction with an identifiable development proposal, may be initiated by a petitioner through the following amendment process:

General requirements for a site-specific amendment include:

- a. **Fees.** The petitioner shall pay to the Department of Community Development the application fee prescribed by the approved fee schedule as now or hereafter amended. Fees for amendments to correct mapping errors may be waived by the Administrator.
- b. **Petition.** The petitioner must submit to the Department of Community Development a written application, on forms provided by the Department, containing appropriate amendatory language and, if applicable, a map drawn to scale, showing the proposed change. The petition shall also address policy or map evaluation criteria as described above. Incomplete petitions shall not be accepted. Depending on the nature of the application, the petitioner may be required to attend a meeting to discuss the petition with Department staff.

- c. **Timing.** Petitions shall be submitted to the Department of Community Development by the application deadline established through Jefferson County's adopted development regulations. Late or incomplete applications shall not be accepted.
- d. **Approval for Consideration.** When a petition application is considered complete the Department of Community Development shall submit it to the Board, with a recommendation as to whether the Board should consider or reject the proposed petition. After receiving the Department's recommendation, the Board, in a public meeting, shall determine whether to consider or reject the proposed petition. A decision by the Board to initiate the plan amendment process is procedural only and does not constitute a decision by the Board as to whether the amendment will ultimately be approved.
- e. **Environmental Review.** If the Board approves consideration of the amendment, the petitioner shall submit to the Department of Community Development an environmental checklist. Upon receipt of the environmental checklist and supporting documentation, the Department shall issue an environmental threshold determination on the proposed amendment. If necessary, a Draft Environmental Impact Statement should be published. (State Environmental Policy Act Rules [Chapter 197-11 WAC]).
- f. **Process.** The Department of Community Development will process the amendment pursuant to the procedures contained within Chapter 36.70 RCW and the Jefferson County development regulations, this process shall include at least one public hearing before the Planning Commission and one public hearing before the Board of County Commissioners.

**Emergency Comprehensive Plan Amendments**

Emergency amendments to the Comprehensive Plan are allowed pursuant to RCW 36.70A.130(2)(b): "Except as otherwise provided in (a) of this subsection, all proposals shall be considered by the governing body concurrently so the cumulative effect of the various proposals can be ascertained. However, after appropriate public participation a county or city may adopt amendments or revisions to its comprehensive plan that conform with this chapter whenever an emergency exists or to resolve an appeal of a comprehensive plan filed with a growth management hearings board or with the court."

***Future Subarea Plans as Chapters of the Comprehensive Plan***

Subarea plans refine Comprehensive Plan countywide policies for application to specific sub-regions or communities within the county. Subarea plans may reflect differences between local circumstances and values and those generally found countywide, but they must also be "consistent" with the Comprehensive Plan pursuant to the Growth Management Act. Because of changes to land use districts and policies as a result of the adoption of subarea plans, the reader must take care when interpreting tables and analysis within the Comprehensive Plan to note whether the particular page has been amended. Amended pages contain a notation in the page footer. If a particular page has not been amended, the contents reflect analysis at the time of the adoption of the Comprehensive Plan. Analysis specific to subarea planning is generally contained within the adopted subarea plan itself.

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## RCW 36.70A.140

## Comprehensive plans — Ensure public participation.

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments. In enacting legislation in response to the board's decision pursuant to RCW 36.70A.300 declaring part or all of a comprehensive plan or development regulation invalid, the county or city shall provide for public participation that is appropriate and effective under the circumstances presented by the board's order. Errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed.

[1995 c 347 § 107; 1990 1st ex.s. c 17 § 14.]

## Notes:

**Finding -- Severability -- Part headings and table of contents not law -- 1995 c 347:** See notes following RCW 36.70A.470.

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**36.70.020****Definitions.**

The following words or terms as used in this chapter shall have the following meaning unless a different meaning is clearly indicated by the context:

