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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By

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No. 265480
Kittitas County Superior Court No. 07-2-00552-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

CENTRAL WASHINGTON HOME BUILDERS ASSOCIATION *et al.*,

Petitioners,

v.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD, *et al.*,

Respondents.

KITTITAS COUNTY CONSERVATION, RIDGE, AND FUTUREWISE'S MOTION FOR DISCRETIONARY REVIEW

Keith Scully, WSBA No. 28677
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I. IDENTITY OF PETITIONERS

Petitioners Kittitas County Conservation, RIDGE, and Futurewise (KCC) are the respondents in the Kittitas County Superior Court administrative appeals at issue here. KCC was the petitioner in front of the Eastern Washington Growth Management Hearings Board in the underlying case, and prevailed on all relevant issues in the Board's Final Decision and Order of August 20, 2007.

II. DECISION BELOW

The Eastern Washington Growth Management Hearings Board issued its Final Decision and Order in *Kittitas County Conservation et al. v. Kittitas County*, Case No. 07-1-0004c, on August 20, 2007 (Attached as Att. A).

III. ISSUES PRESENTED FOR REVIEW[1]

a. Did the Growth Management Hearings Board erroneously apply the law by ruling that the growth management act does not allow rural densities of one unit per three acres?

b. Was the Growth Board's decision finding Kittitas County's cluster ordinance and planned unit development ordinance in violation of

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[1] These issues were framed by the petitioners to the Superior Court, Central Washington Home Builder's Association of Washington, Building Industry Association of Washington, and Mitchell F. Williams (intervenors in EWGMHB Case No. 07-1-0004c). They have been altered only to correct grammar.

the GMA an erroneous application of the law and arbitrary and capricious?

c. Is the Growth Board's decision finding Kittitas County's comprehensive plan in violation of the GMA for failing to provide for a variety of rural densities an erroneous application of the law, not supported by the evidence, and arbitrary and capricious?

IV. STATEMENT OF THE CASE

On December 11, 2006, Kittitas County adopted Ordinance 2006-63, the County's amended Comprehensive Plan. Kittitas County Conservation, RIDGE, and Futurewise (KCC) filed a petition for review to the Eastern Washington Growth Management Hearings Board (Board). The Washington State Department of Community, Trade, and Economic Development (CTED) filed a separate petition, and the matters were consolidated under Case No. 07-1-0004c. Several parties, including the Central Washington Home Builders Association (CWHBA), intervened or were granted *amicus* status.

On August 20, 2007, the Board issued its Final Decision and Order (FDO)[2]. The Board found in favor of CTED on all four issues alleged in CTED's petition for review, and in favor of the majority of KCC's issues. Kittitas County and the CWHBA each filed petitions for review to the

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[2] See Att. A.

Kittitas County Superior Court.[3] Each petition alleges error in the Board's finding that the County's rural densities of 1 dwelling unit per 3 acres violated the GMA. CWHBA also assigns error to the Board's findings that the County failed to provide for a variety of rural densities, and that the County's Performance Based Cluster Platting and Planned Unit Development Zone violated the GMA.

On October 18, 2007, KCC applied to the Eastern Washington Growth Management Hearings Board (Board) for a Certificate of Appealability in both Superior Court cases. On October 22, 2007, the Board issued a Certificate of Appealability for both cases.[4] On October 29, 2007, KCC file a Notice of Discretionary Review in both Superior Court cases.

V. ARGUMENT

RAP 6.3 and RCW 34.05.518 govern direct review of the decisions of environmental boards, including the Growth Management Hearings Boards, and provide that the Court should accept direct review based upon the same standards upon which the Board should issue a certificate of

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[3] Kittitas County's petition is Case No. 07-2-00549-1; CWHBA et al.'s petition is Case No. 07-2-00552-1.
[4] See Att. B.

appealability, specifically if it "finds that delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest and either: (i) fundamental and urgent statewide or regional issues are raised; or, (ii) the proceeding is likely to have significant precedential value."[5] Because the Board has issued a certificate of appealability and because all of the statutory criteria are met, this court should accept direct review.

A. A delay in obtaining a final and prompt determination of the issues in this matter is detrimental to all parties and the public interest.

In addressing this issue, the Board has held that:

> [i]t is important to have this matter decided by Division Three of the Court of Appeals as soon as possible. The issue will have great precedential value in Eastern Washington and the State as a whole. The resolution of these issues will be of great benefit to the parties and their local constituencies.[6]

All parties are benefited by a rapid and binding resolution of this case. Given the scope of the issues presented and the acreage affected by

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[5] RCW 34.05.518(5). RAP 6.3 provides:

> The appellate court accepts direct review of a final decision of an administrative agency in an adjudicative proceeding under RCW 34.05.518 and RCW 34.05.522 by entering an order or ruling accepting review. In requesting direct review, the parties shall follow the procedures set forth in rule 6.2.

RAP 6.2(c) provides:

> Regular Motion Procedure Governs. A motion for discretionary review is governed by the motion procedure established by Title 17.

[6] Att. B, Certificate of Appealability at P. 4.

the Board's ruling, it seems unlikely that the losing side at the Superior Court level would fail to appeal. KCC is harmed by delay because development applications can vest to the noncompliant code even while an appeal is pending. Washington's vesting law allows applications to vest upon filing.[7] Thus, even though the Board has found noncompliant the County's 3 acre rural zoning and other provisions, land can still be divided during the pendency of the appeal, and housing that harms working farms and forests and the rural area constructed.

As KCC demonstrated during the Hearing on the Merits in this matter, three acre plots lead to sprawl, degradation of water quality, transportation and other public service provision problems, and endanger farming and other natural resource industries, and imperil water rights. Thus, the interests of KCC and the public are aided by a rapid resolution of the appeal, allowing the County to repair its error in allowing urban densities in the rural area in the near rather than far future.

CWHBA *et al.* are aided by a rapid resolution as well. Even though applications can vest, property owners and the businesses represented by CWHBA still face uncertainty regarding the future of

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[7] RCW 36.70A.302.

density in Kittitas County for those properties where the owner or potential purchaser is unable or unwilling to file a permit application. Uncertainty regarding the development potential of a property may make sale difficult, as well as making it more difficult to obtain financing for a property. Furthermore, the long-term business interests of CWHBA and other developers are harmed by sprawl zoning. Traffic, inadequate water and sewer, poor fire protection, and a degraded environment are not good selling points for real estate. A binding ruling requiring the County to fix its sprawl zoning will aid the long-term economic health of the region, and the long-term interests of CWHBA and the other appellants.

B. Fundamental and urgent statewide or regional issues are raised.

The Board has noted that "[t]he issues raised herein are fundamental and of urgent regional and statewide interest."[8] As discussed above, Kittitas County's urban densities in the rural area are bad for water quality and the environment. Water quality knows no borders; regional supplies are at risk. Furthermore, traffic, wildfires, and agricultural markets and communities are not constrained within the County. Adjacent

[8] Att. B, Certificate of Appealability at p. 4.

counties and the region as a whole stand to benefit from careful land use planning in Kittitas.

Furthermore, Kittitas County's noncompliant rural densities create an unfair playing field in the short-term for builders and developers operating in adjacent GMA-compliant counties. In the long-term, adequate rural densities aid the economic health of a region. In the immediate future, though, it is more profitable to build sprawl housing without paying for infrastructure than it is to build at appropriate rural levels, or pay for urban-level services. Thus, builders in Yakima, Chelan, Grant, and King counties must abide by GMA-compliant densities, while competing with Kittitas County builders who have an unfair competitive advantage under the Kittitas County comprehensive plan found noncompliant by the Board.

C. The proceeding is likely to have significant precedential value.

The Board has correctly noted that:

> The issue will have great precedential value in Eastern Washington and the State as a whole. . . It is unlikely that the Superior Court will have the final review. Direct review by the Court of Appeals will be a more efficient use of the judicial system[']s valuable time.[9]

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[9] Att. B, Certificate of Appealability at p. 4.

In addition to the factors described above, in 2005, the Washington Supreme Court noted in *Viking Properties v. Holm* that Growth Boards cannot set "bright line rules" regarding density.[10] Few decisions have applied this ruling, and none have been considered by the Supreme Court.[11] The appellate courts have yet to provide binding guidance on when a Board violates *Viking Properties'* bright-line rule conclusion, and whether previous rulings from all three Boards holding that 1 dwelling unit per 5 acres is the minimum rural density may be utilized as a benchmark or presumption, or are a fact-based application of the GMA's prohibitions on urban growth outside urban growth areas.[12] Clarity is required, and KCC requests that this court provide guidance.

Similarly, there is little appellate guidance on planned unit developments and rural clustering. The Board in this case found the County's ordinance addressing these areas noncompliant both because it allows improper rural density and fails to prevent urban-like development.

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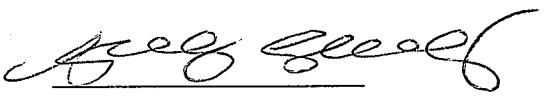
[10] *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005).
[11] *Normandy Park v. CPSGMHB*, 78630-5, a case involving urban densities and bright-line rules, was granted review but then dismissed by the appellant.
[12] See, *Gold Star Resorts, Inc. v. Futurewise, ___Wn.App. ____*, 166 P.3d 748(2007) (Agid, J., concurring), noting that 1 dwelling unit per 5 acres in jurisprudence from the Boards is a "rebuttable presumption", not a "bright-line rule".

While both of these objections are well-grounded in the GMA, there appears to be no appellate precedent directly addressing them.

VI. CONCLUSION

For the reasons set forth herein, KCC respectfully requests that this court accept direct review of this matter.

RESPECTFULLY SUBMITTED and signed on this 2nd day of November, 2007,



Keith Scully
WSBA #28677
Attorney for Petitioners Kittitas
County Conservation, RIDGE,
and Futurewise

DECLARATION OF SERVICE

I, Keith Scully, declare under penalty of perjury and the laws of the State of Washington that, on November 2, 2007, I caused the following documents to be served on the persons listed below in the manner shown:

KITTITAS COUNTY CONSERVATION, RIDGE, AND FUTUREWISE'S MOTION FOR DISCRETIONARY REVIEW

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DATED this 2nd day of November, 2007,

Keith Scully

EXHIBIT "A"

State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

KITTITAS COUNTY CONSERVATION et al.,

Petitioners,

v.

KITTITAS COUNTY,

Respondent,

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON (BIAW), CENTRAL WASHINGTON HOME BUILDERS ASSOCIATION (CWHBA), MITCHELL WILLIAMS, d/b/a MF WILLIAMS CONSTRUCTION CO., TEANAWAY RIDGE, LLC, KITTITAS COUNTY FARM BUREAU

Intervenors,

ART SINCLAIR and BASIL SINCLAIR,

Amicus Parties.

Case No. 07-1-0004c

FINAL DECISION AND ORDER

I. SYNOPSIS

Two Petitions for Review were timely filed challenging Kittitas County's (County) amended Comprehensive Plan (CP); one by Kittitas County Conservation Coalition, RIDGE, and Futurewise (KCCC et al.), and the other by the Washington State Department of Community Trade and Economic Development (CTED). The Petitioners, KCCC et al., raised ten issues contending the County failed to comply with the GMA and violated the following statutes: RCW 36.70A.020, Goals 1-2, 5, 8-10, 11-12; 36.70A.035; 36.70A.040; 36.70A.050;

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36.70A.060; 36.70A.070; 36.70A.110; 36.70A.115; 36.70A.120; 36.70A.130; 36.70A.131; 36.70A.160; 36.70A.170; 36.70A.172; 36.70A.175; and 36.70A.177. In addition, KCCC et al. contends the County's designation of certain federal and state lands failed to meet the criteria for inclusion as Resource Lands of Long-Term Commercial Significance, and Issue Nos. 4 and 6, if found non-compliant, warrant invalidity.

The Petitioners, Kittitas County Conservation, (KCCC et al.) address Issue Nos. 1 through 10; and Petitioner, Department of Community Trade and Economic Development (CTED) primarily address Issue Nos. 11 through 14 (although these issues overlap substantially with Issue Nos. 1, 4, 5, and 6.)

The Respondent, Intervenors, and amicus parties argued the amended CP is a result of following a process in establishing minimum acre lot sizes that provide for a mixture of densities, combats rural sprawl and maintains agricultural character, provides for residential development of land ill-suited to agriculture, and reduces the amount of agricultural land converted to residential uses. The County argues the county planning decision is presumed valid and to be given greater than substantial deference, Petitioners have a high burden to show the County's decision was clearly erroneous, and Petitioners have failed to meet this burden in this matter. The Intervenors argue Kittitas County's Comprehensive Plan, as amended by Ordinance 2006-63, was adopted pursuant to Washington State's Growth Management Act (GMA) and is presumed valid. Before the Board can find an action clearly erroneous, the Board must be left with the firm and definite conviction that a mistake has been committed. The Intervenors also argue the proper burden of proof cannot be overstated.

The Board agrees, it is the responsibility of the Petitioners to provide the burden of proof. The Board studied the issues as presented and determined from the parties' arguments, the record, past Hearings Boards' decisions, case law, and the requirements set forth in the Growth Management Act (GMA), whether the County complied with RCW 36.70A. Rather than reiterate the Board's analysis for every issue here in the synopsis, only a summary of the conclusions will be given.

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The Board finds the Petitioners (KCCC et al.) failed to carry their burden of proof in the following issues: No. 8 (designation of resource lands of long-term significance), and No. 9 (FLUM and zoning maps).

The Board finds KCCC et al. carried their burden of proof in the following issues: No. 1 (rural issues), No. 2 (Gold Creek resort designation), No. 3 (designation of resource lands), No. 4 (de-designation of agricultural land), No. 5 (UGNs), No. 6 (UGA expansions for Cities of Kittitas and Ellensburg), No. 7 (FLUM, zoning map, and development regulations), No. 10 (review and revise development regulations, PUD zones, performance based zones). The Board also finds CTED has carried its burden of proof on Issues No. 11 (variety of rural densities), No. 12 (UGNs), No. 13 (de-designation of agricultural lands), and No. 14 (expanding UGAs for cities of Kittitas and Ellensburg.)

II. INVALIDITY

The Board further grants the Petitioners', (KCCC et al.), request for a finding of invalidity. The Board finds the County's actions argued in Issue Nos. 4 and 6, invalid. (See section VI below).

III. PROCEDURAL HISTORY

On February 8, 2007, KITTITAS COUNTY CONSERVATION, RIDGE, and FUTUREWISE (KCCC et al.), by and through their representative, Keith Scully, filed a Petition for Review.

On February 21, 2007, WASHINGTON STATE DEPARTMENT OF COMMUNITY TRADE and ECONOMIC DEVELOPMENT (CTED), by and through their representative, Alan Copsey, filed a Petition for Review.

On February 23, 2007, the Board received BIAW's, CWHBA's, and MITCHELL WILLIAMS', Motion to Intervene in EWGMHB Case No. 07-1-0003.

On February 27, 2007, and March 12, 2007, the Board received Teanaway Ridge, LLC's Motion to Intervene in EWGMHB Case Nos. 07-1-0003 and 07-1-0004.

On March 12, 2007, the Board received Art Sinclair and Basil Sinclair's Motion to File Amicus Brief in EWGMHB Case Nos. 07-1-0003 and 07-1-0004.

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On March 14, 2007, and March 15, 2007, the Board received Kittitas County Farm Bureau, Inc., Motion to Intervene in EWGMHB Case Nos. 07-1-0003 and 07-1-0004.

On March 15, 2007, the Board heard the Motions to Intervene filed by the aforementioned parties. The Board also heard the Motion to File Amicus Brief filed on behalf of the Sinclairs before the Prehearing conference. The Board grants Intervenor status to BIAW, CWHBA, Mitchell Williams, Teanaway Ridge, LLC, and Kittitas County Farm Bureau. The parties are intervening on behalf of the Respondent. The Board also grants amicus status to Art Sinclair and Basil Sinclair.

On March 15, 2007, the Board held a telephonic Prehearing conference. Present were John Roskelley, Presiding Officer, and Board Members, Dennis Dellwo and Joyce Mulliken. Present for the Petitioners were Tim Trohimovich, Jamie Mathey, and Alan Copsey. Present for the Respondent was James Hurson and Neil Caulkins. Present for Intervenors BIAW, Central Washington Home Builders Association, and Mitchell Williams was Andrew Cook. Present for Intervenor Teanaway Ridge, LLC, was Jeff Slothower. Mr. Slothower also represents Art Sinclair and Basil Sinclair. Present for Intervenor Kittitas County Farm Bureau was Gregory McElroy. Anne Watanabe was present for Eastern Ridge Land Company, an interested party in this matter.

The Board at the Prehearing conference consolidated Case Nos. 07-1-0003 and 07-1-0004. The new Case Name and Number are as follows and shall be captioned accordingly: KITTITAS COUNTY CONSERVATION et al. v. KITTITAS COUNTY, 07-1-0004c.

On March 16, 2007, the Board issued its Prehearing Order.

On March 15, 2007, the Board received a Motion for Consolidation from attorneys Michael Murphy and William Crittenden, Intervenors, Misty Mountain, EWGMHB Case No. 06-1-0011.

On May 22, 2007, the Board issued its Order Denying Motion to Consolidate EWGMHB Case Nos. 06-1-0011 and 07-1-0007c.

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On May 25, 2007, the Board received Petitioners, Kittitas County Conservation, Ridge, and Futurewise Requests to File a Motion beyond the Motion Deadline and Agreed Motion to Revise Service List and Motion for Leave to File an Over-Length Brief.

On May 30, 2007, the Board issued its Order Granting Motion to Revise Service List and Leave to File an Over-Length Brief.

On June 5, 2007, the Board received Kittitas County's Motion for Continuance, asking for 30 days, Petitioner, CTED, Response to Kittitas County's Motion for Continuance, and Intervenor, Teanaway Ridge LLC's Response to Kittitas County's Motion for Continuance. The Board has not received responses from the representatives of the other parties involved in this matter.

On June 6, 2007, the Board issued its Order Granting Continuance.

On July 16, 2007, the Board held the Hearing on the Merits. Present were Joyce Mulliken, Presiding Officer, and Board Members, Dennis Dellwo and John Roskelley. Present for the Petitioners were Tim Trohimovich, Jamie Mathey, and Alan Copsey. Present for the Respondent was Neil Caulkins and Darryl Piercy. Present for Intervenors BIAW, Central Washington Home Builders Association, and Mitchell Williams was Andrew Cook. Present for Intervenor Teanaway Ridge, LLC, was Jeff Slothower. Mr. Slothower also represents Art Sinclair and Basil Sinclair. Present for Intervenor Kittitas County Farm Bureau was Gregory McElroy.

IV. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF REVIEW

Comprehensive plans and development regulations (and amendments thereto) adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon adoption by the local government. RCW 36.70A.320. The burden is on the Petitioners to demonstrate that any action taken by the respondent jurisdiction is not in compliance with the Act. The Board ". . . shall find compliance unless it determines that the action by the . . . County. . . is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of [Growth Management Act]." RCW 36.70A.320. To find an

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action clearly erroneous, the Board must be ". . . left with the firm and definite conviction that a mistake has been committed." *Department of Ecology v. Central Puget Sound Growth Management Hearings Board,* 142 Wn.2d 543, 552, 14 P.3d 133 (2000).

The Hearings Board will grant deference to counties and cities in how they plan under Growth Management Act (GMA). RCW 36.70A.3201. But, as the Court has stated, "local discretion is bounded, however, by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearings Board,* 142 Wn.2d 543, 561, 14 P.2d 133 (2000). It has been further recognized that "[c]onsistent with *King County,* and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent with the requirements and goals of the GMA." *Thurston County v. Cooper Point Association,* 108 Wn. App. 429, 444, 31 P.3d 28 (2001).

The Hearings Board has jurisdiction over the subject matter of the Petition for Review. RCW 36.70A.280(1)(a).

V. ISSUES AND DISCUSSION

Issue No. 1:

Does Kittitas County's failure to review and revise the comprehensive plan to eliminate densities greater than one dwelling unit per five acres in the rural area (outside of limited areas of more intense rural development (LAMIRDs and Urban Growth Areas), failure to adopt rural policies and designations that protect natural resource lands from incompatible development, failure to define rural character and to adopt provisions to protect rural character, inadequate or absent criteria for the designation of rural land use designations, failure to adopt a policy to prohibit urban governmental services outside the urban growth area, and failure to review and revise the rural element to comply with the GMA violate RCW 36.70A.020 (1-2, 5, 8-10, 12), 36.70A.040, 36.70A.070, 36.70A.110, 36.70A.120, 26.70A.130, and 36.70A.177? (Related to Issue 11 [CTED])

The Parties' Position:

Petitioners KCCC, et al.:

The Petitioners (Kittitas County Conservation Coalition, RIDGE, Futurewise, [KCCC et al.]) contend Kittitas County's Comprehensive Plan fails to eliminate densities greater than

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one dwelling unit (DU) per five acres in the rural area outside the limited areas of more intense rural development (LAMIRDs) and Urban Growth Areas (UGAs), thereby designating rural land for urban growth. Furthermore, the Petitioners contend the County failed to adopt policies and designations to protect natural resource lands from incompatible development; failed to protect rural character, and does not provide criteria for rural land use designations; failed to review and revise the rural element to comply with the GMA by not adopting a variety of rural densities; and failed to review and revise the rural element to comply with the Growth Management Act (GMA). The Petitioner, CTED, has similar contentions and arguments, which are summarized in Issue No. 11 of this Final Decision and Order (FDO).

The Petitioners contend Kittitas County allows two rural land use designations, "Rural 3" (R-3) and "Agriculture 3" (A-3), allowing urban growth in a rural area. The Petitioners point out one of the most important tools to prevent urban sprawl is RCW 36.70A.070(5), which prohibits designating land for urban growth in the rural element of the Comprehensive Plan (CP). "The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide ... appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character." RCW 36.70A.070(5)(b).

The Petitioners also cite RCW 36.70A.110(1), which prohibits urban growth outside urban growth areas (UGAs). "Urban growth" refers to growth that makes intensive use of land for the locations of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to the GMA. RCW 36.70A.110(1).

The Petitioners point out all three Growth Management Hearings Boards (Hearings Boards) have held the minimum density is one (1) (DU) per five (5) acres of land; and as this Board explained, "This is not to say there is a "bright line" rule [of the kind disfavored

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in the Supreme Court's *Viking Properties* decision] concerning rural lot sizes. Counties and Cities do have some discretion based on local circumstances, but this discretion on rural lot sizes or density is limited by the GMA and must be justified in the record. *Futurewise v. Pend Oreille County,* EWGMHB Case No. 05-1-0011 Final Decision and Order, p.16 (November 1, 2006).

The Petitioners contend the County recognizes one DU per three (3) acres is incompatible with natural resources lands by also including density requirements of one DU per 20 acres, and one DU per 80 acres. In *Tugwell v. Kittitas County,* the Court of Appeals held parcels of less than twenty acres, especially the very small lots allowed in the A-3 and R-3 zones, are too small to farm. The Petitioners also argue that according to the United States Census of Agriculture the smallest category of farm is from one to nine acres in size. They further state, "since an average of a little over six acres is the smallest size supporting agriculture" ... "densities of one DU per three acres are incompatible with the primary use of land for the production of food, other agricultural products, ... and natural resource lands designated pursuant to RCW 36.70A.170."

The Petitioners cite numerous studies and publications to further express their concerns about water quality and failed septic systems. The Petitioners contend, "...water is scarce" in Kittitas County, citing a letter from the Department of Ecology (DOE) to Kittitas County Community Development Services. The breaking up of the rural area into small parcels exacerbates the water shortage.

The Petitioners argue urban densities in rural areas violates RCW 36.70A.110(1), which requires the County to encourage urban growth in UGAs and prohibits urban growth outside them.

The Petitioners contend the County may apply local circumstances to its rural element in deciding density, but must develop a written record explaining how the rural element meets the requirements of the GMA. The County merely listing the densities permitted is insufficient. According to the Petitioners, densities of one DU per three acres are inconsistent with Kittitas County's local circumstances. The Petitioners also contend the

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conflicts between rural land uses and those lands designated agricultural, forest and mineral resource lands under RCW 36.70A.170.

In addition, the Intervenors contend Kittitas County's rural element provides a variety of rural densities based on local circumstances and designates as least six rural zones. The Intervenors argue there is no requirement under the GMA that requires local jurisdictions to set criteria in their comprehensive plans to limit the ability of property owners to rezone their property. Kittitas County does designate a number of rural areas with varying densities, so its CP complies with the GMA.

The Intervenors contend Kittitas County's CP protects the rural character by containing substantive criteria minimizing conflicts in adjacent zones. In the County's CP under rural element, the section, "Rural Uses Adjacent to Designated Resource Lands", states that rural lands should be managed in a manner that minimizes impact on adjacent natural resource lands. It also provides that development standards for access, lot size and configuration, fire protection, forest protection, water supply and dwelling unit location should be adopted for development within or adjacent to forest lands. The Intervenors contend the County's rural element further protects the rural character through a number of policies that seek to continue agriculture, timber and mineral uses on lands not designated for long-term commercial significance.

Petitioners KCCC, et al. HOM Reply:

The Petitioners, KCCC, et al., contend the Respondents ignore arguments and data presented by the Petitioners in their HOM Brief. The Respondents have misinterpreted this Board's decisions in *Futurewise v. Pend Oreille County, Woodmansee v. Ferry County, 1000 Friends of Washington v. Chelan County, City of Moses Lake v. Grant County,* and the Court of Appeals *Diehl* decision, in that the County's local circumstances and the GMA support minimum rural densities of one DU per five acres showing it is not a bright line rule for rural densities. The Petitioners also argue there are no applicable Board precedents that allow urban densities in the rural area to the extent Kittitas County allows and, if properly read, these cases all support the proposition the County's Comprehensive Plan and Rural-3 and

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
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Phone: 509-574-6960
Fax: 509-574-6964

Agriculture-3 zones violate the GMA. The Petitioners further contend the Intervenors claim "...unambiguously absent from RCW 36.70A.070(5)(a)-(c) is any minimum density requirement ...". However, the Petitioners contend they have shown in their HOM Brief and in the summary above, RCW 36.70A.050(5) and other provisions of the GMA prohibit urban growth outside the UGAs Urban growth is defined as growth too dense to grow food and forest products.

The Petitioners argue the Growth Board has the duty to interpret the GMA and invalidate non-compliant CPs and DRs, such as Kittitas County's. The Respondents cite *Viking Properties v. Holm,* which holds that Growth Board decisions do not establish the kind of "public policy" used to invalidate restrictive covenants, the source of that type of public policy is set forth in constitutional, statutory, and regulatory provisions, as well as prior judicial decisions. In that case the Supreme Court also wrote "...that the GMA creates a general 'framework' to guide local jurisdictions instead of 'bright line' rules." Furthermore, the GMA allows consideration of local circumstances through a broad range of discretion.

The Petitioners also contend the Respondent's argument, allowing farmers to save the farm in low flow [water] years by selling off small lots, fails because many of the farmers and Irrigation Districts are senior water rights holders and are assured adequate irrigation water in most years. The Petitioners argue the County ignored a better solution offered from its own Resource Lands Advisory Committee (RLAC),which recommended creating a transfer of development rights program where development in the rural area would be required to buy development rights from farmers in the Commercial Agriculture land use designation. The Petitioners cite data from several documents and publications to support their arguments regarding variable irrigation water conditions.

The Petitioners contend the Respondent's argument that it followed a process in adopting its rural zoning densities fails because the Rural-3 and Agriculture-3 zones do not provide for rural densities, which is a GMA requirement, and is contradicted by the record, , the Court of Appeals *Tugwell* decision, and the *Ferry County* decision allowing 2.5 acre zoning, which has been called into question by the Court of Appeals *Diehl* decision.

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
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Phone: 509-574-6960
Fax: 509-574-6964

The Petitioners contend the Respondent's and Intervenors' arguments that the Petitioners are erroneously elevating certain GMA goals over others and the Rural-3 and Agriculture-3 zones meet the GMA and CP goals fail because these designations and zones violate the GMA requirements. In addition, the County and Intervenors have committed the error of focusing on the GMA goals and elevating one goal over another when they should focus their arguments on the GMA requirements. Therefore, their goal elevation arguments fail.

Finally, the Petitioners contend the County's argument that its CP and DRs have created a mix of densities fail because the GMA requires a variety of rural densities and the variety must be in its rural element. RCW 36.70A.070(5)(b) requires "[t]he rural element shall provide for a variety of rural densities, uses...", not urban densities as A-3 and R-3 allow. The Petitioners argue the County and the Intervenors confuse the Comprehensive Plan and zoning, since in *Tugwell v. Kittitas County, Henderson v. Kittitas County,* and *Woods v. Kittitas County* we have seen rural lands rezoned from Agriculture-20 and Forest and Range-20 to Agriculture-3 and Rural-3.

Board Analysis:

The Board is finding Kittitas County out of compliance in Issue No. 11, which encompasses many of the same issues contained herein. Because of that, the Board will concentrate on the portions of Issue No. 1 which are not already decided in Issue No. 11. The primary issue needing to be resolved in Issue No. 1 is whether Rural-3 and Agriculture-3 zoning are in error and violations of the GMA for allowing urban growth in the rural element.

Kittitas County is prohibited from designating land for urban growth in the rural element of the comprehensive plan. RCW 36.70A.070(5)(b) provides as follows:

> (b) Rural development. The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses. In order to achieve a variety of rural densities and uses, counties

Eastern Washington
Growth Management Hearings Board
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> may provide for clustering, density transfer, design guidelines, conservation easements, and other innovative techniques that will accommodate appropriate rural densities and uses that are consistent with rural character. RCW 36.70A.070(5)(b).

RCW 36.70A.110(1) also prohibits urban growth outside urban growth areas:

> (1) Each county that is required or chooses to plan under RCW 36.70A.040 shall designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature.

The decisions cited by the Respondent , *Woodmansee v. Ferry County, 1000 Friends of Washington v. Chelan County, City of Moses Lake v. Grant County,* stand on their own facts and status of the GMA law at the time adopted. Under the GMA, as amended, this Board would likely not have allowed such densities permitted in the above cases without sufficient evidence that the densities were rural densities and meet the requirements of the GMA.

Agriculture-3 and Rural-3 both allow the sizing of lots throughout the rural element at a density of three acres per dwelling unit. Those regulations provide for bonus densities under certain circumstances. This Board and the other two Hearings Boards have studied rural lot sizes, effects of those lot sizes and measured these findings against the requirements of the GMA and its definitions. With this extensive research and having reviewed the Kittitas County Record, searching for the basis for the sizing of these Rural lots, this Board finds that the densities of lots the size allowed by these regulations, Agriculture-3 and Rural-3, are urban densities and this urban growth is prohibited in the Rural element.

The County contends that regulations adopted pursuant to a comprehensive plan are an appropriate means of achieving GMA compliance. The GMA requires the County to adopt regulations to implement their CP, however the regulations authorizing the Rural-3 and Agriculture-3 were adopted prior to the adoption of the CP. Agriculture-3 was adopted in 1983 and Rural-3 was adopted in 1992. In a previous Board decision, Kittitas County was

Eastern Washington
Growth Management Hearings Board
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Fax: 509-574-6964

found to not have properly reviewed these pre-CP regulations for consistency or adopted the regulations properly as implementing the CP. "The Board finds there was clear and convincing evidence that the County failed to act when it failed to adopt regulations implementing its CP, review Agriculture-3 and Rural-3 regulations for consistency with its Comprehensive Plan, and provide for proper notice and public participation." *KCCC, et al. v. Kittitas County, et al.,* EWGMHB Case No. 06-1-0011, FDO, April 3, 2007. While the County claims that these regulations were adopted to carry out local circumstances in establishing patterns of rural densities and uses, this would seem difficult to sustain where such regulations were improperly reviewed and adopted. Further, the County must "develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of the [Act]." RCW 36.70A.070(5). They have not developed this written record.

From the record before the Board and review of previous Board decisions here in Eastern Washington and Western Washington, the Board must find that densities permitted by Agriculture-3 and Rural-3 regulations are urban and prohibited in the County's rural element.

Conclusion:

The Petitioners have carried their burden of proof and shown by clear and convincing evidence that the action of the County, complained of herein, is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act. The Board finds that the densities allowed by regulations Agriculture-3 and Rural-3 are urban in the rural element and not in compliance with the Growth Management Act and the County has not developed a written record explaining how the rural element harmonizes the planning goals in the GMA and meets the requirements of the Act.

Issue No. 2:

Does Kittitas County's failure to review and revise the Gold Creek resort designations and Comprehensive Plan Chapter 7: Snoqualmie Pass Sub-Area Comprehensive Plan –

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

Master Plan to meet the requirements for a master planned resort or to comply with the rural areas requirements for an area unsuited to resort development violate RCW 36.70A.020 (1-2, 8-10, 12) 36.70A.040, 36.70A.050, 36.70A.060, 36.70A.070, 36.70A.110, 36.70A.110, 36.70A.130, 36.70A.170, and 36.70A.172?

The Parties' Position:

Petitioners KCCC, et al.:

The Petitioners contend the GMA requires the Gold Creek area to comply with the rural element requirements because the area does not comply with the requirements for a master planned resort (MPR) and is unsuited for large resort development. They argue this area fails to comply with the rural element requirements because it permits urban densities in the rural element. The County simply describes it as a "Sub-Area" with a variety of urban and rural zones.

The Petitioners further argue this MPR process becomes the equivalent of the planned unit development (PUD) process used in RCW 36.70A.360 to ensure all future development is in accord with the County's DRs, county-wide planning policies and the County's CP. The Petitioners point out the County's CP places additional restrictions on MPRs, Kittitas County GPO 2.187: "A MPR should be designed in context with its surrounded environment, natural and man-made. An MPR should not adversely affect surrounded lands in any significant way." The County has failed to designate the Gold Creek area as a MPR.

The Petitioners contend because the Gold Creek area does not comply with the MPR requirements then it must meet the requirements of the GMA regarding rural areas. The Petitioners argue the County fails because it permits urban densities in a rural area.

Respondent Kittitas County:

The County argues Gold Creek is actually a valid PUD authorized in 1990, by Ordinance 90-21. They contend it is a "vested property interest that is not properly addressed at the CP stage." Respondent HOM brief at 13. To withdraw such a vested property right would require a due process hearing and determination. The County also

Eastern Washington
Growth Management Hearings Board
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argues Snoqualmie Pass does not need to be a Master Planned Resort, but rather fits an urban growth area designation much better. Regardless of what it may eventually be called, the County considers this area part of a sub-area in its CP and will be revisited. The County is in this process [beginning July 2007] by holding community scoping meetings.

Intervenors BIAW, et al.:

The Intervenors did not brief this issue.

Petitioners KCCC, et al. HOM Reply:

The Petitioners contend the County has failed to comply with the GMA by permitting urban densities in the rural area. The County defends its decision on the grounds Gold Creek is "a valid Planned Unit Development (PUD)" authorized in 1990, and that this is vested property. The Petitioners argue under Washington's vested rights law, a PUD only vests when "coupled with" and "inextricably linked" with a preliminary plat applications for a subdivision. Petitioners HOM Reply brief at 19. However, the PUD did not vest the development within the statutory time limits. The Petitioners further argue the preliminary plat has either expired or is beyond its vesting date and, even though there may be vested developments in an area, does not justify the continuing violations of the GMA. The Board must remand this issue back to Kittitas County for action consistent with the GMA.

Board Analysis:

The Snoqualmie Pass Sub-Area includes an area called Gold Creek. This area has not been designated as a Master Planned Resort, but is called a "Sub-Area", with a variety of urban and rural zones, separate from the zoning designation for a Master Planned Resort.

The question of whether lots or a PUD in the Gold Creek area are vested is not before the Board and this Board will not make such a determination. The question before the Board is whether the County failed to meet the requirements for a master planned resort or comply with the rural area requirements if the area is unsuited for resort development and therefore violated the GMA.

The subject area is not designated as a master planned resort, a LAMIRD, or another designation authorized under the GMA. The County states that the planning process is

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
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Phone: 509-574-6960
Fax: 509-574-6964

ongoing. Subarea plans are neither defined nor required by the GMA; Subarea plans are an optional element that a jurisdiction may include in its GMA Plan. RCW 36.70A.080(2). All that can be inferred from the statute and prior Board cases is that Subarea plans are, as the pre-fix "sub" implies, subsets of the comprehensive plan of a jurisdiction. Additionally, Subarea plans typically augment and amplify policies contained in the jurisdiction-side comprehensive plan. (*Laurelhurst, 03-3-0008*, FDO, at 8.) The County's use of a Subarea planning process does not exempt that land from the goals and requirements of the GMA, the CP and the County Wide Planning Policies. This "Area" cannot exist outside of the UGA and allow urban growth or the potential of development inconsistent with areas outside of UGAs unless it is selected for one of the designations allowed under the GMA, such as Master Planned Resorts, LAMIRDs or UGAs. The vesting of properties within that area does not justify the continuing violations of the GMA.

The County must comply with rural requirements unless or until this property is no longer considered Rural.

Conclusion:

The Petitioners have carried their burden of proof and shown that the County's actions are clearly erroneous. This issue is remanded with directions for the County to designate this land consistent with the GMA.

Issue No. 3:

Does Kittitas County's lack of criteria for designating agricultural lands of long-term commercial significance, failure to adopt comprehensive plan provisions and development regulations to conserve natural resource lands and to protect them from incompatible development, lack of criteria for designating forest lands of long-term commercial significance, and failure to otherwise comply with the requirements for natural resource lands violate RCW 36.70A.020 (1-2, 5, 8-10, 12), 36.70A.040, 36.70A.050, 36.70A.060, 36.70A.070, 36.70A.110, 36.70A.130, 36.70A.170, 36.70A.172, and 36.70A.177?

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
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The Parties' Position:

Petitioners KCCC, et al.:

The Petitioners contend Kittitas County violates the GMA by having non-compliant criteria for designating agricultural lands of long-term commercial significance. The statute clearly requires local governments to conserve agricultural lands of long-term commercial significance [RCW 36.70A030(10)], and the Washington State Supreme Court has held there is a three part test for agricultural lands of long-term commercial significance in *City of Redmond v. CPSGMHB,* 136 Wn.2d 38, 53, 959 P.2d 1091, 1097 (1998). The Petitioners also argue local governments are directed to consult and consider guidelines provided by Washington Administrative Code (WAC) provision 365-190-050 in determining which lands have long-term commercial significance under RCW 36.70A.170(1) and .050., and *Lewis County v. WWGMHB,* 157 Wn2d 488, 502, 139 P.3d 1096, 1103 (2006). If a county or city chooses to not use the categories listed by the United States Department of Agriculture (USDA) Soil Conservation Service, the rationale for that decision must be included in its next annual report to the department of community development.

The Petitioners further argue prime farmland is described at 7 Code of Federal Regulations (CFR) § 657.5(a)(1) as follows [in part]: "... has soil quality, growing season, and moisture supply needed to economically produce sustained high yields of crops when treated and managed, including water management, according to acceptable farming methods." Significant in these [Federal] guidelines is they do not provide any guidance in how these factors should be weighed and what conclusion should be reached with respect to designation, so these decisions are presumably left to the discretion of local governments. However, this discretion comes with an important caveat in that designation decisions must be made in the context of the GMA's conservation mandate and, as this Board has ruled, local governments should err towards inclusion of agricultural land (*Grant County Association of Realtors v. Grant County,* EWGMHB Case No. 99-1-0018, FDO, May 18, 2000.) The Petitioners point out Kittitas County's CP contains the following criteria for designating agricultural lands of long-term commercial significance:

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

- current zoning and parcel sizes of the area
- availability of an adequate and dependable water supply
- soil types (prime, unique, local, and statewide) of the area
- criteria contained under WAC 365-190-050 (Kittitas County Ord. 2006-63, at Section 2.3(c)).