- (1) "Approval by motion" is a means by which a board, through other than by ordinance, approves and records recognition of a comprehensive plan or amendments thereto.
- (2) "Board" means the board of county commissioners.
- (3) "Certification" means the affixing on any map or by adding to any document comprising all or any portion of a comprehensive plan a record of the dates of action thereon by the commission and by the board, together with the signatures of the officer or officers authorized by ordinance to so sign.
- (4) "Commission" means a county or regional planning commission.
- (5) "Commissioners" means members of a county or regional planning commission.
- (6) "Comprehensive plan" means the policies and proposals approved and recommended by the planning agency or initiated by the board and approved by motion by the board (a) as a beginning step in planning for the physical development of the county; (b) as the means for coordinating county programs and services; (c) as a source of reference to aid in developing, correlating, and coordinating official regulations and controls; and (d) as a means for promoting the general welfare. Such plan shall consist of the required elements set forth in RCW ~~36.70.330~~ and may also include the optional elements set forth in RCW 36.70.350 which shall serve as a policy guide for the subsequent public and private development and official controls so as to present all proposed developments in a balanced and orderly relationship to existing physical features and governmental functions.
- (7) "Conditional use" means a use listed among those classified in any given zone but permitted to locate only after review by the board of adjustment, or zoning adjustor if there be such, and the granting of a conditional use permit imposing such performance standards as will make the use compatible with other permitted uses in the same vicinity and zone and assure against imposing excessive demands upon public utilities, provided the county ordinances specify the standards and criteria that shall be applied.
- (8) "Department" means a planning department organized and functioning as any other department in any county.
- (9) "Element" means one of the various categories of subjects, each of which constitutes a component part of the comprehensive plan.
- (10) "Ex officio member" means a member of the commission who serves by virtue of his or her official position as head of a department specified in the ordinance creating the commission.
- (11) "Official controls" means legislatively defined and enacted policies, standards, precise detailed maps and other criteria, all of which control the physical development of a county or any part thereof or any detail thereof, and are the means of translating into regulations and ordinances all or any part of the general objectives of the comprehensive plan. Such official controls may include, but are not limited to, ordinances establishing zoning, subdivision control, platting, and adoption of detailed maps.
- (12) "Ordinance" means a legislative enactment by a board; in this chapter the word, "ordinance", is synonymous with the term "resolution", as representing a legislative enactment by a board of county commissioners.
- (13) "Planning agency" means (a) a planning commission, together with its staff members, employees and consultants, or (b) a department organized and functioning as any other department in any county government together with its planning commission.
- (14) "Variance." A variance is the means by which an adjustment is made in the application of the specific regulations of a zoning ordinance to a particular piece of property,

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**18.05.040 Department of community development – Duties and responsibilities.**

The duties and responsibilities of the director shall be as follows:

- (1) Assist the board of commissioners in their consideration of alternative future directions and implementation of policies for future development of the county;
- (2) Conduct research and prepare reports to the board of commissioners, planning commission and citizens concerning the priority projects and issues identified by the board of commissioners;
- (3) Assist development proponents to achieve project goals in conformance with applicable land use regulations and in support of the Jefferson County Comprehensive Plan and any other applicable land use goals and policies;
- (4) Coordinate project, program, contractual and planning activities with other public agencies;
- (5) Supervise enforcement of building, land use, and related environmental protection codes;
- (6) Administer county land use and environmental protection regulations, the Shoreline Master Program and the National Flood Hazard Insurance Program;
- (7) Serve as the county building official;
- (8) Prepare budget recommendations and monitor expenditures;
- (9) Hire, train, supervise and assist the building inspector and other staff members assigned to planning and building responsibilities;
- (10) Assist in preparation of ordinances, resolutions, contracts, agreements, covenants and other legal documents related to community development and administration and enforcement of county land use and environmental protection ordinances;
- (11) Seek grants and donations in support of the priority planning projects selected by the board of commissioners;
- (12) Prepare job descriptions, performance appraisals, labor agreement addenda, administrative procedures, etc., in exercise of management and supervisory responsibilities;
- (13) Represent the county under the direction of the board of commissioners; and
- (14) Such other duties as may be assigned by the board of commissioners. [Ord. 8-06 § 1]

**18.05.050 Planning commission – Duties and responsibilities.**

The duties and responsibilities of the planning commission shall be as follows:

- (1) The planning commission shall review the Jefferson County Comprehensive Plan and other planning documents to determine if the county's plans, goals, policies, land use ordinances and regulations are promoting orderly and coordinated development within the county. The commission shall make recommendations concerning this to the board of commissioners.
- (2) The planning commission shall review land use ordinances and regulations of the county and make recommendations regarding them to the board of commissioners.
- (3) The planning commission shall recommend priorities for and review studies of geographic subareas in the county.
- (4) All other county boards, committees, and commissions shall coordinate their planning activities, as they relate to land use or the Jefferson County Comprehensive Plan, with the planning commission.
- (5) The planning commission may hold public hearings in the exercise of its duties and responsibilities as it deems necessary.
- (6) The planning commission shall have such other duties and powers as heretofore have been or hereafter may be conferred upon the commission by county ordinances or as directed by resolution of the board of commissioners, the performance of such duties and exercise of such authority to be subject to the limitations expressed in such enactments. [Ord. 8-06 § 1]

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**18.15.132 Decision-making authority.**

(1) The planning commission, pursuant to its authority specified under JCC 18.40.040 and 18.45.080, shall hear and make recommendations on master plans and site-specific applications for MPR land use designations on the Comprehensive Plan Land Use Map.