However, the Petitioners also contend only the third and fourth [criteria] are compliant with the GMA. The first criteria is an improper indicator of actual use and the second criteria, water availability, is contradicted by the County as an indicator of long-term commercial.

The Petitioners contend the County has failed to adopt CP provisions and DRs to conserve natural resource lands and protect them from incompatible development and therefore violates the GMA. Their arguments have been addressed in Issue 1(b), supra.

The Petitioners contend Kittitas County's lack of mandatory criteria for designating forest lands of long-term commercial significance violates the GMA. The Petitioners argue the County's Ordinance 2006-63 contains optional rather than mandatory criteria for designating forest lands of long-term commercial significance and, without mandatory criteria, it is difficult to ascertain if the County has designated the correct amount or type of lands.

The Petitioners contend the County has failed to otherwise comply with the requirements for natural resource lands, fails to require adequate notice of proximity to agricultural lands as required under RCW 36.70A.060, and notes the County has adopted Right to Farm provisions contained in Section 17.74 of the KCC, at GPO 8.15.

Respondent Kittitas County:

The County contends neither KCCC, et al., or CTED cite to any authority for the proposition that the County must do more than it already has to designate various types of land designations or conserve them. Failing to do so, their claims must be denied.

Regardless, the County argues it does have agricultural land designation and protection criteria that comply with the GMA. The County's CP, in section 2.3(C), lists the required criteria from RCW 36.70A.060 and WAC 365-190-050, with additional criteria in

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

GPO's 2.110A through 2.129. The County also argues it has similar designation and protection criteria for commercial forest land in section 2.3(C) and GPO's 2.130A through 2.142.

The County contends one criterion for the designation of agricultural land is parcel size and cites the Court of Appeals case, *Thurston County v. WWGMHB* 137 Wn. App. 871, 800,154 P.3d 959 (2007), which concluded that "the County's use of parcel size as one criteria for designating farm land falls easily within the bounds of the County's legislatively granted discretion." Furthermore, the County argues case law does not require mandatory criteria for forest land designation. Counties must consider guidelines and may consider factors, but there aren't mandatory criteria required. The County also contends it places the term "resource lands" in its CP, which includes mineral resource lands and so follows the requirements under RCW 36.70A. 170.

Intervenors BIAW, et al.:

The Intervenors contend Kittitas County's Comprehensive Plan Section 2.3(C) sets out multiple criteria used to designate and de-designate agricultural lands of long-term significance and lists them in their brief. The Intervenors quote from several cases, including *Lewis County v. WWGMHB*, 157 Wn.2d 488, 139 P.3d 1096 (2006), to emphasize that the courts recognize agricultural land cannot be classified based upon the notion that every acre of farm land must be conserved and not developed. The court determined only land that is capable of being farmed and is commercially significant should be conserved. The Intervenors argue the Supreme Court explicitly and unequivocally rejected the need to conserve every acre of farm land without regard to commercial viability. *Lewis*, 157 Wn2d at 509.

The Intervenors contend the County's CP requires more than just the criteria listed in WAC 365-190-050. It requires consideration of the current zoning and parcel size of the area as well. According to the Intervenors, the Petitioners did not meet their burden in this issue.

The Petitioners criticize the County's criteria, such as the availability of an adequate

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

and dependable water supply, yet fail to accept that agriculture in the County cannot exist without irrigation. The Intervenors argue KCCC, et al. fails to take into consideration commercial farmland is irrigation dependent. The Intervenors provide testimony from the Farm Bureau. They contend the GMA does not pre-empt consideration of water supply, or markets, or farm economies in favor of retaining a visually interesting rural environment.

The Intervenors contend the Petitioners argument is inconsistent with what Kittitas County is required to do in view of *Lewis* and have tried to shift the burden back to Kittitas County to prove that both rural preservation and conservation of farmland required a prohibition of the local option for three acre zoning in some rural and agricultural areas. The Intervenors argue the local evidence states that large lot subdivisions do more to create rural sprawl than small lots and other innovative zoning techniques. The Farm Bureau agrees and testified that an over-reliance on five acre to twenty acre minimums creates a rural designation that will not be rural and not sustainable.

The Intervenors disagree with CTED's arguments that counties must look at the commercial significance of agricultural property by considering the property's significance to the local farm economy. An area wide view, so to speak. The County's CP has criteria which provide a mechanism to determine if a particular parcel is significant to the local economy. The Intervenors contend the County may not have had its agricultural advisory committee review de-designations, but that is only one piece of evidence. The Intervenors again argue Kittitas County's criteria for designating and de-designating agricultural land of long term significance is consistent with the GMA and the Supreme Court's holding in *Lewis.*

Petitioners KCCC, et al. HOM Reply:

The Petitioners contend Kittitas County violates the GMA by having non-compliant criteria for designating agricultural lands of long-term commercial significance, has failed to adopt CP and DRs provisions to conserve natural resource lands and protect them from incompatible development, lacks mandatory criteria for designating forest lands of long-term commercial significance, and fails to otherwise comply with the requirements for natural resource lands under the GMA.

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

The Petitioners argue, while the County contends the KCCC et al. have cited no authority for the proposition, the County must do more than it already has to designate various types of land use designations or conserve them. The Petitioners have made it clear at pages 21 – 25 in their HOM Brief the County's current CP is "inadequate because the County failed to conduct essential steps leading up to the adoption of its CP, and failed to adopt compliant criteria for designating agricultural lands of long-term significance as required by RCW 36.70A.130." Furthermore, the Petitioners argue they cited WACs, the GMA, and decisions of the Supreme Court. The Petitioners also contend the County failed to correctly evaluate whether other lands are potentially eligible for designation as agricultural lands and this is both a procedural and substantive defect under RCW 36.70A020(8), .060, and .170, which directs counties and cities to designate, conserve, and assure the use of adjacent lands does not interfere with agricultural purposes and discourage incompatible uses.

The Petitioners contend the County's inclusion of current zoning is an improper indicator of actual use and perpetuates earlier patterns that impair agricultural uses of property. This is significant because there are numerous farms operating outside the county's designated agricultural lands of long-term commercial significance on land designated "Rural" in the County's CP, not "Commercial Agriculture" as they should be if the GMA criteria were properly applied.

The Petitioners also contend the County's CP does not properly use parcel size as a criterion. The availability of water should not be a factor that limits the designation of agricultural land of long-term commercial significance, since "today's lack of water does not necessarily permanently exclude the possibility of water being available in the future," and "although water usage is tightly limited by historical water rights in the Yakima Basin, Washington's Water Code at RCW 40.90.03.380 allows for the transfer of water rights and water permits to allow water to be used on differing parcels of property." Petitioners HOM Reply brief at 26. The Petitioners cite the example in Kittitas County where fourteen separate water rights were transferred to enable the development of the Suncadia (MPR)

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

Resort. Therefore, a parcel of land today that might not have legal right to water might be able to acquire water rights in the future.

The Petitioners further contend small lot subdivisions do not protect agricultural lands of long-term commercial significance. Small lot subdivisions actually cause the conversion of farm land and the Petitioners point to the argument at Section IV (1)(D) of this HOM Reply Brief.

The Petitioners argue criteria for designating forest land is required prior to designating such land in RCW 36.70A.170.While it may be true the County is to "consider" the guidelines, RCW 36.70A.050(3) states the guidelines "shall be minimum guidelines that apply to all jurisdictions," *Manke Lumber Co., Inc. v. Diehl,* 91 Wn. App. 793, 805, 959 P.2d 1173, 1180 (1998).

The Petitioners point out the County argues it need not do more than it has already done to prevent rural development from interfering with the use of adjacent natural resource lands. However, the Petitioners argue the GMA requires positive steps to protect natural resource lands from neighboring developments under RCW 36.70A.070(5)(c)(v). Furthermore, the Petitioners contend the County's CP provisions do little to actually protect against conflicts between rural development and commercial forest land.

Finally, the Petitioners contend Kittitas County does not comply with RCW 36.70A.060, which requires the County to require that all plats, short plats, development permits, and building permits issued for development activities on, or within five hundred feed of lands designated as resource lands contain a notice that the subject property is within or near designated resource lands. While provision for notice was made, the extent and the wording was not as required. In order to comply with the GMA, the Petitioners state that Kittitas County must add the notice for mineral resource lands in order to ensure adequate notice is given of the probable activities that will occur at the County's gravel and rock mines.

Board Analysis:

The GMA requires the County to designate and conserve natural resource lands,

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
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which include agricultural lands. RCW 36.70A.170. The County is directed to use regulations developed by CTED in such identification. The County has identified agricultural lands of long-term commercial significance by considering the following criteria:

1. The current zoning and parcel sizes of the area;
2. The availability of adequate and dependable water supply;
3. The Soil types (prime, unique, local, and statewide) of the area;
4. The criteria contained in WAC 365-190-050.

Kittitas County Comprehensive Plan Section 2.3(C).

The proper use of these criteria is the critical question before the Board. It is appropriate that the County consider water availability, parcel sizes and soil types. The difficulty identified by the Petitioners is the County's failure to include how these criteria will be considered or the weight they are given. This Board has already held that water or the lack thereof cannot be an excluding criteria. *Mike Williams et al. v. Kittitas County,* 95-1-0009 EWGMHB FDO and Order finding Non-compliance. The fact the land does not have a water right or the water right is secondary should not be an excluding factor. This is also true with the size of the parcels or current zoning. The size may be considered, but cannot be the excluding factor. The criteria are to include agricultural lands not exclude.

The County criteria for the designation of agricultural lands of long-term significance fails to comply with the GMA due to the County's failure to include how parcel size, current zoning and the presence of adequate and dependable water supply is considered.

The GMA requires mandatory criteria for the designation of forest lands of long-term commercial significance. RCW 36.70A.060 and .170. The County does not have mandatory criteria for the designation of forest lands of long-term commercial significance. The County states that it is waiting until a commercial forest committee makes recommendations. This is helpful, yet the County is required to have the mandatory criteria now. The dead line has passed when the County was required to adopt such criteria. The failure to do so has resulted in a failure to protect such lands and a violation of the GMA.

The County is required to provide specific notice on documents pertaining to lands

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
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located within 500 feet of Resource Lands. RCW 36.70A.060. The County has failed to provide the full notice required under that section. The notice posted must be on all plats, short plats, development permits, and building permits issued for development activities on, or within five hundred feet of lands designated as resource lands containing a notice that the subject property is within or near designated resource lands. Kittitas County must add the required notice for mineral resource lands to ensure adequate notice is given of the probable activities that will occur at the County's gravel and rock mines.

Conclusion:

The Petitioners have carried their burden of proof and the County's actions are clearly erroneous and out of compliance. The Agricultural Resource Lands' designation criteria are out of compliance for their failure to clarify how these criteria are to be considered. Mandatory criteria for designation of forest lands are required and the time for adoption has passed. Additional notice is required to be given on all plats, short plats, development permits and building permits. The specific notice required by statute for mineral resource lands is to be included in the required notice.

Issue No. 4:

Does Kittitas County's de-designation of agricultural land in applications 06-01 (Thomas and Lynne Mahre), 06-03 (Kevin Gibb), 06-04 (Ronald and Douglas Gibb), 06-05 (Art Sinclair), 06-06 (Basil Sinclair), 06-13 (Teanaway Ridge LLC., et al.), and 06-16 (Teanaway Ridge LLC., et al.), violate RCW 36.70A.020 (1-2, 5, 8-10, 12), 36.70A.050, 36.70A.060, 36.70A.070, 36.70A.110, 36.70A.130, 36.70A.170, 36.70A.172, and 36.70A.177?

The Parties' Position:

Petitioners KCCC, et al.:

The Petitioners contend the County has de-designated parcels of land previously designated as agricultural resource land and, under the GMA, the "land speaks first" and viable farmland must be protected. *Bremerton v. Kitsap County,* CPSGMHB Case No. 95-3-0039, FDO (October 6, 1995.) The Petitioners argue evidence in the record shows de-designation is inappropriate because all parcels continue to meet both the GMA's and the

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County's criteria for agricultural resource land designation, in particular, with one exception (the Mahre property), the lands are all on prime soils (Tab 7-20, Book 7, Ex. 20, Soil maps; Tab 7-27, Book 7, Ex. 27, Soil maps), and either are currently in agriculture production or have recently been so. The Petitioners contend, "the only difference between these parcels and neighboring agricultural lands is the intent of the landowners or real estate speculators to develop the land." As the Court noted in *City of Redmond, v. CPSGMHB,* 136 Wn.2d at 52, if landowner intent were controlling, "local jurisdictions would be powerless to preserve natural resource lands. Presumably, in the case of agricultural land, it will always be financially more lucrative to develop such land for uses more intense than agriculture."

The Petitioners contend that, according to the Kittitas County Assessor's Property Summaries and aerial photos, none of these parcels is characterized by urban growth. The Petitioners argue all the parcels at issue continue to meet the criteria for agricultural lands of long-term commercial significance and therefore must be conserved.

The Petitioners further argue the lands are currently on septic and well water and are not in a water district; are currently taxed as open space (Kittitas County Assessor's Property Summaries); I are currently served by County rural services; and, while parcel size may correlate with a farm's annual revenue and issues of economies-of-scale, farms are often composed of multiple parcels of land, therefore, "a single parcel is not likely to be a meaningful indicator of the annual revenue and financial success of any individual farm." Petitioners HOM brief at 31.

The Petitioners point out the Supreme Court wrote, "We hold land is 'devoted to' agricultural use under RCW 36.70A.030 if it is in an area where the land is actually used or capable of being used for agricultural production." *City of Redmond v. CPSGMHB,* 136 Wn.2d 38, 53, 959 P.2d 1091, 1097 (1998). Because the parcels are all bordered by farms and some are completely surrounded by agriculture, they must remain agricultural. The Petitioners suggest, "economic benefit can be realized by combining them, either by the current landowner or through sale or lease." Petitioners HOM brief at 31.

The Petitioners contend that all the submitted parcels are bordered by farms and

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many are completely surrounded by agriculture; there are no nearby development permits; and all the parcels are in agricultural areas, but quite close to urban markets and major roads and rail transportation, ideally situated to market a variety of products.

The Petitioners contend they have met their burden and demonstrated the County's action in de-designating these parcels is clearly erroneous under the GMA.

Respondent Kittitas County:

The County defers to the Intervenors and Amicus briefs as to the Teanaway Ridge and Sinclair properties. However, the County contends the Gibb's de-designations, as well as the expansion of the Kittitas UGA, are supported by evidence in the record. The County argues that both Kevin Gibb and Ronald and Douglas Gibb submitted evidence, such as proximity to the City of Kittitas, availability of urban services and the city's projected needs as reasons justifying the change in designation. The City of Kittitas submitted similar support and a substantial analysis done by a consulting planner.

The County contends the Mahre de-designation is supported by evidence in the record citing the lack of economic viability of his property for farming, such as erodable soils, lack of irrigation water and topography.

Intervenors BIAW, et al.:

The Intervenors contend the record clearly supports the de-designation of Teanaway Ridge's property. The property is capable of producing agricultural products, but it is also already characterized by urban growth in the immediate vicinity. The Intervenors argue the 54.36 acre parcel is contiguous to 112 acres of suburban zoned land where lot sizes are as small as one acre. Based on the nearby urban development, the Intervenors contend the property should be de-designated using the Supreme Court's analysis in *Lewis*. Even if the property was not characterized by urban development, the WAC criteria support a finding that the property is not commercially significant.

The Intervenors argue the property has public facilities available, including water and sewer services, and is "extremely close to the Ellensburg UGA." Intervenors HOM brief at 21. Furthermore, the parcel size is small compared to large commercial agricultural

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properties, and land values are higher as residential use than for agricultural uses.

Amicus Art Sinclair and Basil Sinclair:

Amicus Parties Art Sinclair and Basil Sinclair (Amicus) adopt by reference the Intervenors' arguments presented in Issue Nos. 2 and 3.

The Amicus parties argue the Petitioners (KCCC, et al.) position concerning agricultural land is contrary to the law and was rejected by the Washington Supreme Court in *Lewis County v. WWGMHB* (Ibid). They question whether their property fulfills the requirements for designation of agricultural land set forth in the WAC 365-190-050.

The Amicus parties claim three acres of Art Sinclair's property is now within the Ellensburg UGA and the remainder is adjacent to the boundary. Basil Sinclair's property (10.2 acres) is now adjacent to the UGA. The properties are not characterized by urban growth, but there is significant urban growth in the area. Basil Sinclair's property is not devoted primarily to the production of agricultural products, although it is capable of pasturing livestock. Art Sinclair's 65.68 acres is used for the production of agricultural products, but at an economic loss.

Under the analysis required by the Supreme Court in *Lewis*, the properties in question are not agricultural lands of long-term commercial significance. The Amicus parties detail specific statistics concerning farming in Kittitas County that the Petitioners did not dwell on and concluded that "farms, on average, in Kittitas County are getting bigger and rely more and more on subsidies to survive." Amicus brief at 6.

The Amicus parties contend, contrary to the Petitioners, there is no statistical data that supports five acres is an economical viable farming operation. They cite statistics to show the average per acre profit is less than $30.00 per acre for all sized farms in Kittitas County. The Sinclair's claim they are unable to make a living from farming their properties and the land should no longer be classified as agricultural land of long-term commercial significance. Even though the property of Art Sinclair's is currently designated as commercial agricultural land, it is not characterized by large contiguous tracts of land.

Eastern Washington
Growth Management Hearings Board
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Phone: 509-574-6960
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The Amicus parties contend their properties are located in an area where there are a number of competing and incompatible land uses. There are at least three different zone classifications surrounding a portion of the Sinclair's property, including suburban, A-20, and is in the immediate vicinity of A-3. They claim their property is essentially an island of commercial agricultural designation in an area used for rural residential purposes. The Sinclair's land is also close to the Ellensburg UGA.

An analysis of the land using criteria from WAC 365-190-050 suggests the Sinclair's property should not be designated agricultural land of long-term commercial significance. The predominant parcel size in the area is small, urban growth is moving toward the property, and a rural designation would act as a buffer to the more intense agricultural designations. In addition, designating the properties rural would allow Kittitas County to meet its increased housing needs. The Sinclair's feel their property is worth much more zoned for housing than agricultural land.

The Amicus parties argue that water and sewer "have already been extended to the general vicinity of the area and logically can be extended to this property." Amicus brief at 10. They also contend that Bowers Road, near their property, was extended to encourage development in and around the vicinity of the airport. They claim the land uses nearby are shifting from agricultural use to a more intensive residential development

Petitioners KCCC, et al. HOM Reply:

The Petitioners contend the evidence in the record shows that de-designation is inappropriate because all parcels continue to meet both the GMA's and the County's criteria for agricultural resource land designation. All three Boards have upheld the Counties obligation to designate and conserve agricultural land of long-term commercial significance. The County did not conduct a proper evaluation nor use appropriate criteria for identifying natural resource lands of long-term commercial significance, therefore "the decision to de-designate these parcels is invalid." Petitioners HOM Reply brief at 31. The Petitioners argue while the County contends these de-designations are supported by the record, the Petitioners disagree, and contend the County did not go through the required analysis. Each

Eastern Washington
Growth Management Hearings Board
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parcel identified for de-designation must be carefully evaluated to see if it meets the criteria for continuation as agricultural or forest land of long-term commercial significance.

The Petitioners contend, despite the Intervenors' (BIAW) arguments the areas are characterized by urban growth, none of the applications or developments even abut the parcels in question and, in fact, "until the illegal UGA expansion the County approved as part of this update, parcel 06-17 (Teanaway Ridge LLC, et al.) did not abut the UGA." Petitioners HOM Reply brief at 33. Furthermore, this parcel does not abut Reecer Creek Road or the UGA where the large subdivision is going to occur. While the Petitioners agree with the Intervenors' (BIAW, et al) that the land south of the Teanaway Ridge is zoned "Suburban," until the City of Ellensburg UGA expansion the Petitioners are challenging as part of this appeal, that land was designated by the Kittitas County CP as "Rural." Petitioners HOM Reply brief at 33.

The Petitioners contend the Intervenors argue public facilities are readily available to the property, but maps show they are thousands of feet away. The Intervenors also concede the City of Ellensburg UGA expansion in this vicinity violates the GMA and urban services cannot be extended through the rural land south of this parcel to serve this land. The Petitioners ask the Board to remand this de-designation issue back to the County and find invalidity to prevent the land from being converted to urban uses.

Board Analysis:

In Issue No. 13, the Board found the actions of the County out of compliance regarding the de-designation of each of the parcels of Agricultural lands referred herein. These de-designations are remanded to the County to perform the proper county-wide or area-wide assessment of agricultural lands required under RCW 36.70A.060, and .170, applying the definitions in RCW 36.70A.030(2) and (10) and the criteria in WAC 365-190-050. See Issue 13.

While the Petitioners raise major questions concerning whether these properties are agricultural lands of long-term commercial significance, the Board need not reach that decision. Each of these parcels must be reexamined and it is hoped that the Petitioner's

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arguments will be considered therein. It is also expected that the Agricultural Lands Advisory Committee be established as provided in the County's CP for additional review of the de-designation.

Conclusion:

The Petitioners have carried their burden of proof and shown that the actions of the County are clearly erroneous. This matter is resolved in the manner of Issue No. 13.

Issue No. 5:

Does Kittitas County's failure to review and revise the urban growth areas to bring them into compliance with the Growth Management Act requirements for sizing urban growth areas and locational criteria, failure to show its work for the urban growth areas, failure to review and revise the Urban Growth Nodes (UGNs) to comply with the requirements for urban growth areas or limited areas of more intense rural development (LAMIRDs), failure to show its work for the Urban Growth Nodes, failure to designate open space corridors, and failure to review and revise the urban growth area (UGA) criteria to be consistent with the GMA, violate RCW 36.70A. 020 (1-2, 5, 8-10, 12), 36.70A.040, 36.70A.050, 36.70A.060, 36.70A.070, 36.70A.110, 36.70A.115, 36.70A.120, 36.70A.130, and 36.70A.160?

The Parties' Position:

Petitioners KCCC, et al.:

The Petitioners contend Kittitas County violates the GMA by failing to match the size of its UGAs to the growth target the County chose from the range of population projections by the Office of Financial Management (OFM). While the County has adopted the high end of the OFM population projections of 52,180 by 2025, the County's existing UGAs supply more than enough land to accommodate this population target without any expansion and, to be compliant with the GMA, must reduce, not expand, its UGAs.

The Petitioners also contend the County has failed to show its work regarding urban land capacity and population targets. The Petitioners contend Kittitas County must review and revise its Urban Growth Nodes (UGNs) to comply with the requirements for urban growth areas or limited areas of more intense rural development. The County must also show its work regarding UGNs. The Petitioners argue the County acknowledges areas

Eastern Washington
Growth Management Hearings Board
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referred to in its CP as "UGNs" are noncompliant with the GMA, however, if they are UGAs, the Petitioners contend then they must be revised because the UGAs are oversized. The Petitioners further argue that if the County's UGNs are LAMIRDs, then they are noncompliant with the GMA since they have never been designated as LAMIRDs according to the County's CP.

The Petitioners further contend Kittitas County's CP violates the GMA by failing to include designated open space corridors as required by RCW 36.70A.160.

Respondent Kittitas County:

The County contends the determination whether the County's Urban Growth Nodes are UGAs or LAMIRDs is not necessary at this time because GPO 2.99 requires sub-area planning to make that determination and sets 2009 as the deadline for that process. The County's UGNs are areas of pre-existing urban levels of density and some urban services. The County argues it would be out of compliance with the GMA if it were to change the names of the UGNs without doing the required community plan and petitioning the congress of governments to rename them.

The County also argues its CP identifies open space corridors as required by RCW 36.70A.160. It contends KCCC, et al., fails to cite any authority for their proposition that the County must do more than it has. The County provides for open space. It has opted into FEMA and the Shorelines Management Act, has critical areas, cluster platting and floodway ordinances. These are set-aside open space.

Intervenors BIAW, et al.:

The Intervenors cover this issue under Issue No. 6.

Petitioners KCCC, et al. HOM Reply:

The Petitioners reply that Kittitas County's UGNs and UGA policies are clearly erroneous applications of the GMA. The County's UGAs are oversized and it must review and revise the UGNs to comply with the requirements for UGAs or LAMIRDs and show its work regarding UGNs. In addition, the County's Ordinance 2006-63 violates the GMA by failing to include designated open space corridors. The Petitioners argue that while the

Eastern Washington
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County claims this issue will not be ripe until after its self-imposed deadline of December 31, 2009, the County fails to recognize the clear legislative command to bring its CP into compliance with the GMA by December 1, 2006. In RCW 36.70A.130(4)(c), the Legislature established a "schedule for counties and cities to take action to review and, if needed, revise their CPs and DRs to ensure the plan and regulations comply with the requirements" of the GMA. Therefore, because the County has missed the statutory deadline, this issue is ripe for review by the Board.

The Petitioners contend neither the County nor the BIAW Intervenors contest arguments that the County's UGAs are oversized and must be corrected, except for the City of Kittitas UGA, which is addressed under Issue No. 6.

The Petitioners contend the County's CP at GPO 2.12c is limited to conversion of forest or agriculture lands to residential or commercial. Therefore, if there is no conversion of resource lands into subdivisions, the requirements for open space do not apply. Furthermore, the County's CP encourages incentives for easements, but RCW 36.70A.160 states the County "shall" identify open space corridors "within and between UGAs." GPO 2.12c fails to mention UGAs at all. Instead, the clustering and open space requirements in GPO 2.12c are contingent on development of new subdivisions created out of resource lands. The Petitioners further argue the County ignores the statutory requirement to create a connected system of open spaces, wildlife habitats, and critical areas so they are not isolated and cease functioning. The CPs second provision encouraging easements and providing incentives fails to identify open space corridors.

Board Analysis:

The Board decides this Issue as we have Issue Nos. 12 and 14. The Board finds the County out of compliance for the improper designation of the listed UGNs and for failing to conduct a proper land quantity analysis and failing to adopt an updated Capital Facilities Plan to designate and accommodate the UGA expansions for the City of Kittitas and for the City of Ellensburg. See Issue Nos. 12 and 14.

Eastern Washington
Growth Management Hearings Board
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Conclusion:

The Petitioners have carried their burden of proof and shown the County's actions are clearly erroneous. This issue is remanded with directions for the County to designate the communities of Easton, Ronald, Snoqualmie Pass, Thorp, and Vantage consistent with the GMA. Further the County is out of compliance with the GMA by failing to conduct a proper land quantity analysis to determine the appropriate size of the UGA, and the County did not provide an updated Capital Facilities Plan to accommodate the UGA expansions for the City of Kittitas and for the City of Ellensburg. Such expansions are out of compliance. This issue is remanded with directions for the County to conduct a proper land quantity analysis and an updated CFP in compliance with the GMA and to show the work done.

Issue No. 6:

Does Kittitas County's urban growth area expansions for Kittitas and Ellensburg urban growth areas including 06-03 (Kevin Gibb), 06-04 (Ronald and Douglas Gibb), and 06-13 (Teanaway Ridge LLC., et al.) violate RCW 36.70A. 020 (1-2, 5, 8-10, 12), 36.70A.040, 36.70A.050, 36.70A.060, 36.70A.070, 36.70A.110, 36.70A.115, 36.70A.120, 36.70A.130, and 36.70A.170?

The Parties' Position:

Petitioners KCCC, et al.:

The Petitioners argue the Land Use and Population Analysis submitted by the City of Kittitas shows the existing UGA has more land than needed to accommodate the city's extension of the 2025 populations target to 2027. The City of Ellensburg's UGA has the capacity for 20,165 more people than the UGA target of 23,765 people and, therefore, there is no justification for the proposed Cities of Ellensburg and Kittitas UGA expansions.

Respondent Kittitas County:

The Respondent argues the expansion of the City of Kittitas UGA is supported by evidence in the record (Ex. D) and this issue has been discussed under the Gibb property de-designation. The City of Kittitas submitted letters supporting the Gibb's designation changes and expressing the City's need for the properties for municipal purposes. A

Eastern Washington
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substantial analysis was done by Lisa Parks, a senior planner with Alliance Consulting, supporting the need for the UGA expansion. The Respondent contends, under *City of Arlington,* the Board is compelled to grant deference to the County's decision and affirm those choices. The Respondent further argues augmentation of the Cities of Kittitas and Ellensburg are correct and supported by the record at Bk 5, indexes 11-18 and Ex. E. While there is evidence supporting the UGA expansion for Ellensburg, the County will defer to Intervenor's arguments and accept remand.

Intervenors BIAW, et al.:

The Intervenors contend the GMA provides an UGA can include territory located outside of a city, if such territory is already adjacent to territory characterized by urban growth. RCW 36.70A.110(1). The GMA provides guidance that population projections made for a county by the Office of Financial Management (OFM) shall include areas and densities sufficient to permit the urban growth that is projected on the jurisdiction during the next twenty-year period. RCW 36.70A.110(2). The legislature's intent, in passing the GMA statutes, was to give counties and cities flexibility to provide sufficient land within their boundaries to accommodate housing demands and employment growth. The County did this as it developed its Comprehensive Plan and also used a land supply market factor. This factor gave the County greater flexibility as it sized its UGA.

The Intervenors contend CTED, not Futurewise, is correct in that the Ellensburg UGA designation or expansion should be remanded back to the County. The basis should be for the County to show its work in how it arrived at the size of the UGA, a consideration of the local circumstances, which justify the use of a market factor and a review of the UGA expansion in conjunction with Kittitas County capital facilities plan. Invalidation is not the appropriate remedy in this case because the Kittitas County's decisions do not substantially interfere with the goals of the GMA and that is a burden Futurewise cannot overcome.

Petitioners KCCC, et al. HOM Reply:

The Petitioners contend both Kittitas County and the Intervenors assert the expansion of the Ellensburg UGA is supported by evidence in the record and is justified by

Eastern Washington
Growth Management Hearings Board
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the County's discretion to consider local circumstances when planning for growth. However, the Intervenors acknowledge, and the County agrees, the County has not adequately shown its work in expanding the Ellensburg UGA, so this portion of the CP revisions should be remanded back to the County. The Petitioners believe the expansion of the City of Ellensburg's UGAs far exceeds the OFM's population growth projections. The expanded UGA has enough capacity to accommodate 43,929 people, which are 20,165 more people than the 2025 population projection of 23,764. The Petitioners contend the Ellensburg UGA expansion provides approximately 85% more capacity than necessary. The Petitioners argue the Ellensburg UGA expansion should not only be remanded to Kittitas County so it can show its work, the Board should also enter an order of invalidity for the Kittitas County Comprehensive Plan UGA.

The Petitioners also contend the augmentation of the [City of] Kittitas' UGA is unneeded, and the County includes no data or analysis showing it is needed.

Board Analysis:

This issue has been argued and decided in Issue No. 14 and need not be reanalyzed here. It must be noted that the portion of the expansion of the City of Kittitas UGA, which is related to the City's industrial wastewater treatment plant, is not at issue. However the balance of the expansion of the Kittitas UGA and all of the expansion for Ellensburg is out of compliance as decided in Issue No. 14.

Conclusion:

See conclusion as Issue No. 14.

Issue No. 7:

Does Kittitas County's failure to review and revise, and adopt criteria for comprehensive plan designations, failure to review and revise its Future Land Use Map (FLUM) and zoning map, failure to review, revise, and adopt policies and regulations to ensure that the development regulations are consistent with and implement the comprehensive plan, and failure to require approval of comprehensive plan changes or rezones only if they meet the policies and criteria violate RCW 36.70A. 020 (1-2, 5, 8-10, 12), 36.70A.040, 36.70A.050, 36.70A.060, 36.70A.070, 36.70A.110, 36.70A.120, 36.70A.130, 36.70A.131, 36.70A.170, 36.70A.172, and 36.70A.175?

Eastern Washington
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The Parties' Position:

Petitioners KCCC, et al.:

The Petitioners contend Kittitas County Ordinance 2006-63 violates the GMA by not having clear guidelines for implementing and enforcing the CP. RCW 36.70A.070. The Petitioners list a number of sections of the County's CP containing inconsistencies and point out the future land use map (FLUM) or zoning map is in conflict with the CP, or the GMA. The Petitioners argue Kittitas County fails to include criteria for any of its land use designations, excepting agricultural and mining lands, so consequently, its FLUM has not been updated in accord with criteria implementing the CP.

Respondent Kittitas County:

The County contends it has reviewed its future land use map and development regulations. These actions were part of the scoping process for the CP. Neither CTED nor the Resource Land Advisory Committee objected or recommended a change. The County argues its land use map was part of litigation six years ago and, because it was deemed compliant then, it stands to reason the land use map is compliant now. In addition, the County contends its DRs will be in place shortly to comply with the GMA.

Intervenors BIAW, et al.:

The Intervenors adopt and incorporate Kittitas County's arguments on this issue.

Petitioners HOM Reply:

The Petitioners argue on pages 43 and 44 of their HOM Brief that they identified a series of inconsistencies between the Kittitas County Land Use map and the Kittitas County zoning map. According to the Petitioners, there were no effective policies to guide zoning in the County.

Board Analysis:

The Board has been informed Kittitas County adopted its implementing development regulations on July 19, 2007. While this ordinance is not before us at this time, it is hoped that the issues contained herein are addressed. The inconsistencies listed in Issue No. 7 by the Petitioners exist and need to be corrected. The Board is not precluded from reviewing

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land use map errors or inconsistencies. The Board has reviewed each of the zoning map sections listed and the Land Use Map. Such review reflected the conflicts referred to. The Board will rule only on the conflicts between the land use map and zoning map. The other inconsistencies would require more briefing and will not be decided here.

RCW 36.70A.070 requires that "the plan shall be an internally consistent document and all elements shall be consistent with the future land use map. Further, development regulations must be consistent with and implement the comprehensive plan." The Board finds that the County has failed to properly review the zoning and land use maps and there are internal inconsistencies that require a remand.

The failure to include criteria for the various land use designations, except for agricultural and mining lands, is a violation of the GMA. Issue No. 11 addresses this flaw in more detail. In that issue, the Board finds the Petitioner, CTED, has carried its burden of proof and shown the County has failed to adopt specific, directive policies that prospectively maintain a compliant mix of rural densities and set enforceable criteria for determining when and where rezone applications should be approved. This portion of Issue No. 7 will not be decided here.

Conclusion:

The Petitioners have carried their burden of proof and shown that the land use map is inconsistent with the Zoning map section in the ten areas listed on pages 43 and 44 of Futurewise Brief on the Merits. The four alleged inconsistencies with the GMA are not at this time found out of compliance.

Issue No. 8:

Does Kittitas County's designation of the Yakima Firing Center, LT Murray, Quilomene, Whiskey Dick, and Colockum Wildlife Areas as Resource Lands of Long Term Significance, specifically as Commercial Agriculture or Commercial Forest, meet the criteria for inclusion and RCW 36.70A.020 (1-2, 5, 8-10, 12), 36.70A.040, 36.70A.050, 36.70A.060, 36.70A.070, 36.70A.110, 36.70A.130, 36.70A.170, 36.70A.172, and 36.70A.177?

Eastern Washington
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The Parties' Position:

Petitioners KCCC, et al.:

The Petitioners contend "RCW 36.70A.060 requires the county to designate and protect resource lands of long-term commercial significance, including agricultural and forest resource lands." Petitioners HOM brief at 45. According to the Petitioners, the County has erroneously included lands not available for commercial production within its designation of resource lands by including the federally-owned Yakima Firing Center, and the four designated state-owned wildlife areas. This has resulted in confusion regarding the total area designated by the County as resource land, as opposed to the area actually in productive use. By definition, "agricultural land" and "forest land" are lands primarily devoted to "long-term commercial" activity and must be capable of being used for commercial production. Therefore, the lands currently designated as a firing center and as wildlife areas are not capable of being used for commercial resource extraction and are improperly designated.

Respondent Kittitas County:

The County argues the Petitioners fail to cite authority for their argument that certain land ownership should have a different designation. Land uses are not dictated by ownership. The County contends it used criteria in its resource section to designate the land and eventually these lands may be transferred to private ownership and must be properly designated to avoid improper use. The lands in question already are used as range land, commercial forests and industrial use (i.e., Wild Horse Wind Farm, which sits predominately on state-owned land). The County argues it has criteria in its resource section of the CP at Section 2.3(c) p.32 et seq., and these criteria were reviewed by this Board in 2000 and approved as acceptable. These lands will not necessarily remain in public ownership forever and, in fact, the state has transferred many parcels to private ownership. Once these parcels come into private ownership, they must be properly designated to avoid improper use. The Petitioners fail to support their argument with established law.

Eastern Washington
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Intervenors BIAW, et al.:

The Intervenors adopt and incorporate Kittitas County's arguments on this issue.

Petitioners KCCC, et al. HOM Reply:

The Petitioners argue in order to qualify as resource land; the land must be "set apart" for commercial resource use. The lands included by the County are not available for commercial production because they are dedicated to military use and wildlife habitat. Furthermore, the Petitioners argue it is not "...any commercial use (as with the wind farm)", but rather is the commercial production of agricultural or timber products. Because these lands are not capable of being used for resource extraction, they are improperly designated.

Board Analysis:

The Board examines the County's Comprehensive Plan and the GMA to determine if the County appropriately designated the specific federal and state lands mentioned in the issue statement. "Commercial Agriculture" and "Commercial Forest" designation, although not appropriate by definition at present, may be in the future as ownership changes.

The argument presented by the Petitioner centers on whether the particular federal and state lands specified in the issue are designated appropriately as "Commercial Agricultural" land and "Commercial Forest" land and capable of long-term commercial activity and/or capable of being used for commercial production. The issue statement lists many GMA's statutes the County supposedly is in non-compliance with, but the Petitioner's HOM brief and Reply brief argue only two; RCW 36.70A.030(2) and .030(8), the definitions of "Agricultural Land" and "Forest Land". To reiterate the Petitioners argument, "Agricultural Land" means land primarily devoted to commercial production..., and that has long-term commercial significance for agricultural production, and "Forest Land" means land primarily devoted to growing trees for long-term commercial timber production. The Petitioners do not argue the County failed to follow a process to designate these lands, nor do they offer substantial evidence these lands are not capable of commercial production or have long-term commercial significance.

The County's Comprehensive Plan designates the Yakima Training Center and other

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public lands (state wildlife areas) under 2.3 Land Use Plan, sub-section 2.3(B) Public Lands. This designation recognizes the Department of Defense (federal) has developed and is implementing a comprehensive Integrated Cultural and Natural Resource Management Plan, but reserves the right to establish land use planning goals, policies and designations prior to any transfer of land. It requires the same of state agencies. The County claims it wants to ensure the proper land use designation is in place if land is ever transferred by the federal or state agencies to the public or private sector.

The Board must grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of the GMA. Kittitas County's designation of the Yakima Training Center and listed wildlife areas as "Commercial Agriculture" land and "Commercial Forest" land may be squeezing a square peg into a round hole, but falls within the parameters of this deference. And, the alternatives could be worse. The County has rural zoning, but this allows the land to be split into parcels as small as one acre. The Commercial Agriculture and Commercial Forest zones require parcels at least eighty acres in size. The County does not have a specific zone dedicated to public land ownership and there is nothing in the statutes that require counties or cities to adopt specific zoning for public lands.