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**18.40.040 Project permit application framework.**

**Table 8-1. Permits – Decisions**

Type I <sup>1</sup>	Type II	Type III	Type IV	Type V
Septic permits	Classification of unnamed and discretionary uses under Article II of Chapter <u>18.15 JCC</u>	Reasonable economic use variances under JCC <u>18.15.220</u>	Final plats under Chapter <u>18.35 JCC</u>	Special use permits under JCC <u>18.15.110</u>
Allowed uses not requiring notice of application (e.g., "Yes" uses listed in Table 3-1 in JCC <u>18.15.040</u> , building permits, etc.)	Release of six-year FPA moratorium for an individual single-family residence under JCC <u>18.20.160</u>	PRRDs under Article VI-M of Chapter <u>18.15 JCC</u> and major amendments to PRRDs under JCC <u>18.15.545(3)</u>	Final PRRDs under Article VI-M of Chapter <u>18.15 JCC</u>	Jefferson County Comprehensive Plan amendments under Chapter <u>18.45 JCC</u>
Minor amendments to planned rural residential developments (PRRDs) under JCC <u>18.15.545</u>	Cottage industries under JCC <u>18.20.170</u>	Shoreline substantial development permits for secondary uses, and conditional and variance permits under the Jefferson County Shoreline Master Program (SMP)		Amendments to development regulations including amendments to this UDC and the Land Use Districts Map
Home businesses approved under JCC <u>18.20.200</u>	Short subdivisions under Article IV of Chapter <u>18.35 JCC</u>	Plat alterations and vacations under JCC <u>18.35.030(3)</u>		Amendments to the Jefferson County SMP
Temporary outdoor use permits under JCC <u>18.20.380</u>	Binding site plans under Article V of Chapter <u>18.35 JCC</u>	Long subdivisions under Article V of Chapter <u>18.35 JCC</u>		Subarea and utility plans and amendments thereto
Stormwater management permits under JCC <u>18.30.070</u>	Administrative conditional use permits under JCC <u>18.40.520(1)</u> [i.e., listed in Table 3-1 in JCC <u>18.15.040</u> as "C(a)"]	Discretionary conditional use permits under JCC <u>18.40.520(2)</u> [i.e., listed in Table 3-1 in JCC <u>18.15.040</u> as "C(d)"] where required by administrator		Development agreements and amendments thereto under Article XI of this chapter
Road access permits under JCC <u>18.30.080</u>	Discretionary conditional use permits under JCC <u>18.40.520(2)</u> [i.e., listed in Table 3-1 in JCC <u>18.15.040</u> as "C(d)"] unless Type III process required by administrator	Conditional use permits under JCC <u>18.40.520(3)</u> (i.e., uses listed in Table 3-1 in JCC <u>18.15.040</u> as "C")		Master plans for master planned resorts
Sign permits under JCC <u>18.30.150</u>	Minor variances under JCC <u>18.40.640(1)</u>	Major variances under JCC <u>18.40.640(2)</u>		
Boundary line adjustments under Article II of Chapter <u>18.35 JCC</u>	Shoreline substantial development permits for primary uses under Jefferson County SMP	Wireless telecommunications permits under JCC <u>18.20.130</u> and Chapter <u>18.42 JCC</u>		
Minor adjustments to approved preliminary short plats under JCC <u>18.35.150</u>	Wireless telecommunications permits under JCC <u>18.20.130</u> and Chapter <u>18.42 JCC</u>	Major industrial development conditional use approval under Article VIII of Chapter <u>18.15 JCC</u> Forest practices release of a moratorium under Chapter <u>18.20 JCC</u>		
Minor amendments to approved preliminary long plats under JCC <u>18.35.340</u>	Small-scale recreation and tourist (SRT) uses in SRT overlay district under JCC <u>18.15.572</u> . Plat alterations under JCC <u>18.35.670</u> . Appeals of enforcement actions under Chapter <u>18.50 JCC</u>			
Site plan approval advance determinations under Article VII of this chapter				
Exemptions under the Jefferson County SMP				
Revisions to permits issued under the Jefferson County SMP				