In the future, the County should consider adding another zone that typifies public land ownership to the twenty land use zones it already has. Many counties designate public land set aside for conservation purposes, such as wildlife areas, state parks, and county or city-owned conservation lands as Rural Conservation, indicating the use category more correctly.

Conclusion:

The Board finds the Petitioners have not carried their burden of proof in this issue.

Issue No. 9:

Did Kittitas County's failure to develop, broadly disseminate, and follow a public participation program, and failure to update and revise its FLUM and zoning maps, for the update of the County's Comprehensive Plan violate RCW 36.70A.020(11), 36.70A.035, 36.70A.130, and 36.70A.140?

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The Parties' Position:

Petitioners KCCC, et al.:

The Petitioners contend the County failed to provide adequate and proper notice under RCW 36.70A.035, which governs public participation and notice requirements when a county reviews and adopts amendments to its CP. In this case, every section was open to amendment. The County received numerous proposals for specific changes to land use designations, therefore, "the public was deprived of adequate notice regarding the opportunity to amend."

Respondent Kittitas County:

The County contends this argument was covered in the discussion on 3.7, and "various notices, including SEPA notice, were sent to, among others, CTED and it did not object. *Id.* The Resource Land Advisory Committee recommended the land use map not be changed. Bk 1 index 62."

Intervenors BIAW, et al.:

The Intervenors adopt and incorporate Kittitas County's arguments on this issue.

Petitioners KCCC, et al. HOM Reply:

The Petitioners argue that because CTED did not object to the SEPA notices, this does not mean the requirements of RCW 36.70A.020(11) were met. They contend the County failed to notify participants that the entire CP, including the designation of areas of land, was open to revision.

Board Analysis:

The question before the Board under Issue No. 9 is did the County adequately notify the public that the County's entire Comprehensive Plan was open to revision. This Board, as well as the Western and Central Boards, maintains that public participation is the heart and soul of the GMA. Involving the public is a fundamental concept and notice procedures to citizens in some specific manner are critical to the process.

RCW 36.70A.130 requires counties and cities to "...review and, if needed, revise its

Eastern Washington
Growth Management Hearings Board
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comprehensive land use plan and development regulations to ensure that the plan and regulations are complying with the requirements of this chapter". The Petitioners contend that according to *1000 Friends of Washington and Pro-Whatcom v. Whatcom County*, WWGMHB Case No. 04-2-0010, Order on Motion to Dismiss (August 2, 2004), "...each county and city must review their entire comprehensive plan and development regulations to ensure they comply with the Growth Management Act". CTED's HOM brief, Ex. 12.

The Petitioners provided one exhibit, Tab I-5, published by the County, as an example of the County's notice to the public concerning the Comprehensive Plan update. This notice was specific to open space applications and Comprehensive Plan map and text amendments. The County did not specify in this particular notice the entire Comprehensive Plan was up for revision.

But the County, under Exhibit G, did provide several public notices written and disseminated early in the process that shows it complied with the GMA, specifically a "Notice of Public Hearings For Purposes Of Public Input On Issues Included In The Scope Of The 2006 Kittitas County Comprehensive Plan Update"; "Kittitas County Kicks Off the 2006 Update to the Kittitas County Comprehensive Plan" notice; "Notice of SEPA Action"; and a "SEPA Addendum". Clearly, these documents indicate the County gave notice to its citizens that the entire Comprehensive Plan was up for revision and the scope of work was at the citizen's discretion.

The Board also recognizes the extensive public hearing process. According to the record, the County held twenty-one study sessions, six public meetings, four public hearings, four open houses, and sixteen committee meetings open to the public. The public had ample opportunity to bring this issue to the County's attention, as well as any other issue within the context of the Comprehensive Plan.

Conclusion:

The Board finds the Petitioners' have failed to carry their burden of proof in this issue.

Eastern Washington
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Issue No. 10:

Does Kittitas County's failure to review and revise its development regulations including Chapter 17.36 Kittitas County Code, Planned Unit Development Zone; Chapter 16.09 Kittitas County Code, Performance Based Development Zone; Chapter 17.14 Kittitas County Code, Subdivisions; Chapter 17.20 Kittitas County Code, S – Suburban Zone II; Chapter 17.28 Kittitas County Code, A-3 – Agriculture Zone; Chapter 17.28A Kittitas County Code, A-5 – Agriculture Zone; and Chapter 17.30 Kittitas County Code, Rural-3 Zone violate RCW 36.70A.020 (1-2, 5, 8-10 12), 36.70A.040, 36.70A.050, 36.70A.060, 36.70A.070, 36.70A.110, 36.70A.115, 36.70A.120, 36.70A.130, and 36.70A.170?

The Parties' Position:

Petitioners KCCC, et al.:

The Petitioners argue this Board "may review every portion of the updated Comprehensive Plan regardless of whether the County has opted to make changes in the latest update." They contend they urged the County to enact numerous changes to the County's CP, which were not addressed by Kittitas County Ordinance 2006-63. The Petitioners further contend Chapter 17.36 Kittitas County Code (KCC), Planned Unit Development (PUD) Zone; Chapter 16.09 KCC, Performance Based Cluster Platting; and Chapter 17.14 KCC, Performance Based Cluster Plat Uses; violate the GMA by allowing urban densities in rural and agricultural areas. The Petitioners argue that rural densities greater than one dwelling unit per five acres violates the GMA and cite *Save Our Butte Save Our Basin, et al. v. Chelan County*, EWGMHB Case No. 94-1-00015, FDO (August 8, 1994), where the Board decided an agricultural minimum lot size smaller than ten acres was a violation of the GMA. The Petitioners contend there is no provision allowing greater overall density through clustering. Outside the urban growth areas clustering must involve "'appropriate rural densities and uses' that are not characterized by urban growth [RCW 36.70A.030(17)] and that are 'consistent with rural character' [RCW 36.70A.030(14)]."

Kittitas County Performance Based Cluster Platting regulations grant a density bonus up to 100 percent, a doubling of density in the Rural-3, Agricultural-3, Rural-5 and Agricultural-5 zones. This allows densities of one dwelling unit per 1.5 acres and one

Eastern Washington
Growth Management Hearings Board
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dwelling unit per 2.5 acres respectively. The Petitioners argue that cluster development regulations must also include a limit on the maximum number of lots allowed on the land included in the cluster; prohibitions on connections to public and private water and sewer lines; and requirements to limit development on the residual parcel. Kittitas County does not include any of these restrictions.

The Petitioners contend Kittitas County's subdivision code allows property owners to divide applications for short subdivisions, or short plats, and long subdivisions, long plats, even if all the property is part of one development (KCC Title 16). At present, developers can structure subdivision applications to skirt *Ecology v. Campbell & Gwinn*, 146 Wn.2d 1, 43P.3d 4 (2002). Furthermore, allowing structuring of subdivision applications violates the GMA's mandate to ensure public participation by concealing the extent of pending development in a particular area.

The Petitioners contend the County has two zones denominated "suburban" with each zone allowing one (1) DU per acre or less for platted subdivisions, and these [allowed] zones provide too much density for rural areas, and too little for urban. Accordingly, the Agricultural-3 and Rural-3 zones fail to comply with the GMA because they allow urban densities in a rural area.

Respondent Kittitas County:

This Issue was also covered under the discussion on 3.7. The County contends its land use map criteria are GMA compliant and there was no reason to change those criteria. The process only made changes to site-specific designation changes that have occurred over time. The County also argues WAC 365-195-810(1) requires the County to adopt/revise its development regulations to comply with the comprehensive plan after the adoption of that plan.

Intervenors BIAW, et al.:

The Intervenors contend Kittitas County is working on a review of existing development regulations. The GMA does not require development regulations to be adopted with a comprehensive plan. The Intervenors argue this issue is not relevant at this time

Eastern Washington
Growth Management Hearings Board
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because the time for review and adoption of development regulations to implement the amended Comprehensive Plan has not yet expired.

The Intervenors contend the County can achieve a variety of densities through clustering, density transfer, design guidelines, conservation easements, and other innovative techniques. RCW 36.70A.070(5)(b). The GMA grants local governments discretion in establishing a pattern of rural densities.

The Intervenors argue that the County's Cluster Ordinance complies with the GMA by providing a variety of rural densities and protecting the rural character. The County's Cluster Ordinance acknowledges the significant impact in the rural areas by increased density and, therefore, provides that conditions may be placed on development proposals. The County's Ordinance also restricts cluster development by requiring a minimum of nine acres in open space in the Rural-3 and Agriculture-3 zones, a minimum amount of open space of fifteen acres in the Rural-5 and Agriculture-5, and a minimum of thirty acres of open space in areas zoned Agriculture-20 and Forest and Range-20. The Ordinance further reduces the amount of residential lots in rural and agricultural areas by decreasing the amount of density bonuses property owners are able to receive in those areas. The Ordinance also reduces the amount of points a developer can receive.

The Intervenors contend Kittitas County's Subdivision Ordinance, KCC Title 16, complies with the GMA and the Petitioners fail to provide evidence to the contrary. The Intervenors argue this issue should be dismissed and further argument be precluded in the Petitioner's Reply Brief.

Petitioners KCCC, et al. HOM Reply:

The Petitioners refer again to the arguments in their HOM Brief. In addition, the Petitioners contend neither the County nor the Intervenors responded to their arguments concerning the "S Suburban Zone", Chapter 17.20 KCC and/or the "S-II Suburban-II Zone", Chapter 17.22 KCC. Consequently, the Petitioners believe they have met their burden in this issue.

In their HOM Reply brief, the Petitioners argue the County failed to adopt its

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development regulations within the required timeline, which allows six months following the adoption of the County's CP. WAC 365-195-810(1) applies only to the initial adoption of the CP. Concurrent adoption of the County's CP and development regulations after the initial adoption of the CP is required, unless an extension has been requested and granted from CTED. The Petitioners further argue RCW 36.70A.130(4)(c) contains the correct deadline, which mandates "Kittitas County must review and revise its development regulations, except for critical areas regulations, as well as its Comprehensive Plan by December 1, 2006." While Kittitas County reviewed and revised its Comprehensive Plan by December 1, 2006, it did not adopt development regulations by that time. By delaying the adoption of development regulations necessary to implement its revised Comprehensive Plan, Kittitas County is not fulfilling its obligations under the GMA..." Petitioners HOM Reply brief at 47.

The Petitioners contend the Intervenors agree that Performance Based Cluster Platting regulations grant a density bonus of up to 100%, a doubling of density in the Rural-3, Agriculture-3, Rural-5 and Agriculture-5. Clusters cannot be characterized by urban growth. Under the Court of Appeals decision in *Diehl v. Mason County*, 94 Wn. App. 645-57, 972 P.2d 543, 547-49 (1999), these densities are urban growth. The Petitioners contend the County's regulations violate RCW 36.70A.070(5)(b), where clusters can not have urban growth within them.

The Petitioners argue the County's Performance Based Cluster Platting regulations violate the GMA because it allows densities of one dwelling unit per five acres outside the urban growth area. These clustering regulations do not include appropriate controls to prevent urban growth in the rural areas and preclude demands for urban services. The Petitioners cite four Growth Board cases as persuasive authority.

As to the County's subdivision regulations, the Petitioners contend these regulations allow side-by-side subdivisions. This violates the GMA requirements to protect water quality and to evaluate impacts on capital facilities. RCW 36.70A.020(10) requires the protection of water quality, including surface and ground water quality. The Petitioners again cite the Supreme Court's *Campbell & Gwinn* decision, which limits the number of allowed wells to

Eastern Washington
Growth Management Hearings Board
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one per development. By allowing multiple subdivisions, each with their own well, *Campbell & Gwinn* is violated, as is RCW 36.70A.020(10). The Petitioners argue that *Campbell & Gwinn* reflects on the protection of water quality, which is a GMA goal, while the Intervenors contend this case has nothing to do with the GMA. The Petitioners also contend their argument concerning public participation is simply that by allowing multiple applications for what is essentially one development project, the County's subdivision regulations impair the public's ability to be effectively involved.

Board Analysis:

The Board agrees with the Petitioners that the GMA requires local jurisdictions to review and revise their comprehensive plans in their entirety to ensure compliance with the GMA's mandates. In addition, this Board may review every portion of the County's updated Comprehensive Plan as per RCW 36.70A.130(1) and the Court of Appeals decision in *Thurston County v. WWGMHB*, Wn.App 154 P.3d 959, 965-66 (2007).

The County and the Intervenors failed to argue the Petitioners issue concerning KCC Chapter 17.20 S Suburban Zone and Chapter 17.22 S-II Suburban-II Zone. Therefore, the Board agrees the Petitioners have met their burden of proof that these two zones have too low a density to be allowed in the rural areas, but are actually urban development.

The County argues its land use map criteria is GMA compliant, while the Intervenors contend the County is working on new development regulations and will have them finished even before this HOM decision is finalized (which the County has done, but is not part of the record). They also argue WAC 365-195-810(1) gives the County six months from the time of adoption of the County's Comprehensive Plan to adopt development regulations.

The Board again agrees with the Petitioner. WAC 365-195-810(1) applies only to the initial adoption of the comprehensive plan, not the revision.

> Except for interim regulations, required development regulations must be enacted either by the deadline for adoption of the comprehensive plan or within six months thereafter, if an extension is obtained. The possibility of a time gap between the adoption of a comprehensive plan and the adoption of development regulations pertains to the time frame after the initial adoption

Eastern Washington
Growth Management Hearings Board
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of the comprehensive plan. Subsequent amendments to the plan should not face any delay before being implemented by regulations. After adoption of the initial plan and development regulations, such regulations should at all times be consistent with the comprehensive plan. Whenever amendments to comprehensive plans are adopted, consistent implementing regulations or amendments to existing regulations should be enacted and put into effect concurrently. (See WAC 365-195-865.) (Emphasis by the Board.)

The Board also notes the County failed to receive an extension from CTED as required by WAC 365-195-810(1), even if an extension was available to subsequent amendments. RCW 36.70A.130(4)(c) is the operative legislation. It mandates Kittitas County must review and revise its development regulations and comprehensive plan by December 1, 2006. The County is clearly out of compliance with this statute.

Deference to local government decisions, as required by RCW 36.70A.3201 and argued by the Intervenors, is not a license for counties and cities to ignore the requirements and goals of the GMA. Counties and cities must revisit and revise their comprehensive plans and development regulations per schedule as circumstances change within their jurisdictions. Despite numerous court and Board decisions that encourage and mandate low-density development in the rural areas, the County continues to allow high-density development in the rural areas through its development regulations and zoning.

The Petitioners point to the County's Cluster Ordinance, KCC 16.09, as non-compliant with the GMA. The Intervenors argue KCC 16.09 has protections in place to prevent urban-like development, yet KCC 16.09 allows 100% bonus density increases within the Rural-3, Agricultural-3, Rural-5 and Agricultural-5 zones, which would create high density urban development in the rural areas and is contrary to the goals of the GMA. The Ordinance also does not include a limit on the maximum number of lots allowed on the land included in the cluster; prohibit the number of connections to public and private water and sewer lines; nor include requirements to limit development on the residual parcel.

As argued by the Intervenors, RCW 36.70A.177 is a tool for counties and cities

Eastern Washington
Growth Management Hearings Board
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to use for allowing zoning techniques, like clustering, to conserve agricultural lands and encourage the agricultural economy. But the County's controls, while a step in the right direction, fall woefully short of fulfilling the requirement to "conserve agricultural lands and encourage the agricultural economy". RCW 36.70A.177. Without significant changes in its controls and a change in allowable densities in the rural areas, the County remains out of compliance with its Cluster Platting Ordinance (KCC 16.09). The Board agrees with the Petitioners that KCC 16.09 allows urban development in the rural areas.

The Intervenors contend KCC 16.09 meets the requirements of RCW 36.70A.070(5)(a), yet fail to explain, as per RCW 36.70A.070(5)(a), how their rural element harmonizes the planning goals in RCW 36.70A.020 by allowing three-acre and five-acre density in the rural and agricultural zones, then doubling that density through cluster platting. Intensifying density in the rural areas does not protect agricultural lands. The County's Planned Unit Development Zone Ordinance (KCC 17.36) further aggravates the problem of urban-like development in the rural and agricultural zones without the appropriate controls in place.

Kittitas County argues on one hand that farmers must be allowed to split off sections of their land for development because of a lack of water, then argue on the other hand to permit subdivisions that allow property owners to divide applications for short subdivisions, short plats, and long subdivisions and long plats among numerous applications, which would increase water usage. Kittitas County Code Title 16 needs review to ensure water quality and quantity is protected as required by the GMA.

Conclusion:

The Board finds the Petitioners have carried their burden of proof in this issue. Kittitas County is found out of compliance with the GMA for failing to revisit and revise its development regulations, in particular KCC 16.09.030, Performance Based Cluster Platting; KCC 17.36, Planned Unit Development Zone; Title 16, Subdivision

Eastern Washington
Growth Management Hearings Board
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Phone: 509-574-6960
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Regulations; and KCC 17.20, S Suburban Zone and KCC 17.22, S-II Suburban-II Zone.

Issue No. 11:

By amending its Comprehensive Plan without providing for a variety of rural densities, and without providing sufficient specificity and guidance on rural densities to prevent a pattern of rural development that constitutes sprawl, has Kittitas County failed to provide for a variety of rural densities, failed to protect rural character, an otherwise failed to comply with RCW 36.70A.070(5)? (Related to Issue 1 [KCC])

The Parties' Position:

Petitioner CTED:

The Petitioner contends Kittitas County Ordinance 2006-63, as amended, fails to provide for a variety of rural densities, contrary to RCW 36.70A.070(5)(b). A county may consider local circumstances in establishing patterns of rural densities and uses, but if it does so it "shall develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of the GMA." RCW 36.70A.070(5)(a). According to the Petitioner, the densities provided for in the rural element must be rural densities. "There is no bright line established by the GMA, but with one narrow exception, this Board consistently has found that a pattern of lots smaller than 5 acres in size is urban, rather than rural." CTED HOM brief at 5.

The Petitioner further contends the County's Comprehensive Plan (CP) relies on the underlying zoning [regulations] to assign density, at least six of which are applied in the rural areas; Agriculture-3, Agriculture-5, Agriculture-20, Rural-3, Rural-5, and Forest and Range-20. CTED understands the County has recently adopted updated zoning regulations in an effort to comply with RCW 36.70A.130.

The Petitioner contends the County's Comprehensive Plan does not set meaningful criteria to limit the ability of landowners in the rural area to obtain rezones to smaller lots and more intense uses, and there are no meaningful limits on the discretion of County staff to grant rezone applications. The County appears to believe lots larger than three acres in

Eastern Washington
Growth Management Hearings Board
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the rural area lead to "rural sprawl." Kittitas Comprehensive Plan, pg. 160. The Petitioner argues that even in locations adjacent to designated natural resource lands, there are no criteria in the rural element that address lot size or limit rezones. The County's Comprehensive Plan, rather than provide for a variety of rural densities, allows a variety, so long as landowners are satisfied with their present lot size, but it also allows them to rezone to three acre lots with no criteria to guide or limit the consideration of a rezone application. The omission of criteria in the Comprehensive Plan to limit applications for rezones to Agriculture-3 or Rural-3 constitutes a violation of the GMA's requirement to affirmatively provide for a variety of rural densities.

The Petitioner contends Kittitas County Ordinance 2006-63 fails to protect rural character and is contrary to RCW 36.70A.070(5)(c). The Petitioner argues the measures a county uses to protect rural character must do the following: (i) contain or control rural development; (ii) assure visual compatibility of rural development with the surrounding rural area; (iii) reduce the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area; (iv) protect critical areas, surface water, and ground water; and (v) protect against conflicts with the use of agricultural, forest, and mineral resource lands designated under the [Act]. RCW 36.70A.070(5)(c).

The Petitioner argues the County's Comprehensive Plan fails to provide provisions governing rezone applications to convert lands useful for agriculture or forestry in the rural area to three acre lots for residential development, apart from the most general limitations on rezones, identified in *Woods v. Kittitas County*, 130 Wn. App. 573, 581, 123 P.3d 883 (2006). In addition, there are no substantive criteria that could be used to resolve or minimize conflicts between land uses in adjacent zones; no criteria to guide which lands in the rural area should be assigned to each zoning classification; and no criteria that would prevent all or most of the existing variety of rural densities, and the rural character supported by that variety of densities, to be lost.

The Petitioner contends Kittitas County Ordinance 2006-63 continues to allow low-density sprawl throughout much of the rural area and is contrary to RCW 36.70A.070(5).

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

The Petitioner argues the rural element cannot permit urban development or a pattern of low density sprawl in the rural area, but it may allow for limited areas of more intensive rural development (LAMIRD). RCW 36.70A.070(5)(d), .030(15)(e). They further argue the rural element may use "innovative techniques" to provide for a variety of rural densities and uses, but these too must be consistent with rural character and cannot be characterized by urban growth. RCW 36.70A.070(5)(b); *Citizens for Good Governance v. Walla Walla Cy.,* EWGMHB Nos. 01-1-0015c and 01-1-0014cz, Final Decision and Order at 17 (May 1, 2002). The Petitioner points to RCW 36.70A.020(1), (2); .110(1), which prohibit urban growth outside designated UGAs.

The Petitioner contends patterns of smaller lots in the rural area result in uncoordinated use of ground water (individual wells) and greater likelihood of groundwater contamination (individual septic systems), as articulated by the Department of Ecology and Petitioners Kittitas County Conservation, et al. The Kittitas County Conservation, et al. also cited additional scholarly evidence regarding the adverse effects on agriculture and other rural services and values of allowing residential development of two acre to ten acre lots in the rural area.

The Petitioners argue it is not the primary purpose of the rural area to accommodate growth. That is the function of urban areas. They also argue the County's continuing to allow patterns of smaller lots in rural areas, such as three-acre lots and is what the GMA is trying to prevent: "the inappropriate conversion of undeveloped land into sprawling, low-density development." RCW 36.70A.020(2). *Moses Lake v. Grant County,* EWGMHB No. 99-1-0016, Order on Remand. The Petitioner further argues the long-term result will be a homogenized rural landscape lacking the diversity and character the GMA seeks to preserve in the rural area, and a violation of the explicit requirements for the rural element mandated in RCW 36.70A.070(5).

Respondent Kittitas County:

Respondent Kittitas County provided briefing on this issue under Issue No. 1.

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
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Intervenors BIAW, et al.:

The Intervenors contend CTED and KCCC, et al., are unlawfully transferring the burden of proving a variety of rural densities through innovative techniques to Kittitas County. The Intervenors cite a recent Court of Appeals case, *Thurston County v. WWGMHB*, 154 P.3d 959 (2007), where the Board ruled against Thurston County because the County failed to demonstrate how innovative techniques create a variety of rural densities. The Court found that the Western Board failed to presume validity and failed to require the Petitioner to prove invalidity. Thus, the Board erred in finding that the Thurston County's Comprehensive Plan and development regulations fail to provide for a variety of rural densities through innovative techniques. The Intervenors argue the Petitioners are repeating the same mistake here by placing the burden on Kittitas County and fail to point to actual violations of the GMA. Moreover, the burden Futurewise and CTED must overcome is the heightened "clearly erroneous" standard. RCW 36.70A.320(3).

Petitioner CTED HOM Reply:

The Petitioners maintain Kittitas County's Comprehensive Plan does not provide for a variety of rural densities, does not protect rural character, and continues to allows low-density sprawl throughout much of the rural area, all contrary to the specific requirements in RCW 36.70A.070(5). The County relies on the zoning code to assign density. That reliance defeats the purpose of the Comprehensive Plan, which is to act as the "central nervous system" of the Growth Management Act's planning requirements, containing data and detailed policies to guide the development of land, consistent with the GMA's goals and requirements.

The Petitioners contend the policies governing rural lands are found in section 8.5 of the Rural Element. Only two policies are specific enough to guide the locations and extent of land use designations adopted in the zoning code. There are no other specific, directive policies that address rural density.

The Petitioners argue it is not challenging the current mix of rural densities existing in Kittitas County nor that three-acre lots are never allowed in the rural area. The County

Eastern Washington
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must follow the requirements in RCW 36.70A.070(5) and the definitions in RCW 36.70A.030(15) and (16) to assess whether a particular density or pattern of densities is permissible. RCW 36.70A.020, Goals 1 and 2 fundamentally distinguish the rural area from the urban area by directing that population growth is to be encouraged in urban growth areas, rather than rural areas to avoid sprawling, low-density development and the loss of rural character.

The problem is the County's failure to provide specific, directive policies in the CP as required by RCW 36.70A.040 and .070 to guide the development (or amendment) of the zoning code and other development regulations that are to implement the Comprehensive Plan and which must be consistent with it. Therefore, the problem is not one of disagreement between CTED and Kittitas County as to rural policy choices; it is a failure of the CP to comply with the GMA's requirements to include specific, enforceable policies as to the future of rural lands in the County.

The County argues its existing rural densities have been approved by the courts. However, the Petitioner disagrees with the County's interpretation of the three Court of Appeals decisions it cites, all three of which were brought under the Land Use Petition Act (LUPA), RCW 36.70C, rather than the GMA. In *Tugwell v. Kittitas County, Henderson v. Kittitas County,* 90 Wn. App. 1, 951 P.2d 272 (1998) and *Henderson v. Kittitas County,* 124 Wn. App. 747, 100 P.3d 842 (2004) *review denied*, 154 Wn.2d 1028 (2005), the Court of Appeals looked at whether Agriculture-3 zoning was consistent with the County's Comprehensive Plan, but the plan's compliance with the GMA was not at issue and was not addressed by the Court. In *Woods v. Kittitas County*, 130 Wn. App. 573, 123 P.3d 883 (2005), the Superior Court ruled the rezone to three-acre zoning was inconsistent with the GMA. The Court of Appeals reversed, holding that consistency with a comprehensive plan is properly determined in a LUPA petition, but compliance with the GMA is not.

The Petitioners argue even if Kittitas County were to have a current mix of rural densities that complies with the GMA, the County has failed to comply with RCW 36.70A.070(5)(b) by its failure to adopt specific, directive policies that prospectively

Eastern Washington
Growth Management Hearings Board
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Phone: 509-574-6960
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maintain a compliant mix of rural densities and set enforceable criteria for determining when and where rezone applications should be approved.

In addition, the Petitioners contend the County's Rural Element must include measures that protect rural character by "[c]ontaining or otherwise controlling rural development" and "[r]educing the inappropriate conversion of undeveloped land into sprawling, low-density development in the rural area." RCW 36.70A.070(5)(c). The Petitioners argue that because the County's Rural Element contains an almost complete lack of controls on rural densities, provides no specific, enforceable guidance that can be used meaningfully to asses whether a rezone application or an amendment to the zoning code implements and complies with the Comprehensive Plan, the Rural Element of the Plan fails to comply with RCW 36.70A.070(5)(c).

The County also failed to develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of the GMA. The Petitioners doe not challenge the County's authority to consider local circumstances in establishing patterns of rural densities and uses, however the County must "develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of the [Act]."

Board Analysis:

The Board agrees with the Petitioners. RCW 36.70A.070(5) Rural element, is a mandatory element of the GMA. The rural element must "provide for a variety of rural densities, uses, essential public facilities, and rural governmental services needed to serve the permitted densities and uses." RCW 36.70A.070(5)(b). This Board agrees there is no bright line as to the size of rural lots, however, densities provided for in the rural element must be rural densities, and not urban in nature.

The Petitioners contend the County's Comprehensive Plan fails to protect rural character; fails to provide specific, enforceable guidance to assess whether a rezone complies with the County's Comprehensive Plan; fails to provide provisions in its Comprehensive Plan governing rezone applications to convert lands useful for agriculture or

Eastern Washington
Growth Management Hearings Board
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forestry in the rural area to three acre lots for residential development, apart from the most general limitations on rezones; fails to provide specific, directive policies that address rural density; fails to provide for a variety of rural densities; fails to protect the quality and quantity of groundwater; continues to allow low-density sprawl throughout much of the rural area, contrary to the specific requirements in RCW 36.70A.070(5); and relies on the zoning code to assign density.

The County has failed to adopt specific, directive policies that maintain a compliant mix of rural densities and set enforceable criteria for determining when and where rezone applications should be approved. Urban-like development in the rural areas also has an adverse effect on agriculture and other rural services and values.

The Board recognizes a county may consider local circumstances in establishing patterns of rural densities and uses, but if it does so it must develop a written record explaining how the rural element harmonizes the planning goals in RCW 36.70A.020 and meets the requirements of the Growth Management Act. The GMA requires, in part, that counties develop a written record explaining how the rural element harmonizes the planning goals, RCW 36.70A.070(5)(a); that counties provide a variety of rural densities [.070(5)(b)]; that counties protect rural character, [.070(5)(c)], and, in particular protect against conflicts with the use of agricultural, forest, and mineral resource lands designated under the Act, [.070(5)(c)(v)].

Hearings Board Member Roskelley separately believes the following argument presented by the Petitioner is important. His addition, although not supported by the entire Board, is for clarity and not a dissent."

Patterns of smaller lots in the rural area result in uncoordinated use of ground water (individual wells) and greater likelihood of groundwater contamination (individual septic systems). Furthermore, this Board has consistently found and the courts have held, as the Petitioners have shown, that a pattern of lots smaller than five acres is urban in nature, rather than rural.

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

Hearings Board Member, Mulliken offers the following statement for clarity, not for dissent, and agrees with the Board's Order finding Kittitas County's CP out of compliance regarding Issue 11, "... Kittitas County failed to provide for a variety of rural densities, failed to protect rural character, and otherwise failed to comply with RCW 36.70A.070(5) (CTED HOM Brief), CTED's Petition for Review does not challenge the current mix of rural densities existing in Kittitas County's zoning code, "This problem is not one of disagreement between CTED and Kittitas County as to rural policy choices; it is a failure of the CP to comply with the GMA's requirements to include specific, enforceable policies as to the future of rural lands in the County." P.6 CTED's HOM Reply Brief.

However, by the County's failure to adopt specific, directive policies that maintain a compliant mix of rural densities and set enforceable criteria for determining when and where rezone applications should be approved, the County puts the future of the agriculture industry at risk by allowing site specific development to occur at the whim of the developer and the farmer. The County should continue to look at alternative methods to ensure farmers' economic success and conserve designated agricultural lands of long-term commercial significance. It is this Board member's opinion once the agriculture land is allowed impervious development, the land will never be returned back to agriculture production; and we have only to look at the mistakes make in King County which perpetuated the demise of agriculture production in that County.

Conclusion:

The Petitioner (has carried its burden of proof in Issue No. 11 and the Board finds the County's actions erroneous. The County failed to provide specificity and guidance on rural densities in its amended Comprehensive Plan to prevent a pattern of rural development that constitutes sprawl, protect rural character, and protect against conflicts with the use of agricultural lands of long-term commercial significance. Further, the County failed to develop a written record explaining how the rural element harmonizes the planning goals and meets the requirements of the Act.

Eastern Washington
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Issue No. 12:

By not reviewing its urban growth nodes (UGNs) identified in its Comprehensive Plan (CP) to determine whether the UGNs meet the criteria for designation either as urban growth areas (UGAs) or limited areas of more intense rural development (LAMIRDs), has Kittitas County failed to review and update its CP, in noncompliance with RCW 36.70A.130, and by reference RCW 36.70A.070 and .110? (related to Issue 5[KCCC])

The Parties' Position:

Petitioner CTED:

The Petitioner contends Kittitas County established five Urban Growth Nodes in its 1996 CP, identified as Easton, Ronald, Snoqualmie Pass, Thorp, and Vantage. The County developed these UGNs to recognize communities with urban characteristics, such as established residential, commercial, and industrial settlements. The Petitioner argues the GMA was amended by the legislature in 1997 to provide for limited areas of more intense rural development (LAMIRDs).While the County acknowledges its UGNs might be more appropriately designated UGAs or LAMIRDs, it has not acted to comply with the options provided in the GMA. The Petitioner argues the GMA does not recognize an UGN in the form developed and used by Kittitas County.

The Petitioner further contends Kittitas County's CP designated UGNs without defining them in the context of either urban or rural development and service levels and violates RCW 36.70A.110 and .070(5). CTED argues the County's UGNs are not defined by reference to the statutory criteria for designating either UGAs or LAMIRDs. For the County to determine the appropriate size and location of a UGA, an appropriate land quantity analysis is required. This includes two interrelated components: (1) counties first must determine how much land should be included within the UGAs to accommodate expected urban development, based on the state Office of Financial Management's (OFM) twenty year population forecast; and (2) counties must determine which lands in particular should be included within UGAs, based on locational criteria. RCW 36.70A.110(1) and (3). *Vashon-Maury v. King County,* CPSGMHB No. 95-3-0008c, Order on Supreme Court Remand (June 15, 2000).

Eastern Washington
Growth Management Hearings Board
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The Petitioner contends the UGNs designated by the County are addressed in the County's Land Use Plan under "Urban Land Use" (Tab 2,p.25) and have many characteristics of UGAs. The Petitioner argues an UGA may include territory located outside of a city "only if such territory already is characterized by urban growth" or "is adjacent to territory already characterized by urban growth." RCW 36.70A110.(1). The Petitioner further argues RCW 36.70A.110(3) require that urban growth take place in areas having existing public facilities and service capacities or in areas that can be served by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources.

The Petitioner also notes the County's UGN maps give no indication the boundaries drawn for the UGNs in any way relate to "logical outer boundaries" required for designation as LAMIRDs. RCW 36.70A.070(5)(d)(iv). There is nothing in the record attempting to define the boundaries of the UGNs, and there is nothing in the record attempting to define the "existing area or use" as of Dec. 27, 1990, (the date Kittitas County became subject to the GMA's planning requirements) as required in RCW 36.70A.070(5)(d)(v). The Petitioner also notes the County's CP appears to treat the UGNs as a variant form of UGA, rather than as LAMIRDs, therefore, if one or more of the five UGN designations should be designated as a LAMIRD, none of the UGNs meet the requirements in RCW 36.70A.070(5)(d).

The Petitioner argues RCW 36.70A.130(1) requires counties and cities to review and, if needed, revise the CPs and DRs at specified intervals to "ensure the plan and regulations comply with the requirements of the GMA. The UGNs established by the County do not satisfy the statutory requirements to be designated either as UGAs or as LAMIRDs nor has the County ever attempted to satisfy the statutory requirements for either type of designation. The Petitioner contends the County has had ten years to consider and decide whether each UGN should be designated as a UGA or a LAMIRD, or some other designation permitted under the GMA. Therefore, the County has failed to comply with the [Act].

Respondent Kittitas County:

Kittitas County covered this issue under Issue No. 5. (3.5.2).

Eastern Washington
Growth Management Hearings Board
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Intervenors BIAW, et al:

The Intervenors adopt and incorporate Kittitas County's arguments on this issue.

Petitioner CTED HOM Reply:

The Petitioner maintains Kittitas County's designated UGNs allow urban development outside the designated UGAs, contrary to RCW 36.70A.110. Because the UGNs have not been designated using the process required in the GMA, they cannot be considered as equivalent to UGAs and similarly the UGNs do not satisfy the criteria to be denominated a LAMIRD under RCW 36.70A.070(5)(d).

To the County's response that a challenge to UGNs is not ripe because the CP requires a sub-planning process to review the designated UGNs and sets a deadline of 2009 for its completion, CTED argues that the County disregards the explicit deadline in RCW 36.70A.130 for reviewing, and if necessary, revising non-compliant portions of the County's CP. The deadline for Kittitas County, by statute was December 1, 2006, and the County lacks authority to unilaterally extend a deadline imposed by the Legislature. CTED contends the County has known for several years its UGN designation is problematic under the GMA and has failed to review and take necessary action to revise its UGNs and is therefore out of compliance with the GMA.

Board Analysis:

Kittitas County established five "Urban Growth Nodes" (UGNs) in its 1996 Comprehensive Plan, identified as Easton, Ronald, Snoqualmie Pass, Thorp, and Vantage. The County developed UGNs "to recognize communities with urban characteristics such as established residential, commercial, and industrial settlements." The County acknowledges the GMA was amended in 1997 to provide for pockets of more intense development in rural areas through the designation of limited areas of more intense rural development (LAMIRDs), and its UGNs "might be more appropriately designated as an urban growth area (UGA) or as a LAMIRD."

RCW 36.70A.110(1) and (2) requires all counties planning under the GMA, including Kittitas County, to designate urban growth areas within which urban growth shall be

Eastern Washington
Growth Management Hearings Board
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encouraged and outside of which growth can occur only if it is not urban in nature. The statute requires the size and boundaries of each UGA to reflect a twenty-year planning horizon, based on the growth management population projection made for the county by the state Office of Financial Management. This requirement sets a maximum size for UGAs for the county and each city within the county to accommodate projected urban growth.

The requirement that urban growth should be directed to appropriately-sized and delineated UGAs is one of the main organizing principles of the GMA's approach to planning for growth. To determine the appropriate size and location of an UGA requires an appropriate analysis, variously called a "land capacity analysis" or a "land quantity analysis." That analysis includes two interrelated components: (1) counties first must determine how much land should be included within UGAs to accommodate expected urban development, based on the OFM population projections; (2) counties must determine which lands in particular should be included within UGAs, based on the "locational criteria" provided in RCW 36.70A110(1) and (3). The UGNs designated by Kittitas County are addressed in the Land Use Plan under "Urban Land Use" (Tab 2, p.25) and have many characteristics of UGAs. However, the UGNs have not been designated in compliance with the requirements in RCW 36.70A.110, since the GMA does not recognize an Urban Growth Node in the form developed and used by Kittitas County. Although the County has allocated 10% of the projected 2025 population to UGNs (Tab 14, p.1), no land quantity analysis has been performed. Therefore, there is no way to determine whether the UGNs are appropriately sized as UGAs.

In addition, the Capital Facilities Plan (CFP) states the six-year plan for capital improvements is fully funded (Tab 3, p.63), but no evidence of full funding is provided in the CFP or elsewhere in the record for facilities necessary to support urban development in the UGNs. The County's CFP seems to focus on maintenance and upgrades to existing public facilities and does not appear to address any facilities needed in any of the five designated UGNs (Tab 16).

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
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Phone: 509-574-6960
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Kittitas County's Comprehensive Plan appears to treat the UGNs as a variant form of UGAs, rather than as LAMIRDs, and as this Board explained, LAMIRDs are not 'mini-UGAs' or a rural substitute for UGAs; instead they are subject to the limitations of RCW 36.70A.070(5)(d)(iv). *Whitaker v. Grant County,* EWGMHB Case No. 99-1-0019, FDO, at 4 (May 19, 2000). Consequently, even if one or more of the five UGN designations should more properly be designated as a LAMIRD, none of the UGNs, as currently retained, comply with the requirements of RCW 36.70A.070(5)(d).

It's been ten years since the Legislature provided LAMIRDs as an option for addressing the "established residential, commercial, and industrial settlements," and yet the County has not acted to comply with the options provided in the GMA, but instead has chosen a self-imposed deadline of 2009 to determine whether they should re-designate these UGNs as UGAs or LAMIRDs or some other designation permitted under the GMA. The County must comply with the requirements of RCW 36.70A.130, .070, and .110.

Conclusion:

The Petitioner has carried its burden of proof and shown the County's actions are clearly erroneous. This issue is remanded with directions for the County to designate the communities of Easton, Ronald, Snoqualmie Pass, Thorp, and Vantage consistent with the GMA.