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Table 8-2. Action Types – Process					
	Project Permit Application Procedures (Types I – IV)				Legislative
	Type I	Type II	Type III	Type IV	Type V
Recommendation made by:	Project planner	Project planner	Project planner	N/A	Planning commission 1
Final decision made by:	Administrator	Administrator	Hearing examiner	Board of county commissioners	Board of county commissioners
Notice of application:	No	Yes	Yes	No	N/A
Open record public hearing:	No	Only if administrator's decision is appealed, open record hearing before hearing examiner	Yes, before hearing examiner, prior to permit decision by the hearing examiner	No	Yes, before planning commission to make recommendation to board of county commissioners
Closed record appeal/final decision:	No	No	No	N/A	Yes, or board of county commissioners could hold its own hearing
Judicial appeal:	Yes	Yes	Yes	Yes	Yes 2
	1 Type V land use actions are subject to review and recommendation by the planning commission. However, utility plans and moratoria and interim zoning controls adopted under RCW 36.70A.390 are not subject to review and consideration by the planning commission. 2 Pursuant to RCW 36.70A.250 and 36.70A.280, the Western Washington Growth Management Hearings Board (WWGMHB) is authorized to hear and determine petitions alleging that the county is not in compliance with the requirements of Chapter 36.70A RCW, Chapter 90.58 RCW as it relates to the adoption of the Shoreline Master Program, or Chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or Chapter 90.58 RCW. Direct judicial review may also be obtained pursuant to RCW 36.70A.295.				

If not categorically exempt pursuant to SEPA, Type I projects shall be subject to the notice requirements of JCC 18.40.150 through 18.40.220 and Article X of this chapter (the SEPA integration section).

**SUMMARY OF DECISION-MAKING**

Type I: In most cases, administrative without notice. However, if a Type I permit is not categorically exempt under SEPA, then, administrative with notice.

Type II: Administrative with notice. Final decision by administrator unless appealed. If appealed, open record hearing and final decision by hearing examiner.

Type III: Notice and open record public hearing before the hearing examiner. Final decision by hearing examiner. Appeal to superior court.

Type IV: Closed record decision by board of commissioners during a regular public meeting. Type IV decisions are purely ministerial in nature (see Article IV of Chapter 18.35 JCC).

Type V: Except for utility plans, notice and public hearing before planning commission, with planning commission recommendation to board of commissioners. Notice of public hearings provided prior to final legislative decisions (see Chapter 18.45 JCC).

[Ord. 8-06 § 1]

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**18.45.010 Amendments – Purpose and introduction.**

(1) Purpose. The purpose of this chapter is to establish procedures for amending the Jefferson County Comprehensive Plan, defined for the purposes of this chapter as including the plan text and/or the land use map. The Growth Management Act (GMA, Chapter 36.70A RCW) generally allows amendments to comprehensive plans no more often than once per year, except in emergency situations. This chapter is intended to provide the following:

(a) A process whereby the county will compile and maintain a preliminary docket of proposed amendments to the Comprehensive Plan and then select which proposed amendments will be placed on the final docket for review, no more often than once annually;

(b) Timelines and procedures for placing formal applications for amendments by interested parties (i.e., project proponents or property owners) on the final docket for review, no more often than once annually; and

(c) Criteria for review of the final docket by the Jefferson County planning commission and the Jefferson County board of commissioners. This chapter is also intended to provide a process for the planning commission to monitor and assess the Comprehensive Plan, and based on this review to recommend amendments (if any) to the plan as part of a standardized amendment process.

(2) Public Participation. The public participation process set forth in this chapter is intended to solicit from the public suggested amendments to the Jefferson County Comprehensive Plan for future consideration, and to provide an opportunity for public comment on any proposed amendments. This is achieved by early and continuous public involvement with broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provisions for open discussion, information services, and consideration and response to public comments.

(3) Planning Commission Role. The Jefferson County planning commission is an advisory body that shall make recommendations to the county commissioners on all Comprehensive Plan matters, including amendments to the plan text and land use map, implementing regulations and subarea plans.

(4) Applicability of Chapter 18.40 JCC. Amendments to the text of the Comprehensive Plan, the land use map, and the implementing regulations are legislative, Type V decisions under Chapter 18.40 JCC. Accordingly, all applicable provisions of that chapter apply to the decision-making process adopted in this chapter, regardless of whether or not they are specifically referred to herein. [Ord. 2-06 § 1]

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