Issue No. 13:

By de-designating 183.94 acres of agricultural lands to allow their development for other uses without conducting the proper county-wide or area wide assessment of agricultural lands required under RCW 36.70A.060, and .170, applying the definitions in RCW 36.70A.030(2) and (10) and the criteria in WAC 365-190-050, did Kittitas County fail to protect agricultural lands of long-term commercial significance and otherwise fail to comply with RCW 36.70A.030(2) and (10), 060, and .170? (related to Issue 4 [KCCC])

The Parties' Position:

Petitioner CTED:

The Petitioner contends by de-designating certain agricultural lands to allow development for other uses without the required county-wide or area-wide analysis, Kittitas

Eastern Washington
Growth Management Hearings Board
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County's Ordinance 2006-63 does not comply with RCW 36.70A.060 and .170 and RCW 36.70A.030(2) and (10). The Petitioner further contends the Board of County Commissioners (BOCC) approved four docketed requests for de-designation of agricultural lands of long-term commercial significance. The requests are identified as Docket Nos. 06-01, re-designation of 53.7 acres from Commercial Agriculture to Rural; 06-05, re-designation of 65.68 acres from Commercial Agriculture and Commercial Agriculture-20 to Rural and Agriculture-5; 06-06, re-designation of 10.2 acres from Commercial Agriculture and Commercial Agriculture-20 to Rural and Rural-5 zoning; and 06-17, re-designation of 54.36 acres from Commercial Agriculture and Commercial Agriculture-20 to Rural and Agriculture-5. According to the Petitioner each of these [individual] requests for re-designation was granted based on conclusory findings in Kittitas County's Ordinance 2006-63, and in each case the BOCC found "[t]he subject parcels do not meet the requirements as identified in WAC 365-190-050 ..." The Petitioner also contends there is nothing in the record indicating an area-wide assessment was performed to support the decisions to approve these requests and there was no county-wide or area-wide analysis.

The Petitioner argues RCW 36.70A.060 and .170 require counties planning under the GMA to designate agricultural lands of long term commercial significance and assure their conservation, using definitions in RCW 36.70A.030(2) and (10) and criteria in WAC 365-190-050 to conduct a county-wide or area-wide analysis. The Petitioner argues the GMA establishes a three part test to be used in determining which land should be designated and conserved: land that (1) is not already characterized by urban growth; (2) is primarily devoted to the commercial production of agricultural products, including lands capable of such production based on land characteristics; and (3) has long term commercial significance for agricultural capacity based both on soil characteristics and development related factors. The Petitioner concedes "nothing in the GMA requires agricultural lands, once designated, must remain designated forever; however, nothing in the GMA specifies precisely how a county may determine designated agricultural lands no longer should be

Eastern Washington
Growth Management Hearings Board
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Fax: 509-574-6964

designated." *Petitioner CTED's Hearing on the Merits Brief,* EWGMHB, No. 07-1-0004c, p. 17.

The Petitioner contends this Board has long recognized that local determinations regarding the designation and conservation of agricultural lands must be the product of a valid process, which includes consideration of the factors in WAC 365-190-050. *Save our Butte Save Our Basin Society v. Chelan County,* EWGMHB, 94-1-0015, Final Decision and Order, August 8, 1994. And, this Board has held the importance of counties to designate and conserve a "critical mass" of agricultural land to assure survival of the "agricultural support systems", which requires a county-wide or area-wide analysis, not a parcel by parcel review of agricultural land. *City of Ellensburg v. Kittitas County,* EWGMHB, No. 95-1-0009, Final Decision and Order, at 7 (May 7, 1996.)

The Petitioner argues there must be an assessment on the record as to whether the land is used or capable of being used for commercial agricultural production and whether it is of long-term commercial significance based on soil characteristics and development related factors, including those listed in WAC 365-190-050(1). The Petitioner further argues without an assessment, the de-designation of these agricultural lands results in non-compliance with RCW 36.70A.170, .060, .030(2), and (10), which apply to de-designation.

Finally, the Petitioner contends the BOCC violated Policy GPO 2.125 in the CP (carried forward from the prior version of the CP and renumbered), which provides that any lands that are reclassified out of the Commercial Agricultural designation "revert" to the Agricultural designation. (Tab 2, p.35.) The Petitioner provided no further argument.

Respondent Kittitas County:

The County answered this issue under Issue No. 3 and Issue No. 4.

Intervenors BIAW, et al:

The Intervenors contend this issue was answered under Issue No. 3 and Issue No. 4.

Petitioner CTED HOM Reply:

CTED maintains Kittitas County's Ordinance 2006-63 allowed the de-designation of designated agricultural lands of long-term commercial significance without the county-wide

Eastern Washington
Growth Management Hearings Board
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Phone: 509-574-6960
Fax: 509-574-6964

or area-wide analysis on the record required under RCW 36.70A.060 and .170 that uses the definitions in RCW 36.70A.030(2) and (10) and the criteria adopted in WAC 365-190-050. These are required as determined by appellate court decisions interpreting the GMA's agricultural conservation mandate. The Petitioner argues that if the designation criteria in the CP comply with the GMA, as the County and Intervenors contend, then the de-designation also violates the CP and would constitute a violation of RCW 36.70A.040 and .120.The de-designations would also violate the County's own CP at GPO 2.125 ("If any lands are reclassified out of the Commercial Agricultural designation, then the land reverts to the Agricultural designation"). According to the Petitioners, each designation resulted in all or part of the lands formerly designated as Commercial Agriculture being reclassified into non-agricultural designations. The decision whether to de-designate agricultural lands of long-term commercial significance must be made using the same three-part test articulated in *Lewis County v. WWGMHB,* 157 Wn.2d 488; 139 P.3d 1096 (2006), which rests on criteria set out in statute and rule for designating agricultural lands of long-term commercial significance. In *City of Redmond v. CPSGMHB,* 136 Wn.2d 38, 959 P.2d 1091 (1998) , the Court rejected a parcel-by-parcel analysis, explaining the GMA requires an "area-wide" process for designating and conserving agricultural lands. The Court further explained current or intended land use on a particular parcel may be considered. Under *King County v. CPSGMHB* and *Lewis County v. WWGMHB,* the determination of long-term commercial significance also involves an area-wide or region-wide analysis, which is necessary to understand the effect of designation or de-designation on the agricultural industry. The assessment of long-term commercial significance cannot be solely parcel-specific, if a county is to satisfy its statutory "duty to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural industry. CTED contends it is not arguing that any particular agricultural land does or does not continue to meet the statutory criteria. The County is not in compliance with the GMA because the record contains no evidence the decision to de-designate agricultural lands was made with required information (area-wide analysis).

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

The Petitioner challenged four specific de-designations, identified as docket items 06-01, 06-05, 06-06, and 06-17, based on the lack of analysis by the County (CTED Brief at 20). The Sinclairs' amicus brief responded to CTED's challenge to docket Nos. 06-05 and 06-06 (Sinclair).The Sinclair's argue the de-designation of their properties complies with the three-part *Lewis County* test. However, CTED points out the County had an obligation to conduct this analysis on the record when making it's determination, since it is the County that adopts and amends the CP and implementing DRs. The County could have considered the information submitted by the Sinclairs (and could do so on remand from the Board), but the record does not indicate the required analysis was done under *Lewis County, Redmond, and King County* during the County's consideration of the proposed de-designation.

The County responded to the Petitioner's challenge to docket No. 06-01, and the Petitioner argues the de-designation of this parcel is not supported in the record by the required analysis.

The Intervenors agree (docket No. 06-17) the record does not indicate the County considered the required factors and analysis and on remand the County could consider the proffered analysis.

Board Analysis:

The same statutory requirements govern both the determination whether particular agricultural lands of long-term commercial significance should be designated and whether particular lands should no longer be designated. In both instances, Kittitas County's analysis must reach beyond the specific parcels at issue to examine the county-wide or area-wide implications of the decision to be made. RCW 36.70A.060 and .170 require Kittitas County to designate agricultural lands of long-term commercial significance and assure their conservation using definitions in RCW 36.70A.030(2) and (10) and criteria in WAC 365-190-050 to conduct a county-wide or area-wide analysis. RCW 36.60A.170. .030(2). As recognized both in *Lewis County* and in the Supreme Court's earlier decision, *City of Redmond v. CPSGMHB, 136 Wn.2d 38, 959, P.2d 1091 (1998),* this test must be

Eastern Washington
Growth Management Hearings Board
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applied county-wide or area-wide if it is to have any meaning. *Lewis County v. WWGMHB,* 157 Wn.2d 488, 502, 139 P.3d 1096 (August 10, 2006).

This Board long has recognized local determinations regarding the designation and conservation of agricultural lands must be the product of a valid process, which includes meaningful consideration of the factors in WAC 365-190-050. See *Save our Butte Save Our Basin Society v. Chelan County,* EWGMHB 94-1-0015, FDO, (August 8, 1994).

While nothing in the GMA requires agricultural lands, once designated, must remain designated as such forever, and nothing in the GMA specifies precisely how a county may determine that designated agricultural lands no longer should be designated; logically, the only way to make such a determination consistent with the GMA is to apply the same statutory criteria to a proposed de-designation of agricultural lands as for a proposal to designate such lands. Any other approach defeats the GMA's requirements to designate and conserve agricultural lands of long-term commercial significance and is contrary to the GMA's goal of conserving agricultural land in Washington.

The question before this Board is not whether the agricultural land in question should be designated or de-designated. The question before the Board is, did the County perform the required county-wide or area-wide analysis in approving four requests to de-designate previously designated agricultural lands of long-term commercial significance in Ordinance 2006-63? While there is opportunity for the exercise of local judgment (and it is obvious the local community understands its agricultural lands better than anyone else),the conclusions reached must be the product of a valid process. The record must show the county considered the factors for determination of agricultural lands of long-term significance given in WAC 365-190-050(1). *Merrill H. English and Project for Informed Citizens v. BOCC of Columbia County,* EWGMHB 93-1-0002, FDO, (November 12, 1993). Also, in the *City of Ellensburg v. Kittitas County,* EWGMHB No. 95-1-0009, FDO, at 13 (May 7, 1996), criteria for a landowner to "opt out" of agricultural designation "must be based on something other than the landowner's perception of what is in the owner's short-term interest, and on perceptions of what other uses may be allowed on the land." If requests to

Eastern Washington
Growth Management Hearings Board
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de-designate agricultural lands were evaluated on a parcel-by-parcel basis, or as individual requests for de-designation, a county ultimately would be powerless to conserve agricultural land, because presumably "it will always be financially more lucrative to develop such land for uses more intense than agriculture." *Redmond,* 136 Wn.2d at 52. It was precisely to prevent the incremental loss of agricultural land and the agricultural industry that the Legislature required the use of area-wide criteria for determining which lands to designate and conserve. *Redmond,* 136 Wn.2d at 52.It is for the same reason area-wide criteria must be used in determining whether particular parcels should be de-designated.

Recently, this Board declared the same analysis used to designate agricultural lands must be used to assess whether de-designation of such lands is appropriate and justified:

> "[T]o de-designated agricultural lands, "[I]t logically follows that if the County is required to conduct an analysis based upon [the] GMA mandated criteria to designate agricultural resource lands of long-term commercial significance; it cannot simply adopt an Ordinance that undoes, undermines or contradicts the analysis performed to support the original designation decisions."

Citizens for Good Governance v. Walla Wally County, EWGMHB No. 05-1-0013, FDO, at 30 (June 15, 2006). This Board found Walla Walla County had de-designated 381 acres of agricultural land in compliance with the GMA because it had evaluated the proposal using an area-wide analysis. In this case, the issue raised by the Petitioner is not whether any particular agricultural land that has been de-designated meets the statutory criteria for designation and conservation, because the record is not sufficient for CTED – or Kittitas County – to make that determination, since the County did not conduct the area-wide analysis as required by the GMA

Conclusion:

The Petitioner has carried its burden of proof and shown the County's actions to be clearly erroneous and out of compliance. This issue is remanded with directions for the county to conduct a proper area-wide or County-wide analysis of agricultural lands to comply with RCW 36.70A.060 and .170 and RCW 36.70A(2) and (10) and the criteria in

Eastern Washington
Growth Management Hearings Board
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WAC 365-190-050. The de-designation of the properties referred to in this Issue are out of compliance.

Issue No. 14:

By expanding the UGAs for the City of Kittitas and the City of Ellensburg without conducting a land capacity analysis that shows more land is needed for urban development over the statutory planning horizon, and without developing a capital facilities plan to show how the expanded UGAs would be provided with adequate public facilities, has Kittitas County failed to comply with RCW 36.70A.070(3), .110 and .130? (related to Issue 6 [KCCC])

The Parties' Position:

Petitioner CTED:

The Petitioner contends Kittitas County's approved expansions to the City of Ellensburg UGA and the City of Kittitas UGA without a supporting land capacity analysis, and those expansions do not comply with the requirements of the GMA for UGA expansion. In a Stipulated Clarification of Issues Presented for Review filed with this Board, the Parties agreed the expansion of the City of Kittitas UGA related to the City's industrial wastewater treatment plant is not at issue. CTED's arguments do not apply to that expansion.

The Petitioner argues, however, without first conducting a land capacity analysis (or land quantity analysis), the County does not have the information required under RCW 36.70A.110 to determine whether there is a need to expand a given UGA and, if so, how much to expand it. The Petitioner further argues the County must conduct a land quantity analysis before expanding any UGA. *Miotke v. Spokane County,* EWGMHB No. 05-1-0007, Final Decision and Order, at 8-10 (Feb. 14. 2006).The County must include its analysis in the record so it can be evaluated both by the public and by the Board. *McHugh v. Spokane County,* EWGMHB No. 05-1-0004, FDO, at 19-20.

The Petitioner also points out under the GMA, jurisdictions may not expand UGAs unless there is a need for additional capacity, based on the Office of Financial Management twenty-year population projections, patterns of development, and other similar factors identified in RCW 36.70A.110. The Petitioner concludes because the expansion of the UGAs

Eastern Washington
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for the Cities of Ellensburg and Kittitas were not supported by a land capacity analysis, they cannot comply with either the locational or sizing requirements of the [Act].

The Petitioner contends the expansion of the UGAs for the City of Kittitas and the City of Ellensburg in Ordinance 2006-63 is not supported by a Capital Facilities Plan (CFP) to show how the expanded UGAs would be provided with adequate public facilities and, therefore, does not comply with RCW 36.70A.070(3), .110 and .130.

The Petitioner argues the GMA requires the County's CP include a Capital Facilities Element, but the Petitioner points out the County need not redo the planning and analysis already completed by the cities, special districts, or other entities providing CF to serve an expanded UGA.A mere reference in the record that a city or special district will be able to provide services to an expanded UGA does not eliminate the need to develop a CFP covering the expanded UGA to determine what is needed, how much the infrastructure is going to cost, and which identifies a financial mechanism to fund it. At a minimum, the planning and analysis performed by a city must be adopted by reference or otherwise integrated into the County's CFP and considered in determining whether there are public facilities and services available to support planned development in the expanded UGA to comply with the [Act].

The Petitioner contends the County's expansion of the UGAs for the City of Ellensburg and the City of Kittitas are not supported by an adequate, current CFP, and is in violation of RCW 36.70A.070(3) and .110. The County's failure to update its CFP to include expanded UGAs also is a violation of the update requirement in RCW 36.70A.130.

The Petitioner concludes by requesting the Board find Kittitas County Ordinance 2006-63 and the amended Kittitas County CP be found out of compliance with the GMA, and be remanded to the County to take action to achieve compliance with the GMA.

Respondent Kittitas County:

The County refers to Issue No. 4 and Issue No. 6.

Intervenors BIAW, et al:

The Intervenors believe this issue was answered under Issue No. 4 and Issue No. 6.

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
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Petitioner CTED HOM Reply:

The Petitioner maintains the County expanded the UGAs for the City of Ellensburg and the City of Kittitas without conducting a land capacity analysis (or land quantity analysis) that shows more land is needed for urban development and without developing a capital facilities plan (CFP) to show how the expanded UGAs would be provided with adequate public services.

While the County argues the Kittitas [City] UGA expansion is supported by evidence in the record, RCW 36.70A.110 requires not just the existence of evidence in the record that can be used to support a UGA expansion, but an affirmative assessment by the County as to whether: (1) there is a need to expand the UGA based on OFM population projects and (2) whether the particular land at issue is appropriate for inclusion in the UGA. There is no land capacity analysis in this record, therefore the Kittitas UGA expansion violates RCW 36.70A.110. Even though the County argues a consultant's analysis provided by the City of Kittitas evaluated the availability of urban services in lieu of a CFP, it is the County's obligation to include the necessary analysis in its CF element. RCW 36.70A.070(3). The Petitioner points out in this reply that the Intervenors have conceded the Ellensburg UGA should be remanded to the County to show its work as to how it arrived at the size of the UGA, how it considered local circumstances to justify its use of a market factor, and to review the UGA expansion in conjunction with the Kittitas County CFP. The County has not addressed the Ellensburg UGA expansion, therefore the Petitioner believes further argument is unnecessary to support its contention the Ellensburg UGA expansion should be remanded to the County for completion of a land capacity analysis and capital facilities plan.

Board Analysis:

There are three issues surrounding the expansion of the urban growth areas for the City of Kittitas and the City of Ellensburg:

1. The sizing requirements and locational criteria in RCW 36.70A.110 apply to UGA expansion, as well as to initial UGA designation,

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2. The expansion of the UGAs for the City of Kittitas and the City of Ellensburg must be supported by a proper land capacity analysis,

3. The expansion of the UGAs for the City of Kittitas and the City of Ellensburg must be supported by a capital facilities plan (CFP) to show how the expanded UGAs would be provided with adequate public facilities.

In a Stipulated Clarification of Issues Presented for Review filed with this Board, the Parties agreed the expansion of the City of Kittitas UGA related to the City's industrial wastewater treatment plant is not at issue. The Petitioner is clear their arguments of this issue do not apply to that expansion.

Under the GMA, urban growth areas may not be expanded unless there is a need for additional capacity, based on the state Office of Financial Management (OFM) population projections, patterns of development, and other similar factors identified in RCW 36.70A.110. The purpose of a land capacity analysis is to provide the information necessary to determine whether there is a need to expand an UGA. In the absence of a land capacity analysis, there is no demonstration of need and expansion is not justified. Alternatively, a proper land capacity analysis would provide Kittitas County with information to determine whether expansions of the UGAs adopted in Ordinance 2006-63 are appropriate.

The Intervenors have conceded the City of Ellensburg UGA should be remanded to the County to show its work as to how it arrived at the size of the UGA, how it considered local circumstances to justify its use of a market factor, and to review the UGA expansion in conjunction with the Kittitas County CFP. Intervenors Br. at 25.26. The County defers to Intervenors' arguments and accepts remand for further analysis regarding the City of Ellensburg UGA expansion.

The County argues the City of Kittitas UGA expansion is supported by evidence in the record. County HOM Br. at 16.17. That may be, however, RCW 36.70A.110 requires not just the existence of evidence in the record that can be used to support an UGA expansion, but an affirmative assessment by the County as to whether: (1) there is a need to expand

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the UGA based on the OFM twenty-year population projections, and other considerations, such as the amount of developable land projected to be available within the existing UGA and (2) whether the particular land at issue is appropriate for inclusion in the UGA. *See Moitke v. Spokane County,* EWGMHB No. 05-1-0007, FDO, at 8-10 (Feb. 14, 2006). As this Board explained in *McHugh v. Spokane County,* EWGMHB, No. 05-1-0004, FDO, at 19-20 (Dec. 16, 2005), [T]he County must conduct the analysis (or, at minimum, substantively verify an analysis provided by a proponent) and must include the analysis in the record so it can be evaluated by the public. The Board can find no land capacity analysis in the record.

RCW 36.70A.070(3) requires the County's CP include a Capital Facilities Element that includes at least the following:

> (a) An inventory of existing capital facilities owned by public entities, showing the locations and capacities of the capital facilities; (b) a forecast of the future needs for such capital facilities; (c) the proposed locations and capacities of expanded or new capital facilities; (d) at least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes; and (e) a requirement to reassess the land use element if probable funding falls short of meeting existing needs and to ensure that the land use element, capital facilities plan element, and financing plan within the CFP element and financing plan within the CFP element are coordinated and consistent.

The County argues a consultant's analysis provided by the City of Kittitas evaluated the availability of urban services and constitutes evidence supporting the expansion of the City of Kittitas UGA, presumably in lieu of a CFP. County HOM Br. at 17. However, the question before this Board is not whether the UGA expansions for the City of Kittitas and the City of Ellensburg are necessary, but, rather did the County conduct a proper land capacity analysis and did the County comply with Goal 12 of the GMA, RCW 36.70A.020(12).

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

The County's expansion of the UGAs for the City of Ellensburg and the City of Kittitas are not supported by an adequate, current Capital Facilities Plan, which violates RCW 36.70A.070(3), .110, .130.

Conclusion:

The Petitioner has carried its burden of proof in Issue No. 14 and the Board finds the County's actions clearly erroneous and out of compliance. The County failed to conduct a proper land capacity analysis and the County did not provide an updated Capital Facilities Plan to accommodate the UGA expansions for the City of Kittitas and for the City of Ellensburg. This issue is remanded with directions for the County to conduct a proper land quantity analysis and an updated CFP in compliance with the GMA.

VI. INVALIDITY

The request for an order of invalidity is a prayer for relief and, as such, does not need to be framed in the PFR as a legal issue. *See King 06334 Fallgatter VIII v. City of Sultan (Feb. 13, 2007)* #06-3-0034 Final Decision and Order Page 12 of 17 *County v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 13, 2003) at 18. Petitioner, Futurewise, has requested the Board to find the agricultural land dedesignations and urban growth area expansions, Issues 4 and 6, found in Ordinance 2006-63, invalid.

Applicable Law:

The GMA's Invalidity Provision, RCW 36.70A.302, provides:

> (1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
>
> (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
>
> (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
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Phone: 509-574-6960
Fax: 509-574-6964

(c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

(2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.

Discussion and Analysis:

A finding of invalidity may be entered only when a board makes a finding of non-compliance and further includes a "determination, supported by findings of fact and conclusions of law that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter." RCW 36.70A.302(1). The Board has also held that invalidity should be imposed if continued validity of the non-compliant Comprehensive Plan provisions or development regulations would substantially interfere with the local jurisdiction's ability to engage in GMA-compliant planning.

The Petitioners, Futurewise et al, ask that this Board issue a finding that the actions of the County substantially interfere with the fulfillment of the goals of the GMA. In the discussion of the Legal Issue Nos. 4 and 6 in this case, the Board found and concluded that the Kittitas County's adoption of Ordinance No. 2006-63 was clearly erroneous and non-compliant with the requirements of RCW 36.70A.050, .060, .070, .130, .170, .172 and .177. The Board further found and concluded that the County's action was not guided by the goals of the Act, specifically Goals 1, 2, 8, 9, and 12.

Goal 1 of the GMA, RCW 36.70A.020(1), provides that "Urban growth: Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner." Clearly, from our findings herein, the actions of the

Eastern Washington
Growth Management Hearings Board
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Phone: 509-574-6960
Fax: 509-574-6964

County have substantially interfered with this goal. The County has no Capital Facilities Plan that covers the area of the expanded UGAs and where the agricultural lands were de-designated and moved to the higher density of rural, the county has few plans to address the overall impact of the expected development pursuant to these amendments.

Goal 2 of the GMA, RCW 36.70A.020(2), provides that reducing sprawl is a key goal of the Act: "Reduce the inappropriate conversion of undeveloped land into sprawling, low density development." Extending a UGA without properly preparing an updated Capital Facilities Plan and a land quantity analysis, as is required by the GMA, again substantially frustrates the County's ability to engage in GMA-compliant planning and substantially interferes with the goals of the GMA. The de-designation of Agricultural Resource lands and redesignation of those lands as rural further interferes with this goal.

Goal 8 of the GMA, RCW 36.70A.020(8), "Natural resource industries, maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses." Clearly, the improper exclusion of qualified agricultural lands from designation as Resource lands, frustrate this goal. There is a clear danger these lands will be lost to the Agricultural industry if invalidity were not found.

Goal 9 of the GMA, RCW 36.70A.020(9), "Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities." The expansion of UGAs without parks or open space interferes with Goal 9. Correct procedures need to be followed to avoid substantially interfering with this goal.

Goal 12 of the GMA, RCW 36.70A.010(12), "Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards." No Capital Facilities Plan was adopted or reviewed in the expansion of UGAs for Kittitas County.

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
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Fax: 509-574-6964

Accordingly, the Board enters a determination of invalidity and specifically finds each of the four de-designations of Agricultural lands found out of compliance here and the expansions of UGAs for the Cities of Ellensburg and Kittitas invalid and remands Ordinance No. 2006-63 to Kittitas County to take legislative action consistent with this Order.

Conclusion:

The Board finds that a determination of invalidity is properly issued and actions found out of compliance found in Issue Nos. 4 and 6 are invalid.

VII. FINDINGS OF FACT

1. Kittitas County is a county located East of the crest of the Cascade Mountains and opted to plan under the GMA and is therefore required to plan pursuant to RCW 36.70A.040.

2. The County adopted Kittitas County Ordinance No. 2006-63 on December 11, 2006 in a document entitled "2006 Update of Title 20 Kittitas County Comprehensive Plan and 2006 Annual Amendment to Title 20 Kittitas County Comprehensive Plan."

3. The County has failed to have a variety of rural densities that complies with RCW 36.70A.070(5)(b).

4. The County has failed to adopt specific, directive policies in the CP that prospectively maintain a compliant mix of rural densities and set enforceable criteria to guide the development or amendment of the zoning code or other regulations that are to implement the CP and for determining when and where rezone applications should be approved.

5. The County does not protect its rural character and does permit low-density sprawl throughout much of the rural area, all contrary to the specific requirements in RCW 36.70A.070(5).

6. Kittitas County's Urban Growth Nodes are urban development outside of a designated urban growth area contrary to RCW 36.70A.110.

7. Urban Growth Nodes are not urban growth areas or LAMIRDs.

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

8. The County de-designated certain agricultural lands to allow their development for other uses without the analysis on the record as required under RCW 36.70A.060 and .170.

9. The County expanded the Kittitas and Ellensburg UGAs without conducting a land capacity analysis that shows more land is needed for urban development and without developing a Capital Facilities Plan addressing the expanded UGAs.

10. Gold Creek has failed to comply with the requirements for a master planned resort and failed to comply with the rural areas requirements.

11. The County failed to include in its Comprehensive Plan an explanation of how the criteria for the designation of Agricultural Resource Lands are to be considered.

12. The County has not properly required that all plats, short plats, development permits, and building permits issued for development activities on, or within five hundred feed of lands designated as resource lands contain a notice that the subject property is within or near designated resource lands. Further, the specific notice required by statute for mineral resource lands was not included in the required.

VIII. CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties to this action.
2. This Board has jurisdiction over the subject matter of this action.
3. Petitioners have standing to raise the issues raised in the Petition for Review.
4. Petition for Review in this case was timely filed.
5. Kittitas County improperly enlarged the UGAs of the Cities of Ellensburg and Kittitas and this action is found out of compliance with the GMA.
6. Kittitas County improperly de-designated four parcels of Agricultural Resource Lands and this action is found out of compliance with the GMA.
7. Kittitas County has not properly required that all plats, short plats, development permits, and building permits issued for development

Eastern Washington
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activities on, or within five hundred feed of lands designated as resource lands contain a notice that the subject property is within or near designated resource lands and this action is found out of compliance with the GMA.

8. Kittitas County has not included in its Comprehensive Plan an explanation of how the criteria for the designation of Agricultural Resource Lands are to be considered and is out of compliance with the GMA.

9. Kittitas County has allowed improper densities in the Rural element of the County when it allowed UGNs, Gold Creek and zonings Agriculture-3 and Rural-3.

10. Kittitas County failed to adopt specific, directive policies in the CP that prospectively maintain a compliant mix of rural densities and set enforceable criteria to guide the development or amendment of the zoning code or other regulations that are to implement the CP and for determining when and where rezone applications should be approved and is out of compliance with the GMA.

11. Kittitas County has failed to have a variety of rural densities that complies with RCW 36.70A.070(5)(b) and is out of compliance with the GMA.

12. Kittitas County failed to revisit and revise its development regulations, in particular KCC 16.09.030, Performance Based Cluster Platting; KCC 17.36, Planned Unit Development Zone; Title 16, Subdivision Regulations; and KCC 17.20, S Suburban Zone and KCC 17.22, S-II Suburban-II Zone and is therefore out of compliance with the GMA.

13. Kittitas County failed to conduct a proper area-wide or County-wide analysis of Agricultural lands to comply with RCW 36.70A.060 and .170 and RCW 36.70A(2) and (10) and the criteria in WAC 365-190-050. The de-designations of the four properties referred to in this Issue are found out of compliance.

14. Any conclusion of Law herein after determined to be a Findings of Fact, is hereby adopted as such.

Eastern Washington
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IX. INVALIDITY FINDINGS OF FACT
Pursuant to RCW 36.70A.300 (2)(a)

We incorporate the Findings of Fact above and add the following:

1. The Board finds and concludes that the County's expansion of its UGAs without the required determination that such expansion is required thwarts the goals of the GMA.

2. The Board finds and concludes that the County's improper de-designation of Agricultural Resource Lands substantially interferes with the goals of the GMA because it fails to preserve and protect agricultural lands within the County.

3. The Board finds and concludes that the continued validity of these actions of the County would substantially interfere with the goals of the UGA and their invalidity would cause no hardship upon the County during the period necessary to bring these two areas into compliance.

X. CONCLUSIONS OF LAW
Pursuant to RCW 36.70A.300 (2) (a)

1. The Board has jurisdiction over the parties and subject matter of this case.

2. The County's failure to prepare a current Capital Facilities Plan and properly prepare a land quantity analysis prior to the expansion of the UGAs within the County substantially interfere with the fulfillment of Goals 1, 2, 8, 9 and 12 of the GMA. The Board concludes that these actions or lack of actions substantially interfere with the local jurisdictions' ability to engage in GMA-compliant planning.

3. The County's failure to perform the proper county-wide or area wide assessment of agricultural lands required under RCW 36.70A.060, and .170, applying the definitions in RCW 36.70A.030(2) and (10) and the criteria in WAC 365-190-050 substantially interfere with the fulfillment of Goals 2 and 8.

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
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Fax: 509-574-6964

XI. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board Orders and case law, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

1. Kittitas County's adoption of Ordinance No. 2006-63 is clearly erroneous and does not comply with the requirements of the GMA, and is not guided by GMA goals RCW 36.70A.020(1), (2), (8), (9) and (12) and in Issues 1, 2, 3, 4, 5, 6, 7, 10, 11, 12, 13, and 14 Kittitas County is found out of compliance to the extent herein ruled.

2. The Board further finds and concludes that the expansion of Kittitas County UGAs and the de-designation of Agricultural Resource lands listed in Issue Nos. 4 and 6 substantially interfere with the goals and requirements of the GMA. The Board therefore enters a determination of invalidity.

3. Therefore the Board remands Ordinance No. 2006-63 to Kittitas County with direction to the County to achieve compliance with the Growth Management Act pursuant to this decision no later than **February 18, 2008, 180 days** from the date issued. The following schedule for compliance, briefing and hearing shall apply:

   - The County shall file with the Board by **March 3, 2008, an original and four copies** of a Statement of Actions Taken to Comply (SATC) with the GMA, as interpreted and set forth in this Order. The SATC shall attach copies of legislation enacted in order to comply. The County shall simultaneously serve a copy of the SATC, with attachments, on the parties. **By this same date, the County shall file a "Remanded Index," listing the procedures and materials considered in taking the remand action.**

   - By no later than **March 17, 2008,** Petitioners shall file with the Board an **original and four copies** of Comments and legal arguments on the County's SATC. Petitioners shall simultaneously serve a copy of their Comments and legal arguments on the parties.

Eastern Washington
Growth Management Hearings Board
15 W. Yakima Avenue, Suite 102
Yakima, WA 98902
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- By no later than **March 31, 2007,** the County and Intervenors shall file with the Board an **original and four copies** of their Response to Comments and legal arguments. The County shall simultaneously serve a copy of such on the parties.

- By no later than **April 14, 2007,** Petitioners shall file with the Board an **original and four copies** of their Reply to Comments and legal arguments. Petitioners shall serve a copy of their brief on the parties.

- Pursuant to RCW 36.70A.330(1) the Board hereby schedules a telephonic Compliance Hearing for **April 21, 2008, at 10:00 a.m.** The parties will call **360-357-2903 followed by 16922 and the # sign.** Ports are reserved for: Mr. Trohimovich, Mr. Copsey, Mr. Caulkins, Mr. Cook, Mr. Slothower, and Mr. McElroy. If additional ports are needed please contact the Board to make arrangements.

If the County takes legislative compliance actions prior to the date set forth in this Order, it may file a motion with the Board requesting an adjustment to this compliance schedule.

Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration:

Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and four (4) copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review:

Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil.

Eastern Washington
Growth Management Hearings Board
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Enforcement:

The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail. Service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order.

Service:

This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

SO ORDERED this 20th day of August 2007.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____

Joyce Mulliken, Board Member

_____

John Roskelley, Board Member

_____

Dennis Dellwo, Board Member

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State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

KITTITAS COUNTY CONSERVATION et al.,

Petitioners,

v.

KITTITAS COUNTY,

Respondent,

BUILDING INDUSTRY ASSOCIATION OF WASHINGTON (BIAW), CENTRAL WASHINGTON HOME BUILDERS ASSOCIATION (CWHBA), MITCHELL WILLIAMS, d/b/a MF WILLIAMS CONSTRUCTION CO., TEANAWAY RIDGE, LLC, KITTITAS COUNTY FARM BUREAU

Intervenors,

ART SINCLAIR and BASIL SINCLAIR,

Amicus Parties.

(Kittitas County Superior Court Cause No. 07-2-00549-1)

Case No. 07-1-0004c

Order Granting Certificate of Appealability

I. APPLICATIONS FOR CERTIFICATE OF APPEALABILITY

On August 20, 2007, the Eastern Washington Growth Management Hearings Board (the Board) issued its Final Decision and Order (FDO) in EWGMHB Case No. 07-1-0004c *KITTITAS COUNTY CONSERVATION, et al. v. KITTITAS COUNTY and [BUILDING INDUSTRY ASSOCIATION OF WASHINGTON (BIAW), CENTRAL WASHINGTON HOME BUILDERS ASSOCIATION (CWHBA), MITCHELL WILLIAMS, d/b/a MF WILLIAMS CONSTRUCTION CO.,*

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TEANAWAY RIDGE, LLC, KITTITAS COUNTY FARM BUREAU – Intervenors] [ART SINCLAIR and BASIL SINCLAIR – Amicus Parties].

On September 19, 2007, the Board received KITTITAS COUNTY, (Petitioner in Kittitas County Superior Court Case No. 07-2-00549-1), Respondent/Petitioners' Petition for Review Pursuant to RCW 36.70A.300(5).

On October 16, 2007, the Board received KITTITAS COUNTY CONSERVATION, RIDGE, AND FUTUREWISE'S Application for Certificate of Appealability filed by Mr. Scully.

The Board's jurisdiction is generally limited[1] to addressing whether local governments within the Eastern Washington region have complied with the goals and requirements of the state's Growth Management Act (GMA – Chapter 36.70A RCW) and whether local governments within that region have complied with the provision of the Shoreline Management Act (SMA – Chapter 90.58 RCW).

II. DISCUSSION AND FINDINGS

Mr. Scully contends a delay in obtaining a final and prompt determination of the issues in this matter is detrimental to all parties and the public interest, and all parties would benefit by a rapid and binding resolution of this case. While the Kittitas County Conservation (KCC) Petitioners (*EWGMHB* Case No. 07-0004c) are concerned about development applications being vested to the noncompliant County code while an appeal is pending, allowing land to be divided into three acre rural lot sizes; Mr. Scully also points out the appellants, Central Washington Home Builders Association *et al*, (CWHBA) would also benefit by a rapid resolution as well, since property owners and businesses represented by CWHBA still face uncertainty regarding the future of density in Kittitas County. Mr. Scully further argues, traffic, inadequate water and sewer, poor fire protection, and a degraded environment are not good selling points for real estate, and therefore, a binding ruling requiring the County to fix its noncompliant zoning will provide certainty for the long term interests of CWHBA and other appellants.

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[1] See: RCW 36.70A.280

Eastern Washington
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Mr. Scully contends adjacent counties (Yakima, Chelan, Grant, and King) and the region as a whole stand to benefit from a decision from the Court of Appeals. There are no cases from Division Three of the Court of Appeals on the issues of what rural densities comply with the GMA, or requirements for clustering and planned unit development regulations, or on the variety of rural density issues; therefore a quick appellate decision will have significant regional benefit.

Mr. Scully argues a decision by Division Three of the Court of Appeals would provide significant precedential value. The Washington Supreme Court notes in *Viking Properties v. Holm,* 155 Wn.2d 112, 118P.3d 322 (2005), Growth Management Hearings Boards cannot set "bright line rules" regarding density, and the appellate courts have "yet to provide clear guidance on when a Board violates *Viking Properties'* bright-line rule prohibition, and whether previous rulings from all three Boards holding one dwelling unit (DU) per five acres as the minimum rural density may be utilized as a benchmark or presumption, or are a fact-based application of the GMA's prohibitions on urban growth outside urban growth areas," *Gold Star Resorts, Inc. v. Futurewise,* ___Wn.App.___, 166 P.3d 748(2007) (Agid.J., concurring), noting that one DU per five acres in jurisprudence from the Boards is a "rebuttable presumption," not a "bright-line rule."

And, finally Mr. Scully contends this is the first review and revise case under RCW 36.70A.130 decided by the EWGMHB. Division Three of the Court of Appeals has not addressed this provision and a quick appellate decision will have significant regional benefit. The Board's authority regarding Certificates of Appealability is set forth in RCW 34.05.518, which provides in relevant part:

> (3)(a) For the purposes of direct review of final decisions of environmental boards, environmental boards include those boards identified in RCW 43.12B.005 and growth management hearings boards identified in RCW 36.70A.250.
> (b) An environmental board may issue a certificate of Appealability if it finds that *delay* in obtaining a final and prompt determination of the issues *would be detrimental to any party or the public interest* **and either:**

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(i) Fundamental and urgent state-wide or regional issues are raised; or

(ii) The proceeding is likely to have significant precedential value.

The Board is bound by the criteria established in RCW 34.05.518(3)(b)(i-ii) in determining whether to issue a Certificate of Appealability. In applying these criteria to the present case, and in evaluating the argument presented by Mr. Scully's Application, the Board finds and concludes as follows:

The Eastern Washington Growth Management Hearings Board, EWGMHB, having reviewed the arguments of the Petitioner and being familiar with the law, finds that the statutory criteria for issuance of a certificate of appealability have been met. The issues raised herein are fundamental and of urgent regional and statewide interest. It is important to have this matter decided by Division Three of the Court of Appeals as soon as possible. The issue will have great precedential value in Eastern Washington and the State as a whole. The resolution of these issues will be of great benefit to the parties and their local constituencies. It is unlikely that the Superior Court will have the final review. Direct review by the Court of Appeals will be a more efficient use of the judicial systems valuable time.

III. ORDER

Pursuant to RCW 34.05.518, the Board **grants** KITTITAS COUNTY CONSERVATION, RIDGE, and FUTUREWISE'S Application for a Certificate of Appealability.

SO ORDERED this 22nd day of October 2007.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

Joyce Mulliken, Board Member

Dennis Dellwo, Board Member

John Roskelley, Board Member

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