

**CENTRAL PUGET SOUND  
GROWTH MANAGEMENT HEARINGS BOARD  
STATE OF WASHINGTON**

SEATTLE-KING COUNTY	)	
ASSOCIATION OF REALTORS,	)	<b>Case No. 04-3-0028</b>
	)	
Petitioner,	)	<b>(S/K Realtors)</b>
	)	
v.	)	
	)	
KING COUNTY,	)	<b>FINAL DECISION AND ORDER</b>
	)	
Respondent.	)	
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SYNOPSIS

*In September of 2002, King County in consultation with its 40 cities, completed its Buildable Lands Report, as required by RCW 36.70A.215. In September of 2004, King County adopted its 2004 Plan Update [Ordinance No. 15028], as required by RCW 36.70A.130(1) and (4). About a month later the County adopted a series of ordinances updating its critical areas regulations.*

*The Seattle-King County Association of Realtors filed a timely challenge to the County's Plan Update. The crux of Petitioners' challenge was that the County's BLR was flawed, and since the County relied upon information in the BLR to do the Plan Update, the Plan Update was likewise flawed. Petitioners also challenged the Plan Update's compliance with several other requirements and goals of the Act, focusing on affordable housing concerns.*

*The Board first determined that it had jurisdiction to review the sufficiency of the BLR, since the County had not taken any legislative action to acknowledge its completion, thereby establishing a deadline for appeal to the Board. The Board then concluded that the BLR complied with the review and evaluation requirements of the Act – RCW 35.70A.215. On the remainder of the issues posed, the Board concluded that the County had complied with the goals and requirements of the Act, or that Petitioners had failed to carry their burden of proof in demonstrating noncompliance with provisions of the GMA. The Board was not persuaded that the County's action was clearly erroneous.*

## I. BACKGROUND<sup>1</sup>

In September of 2002, King County (**County**) completed the “King County Buildable Lands Evaluation Report – Recent Growth and Land Capacity in King County and Its Cities” (**BLR**). The BLR was promptly submitted to the Washington State Department of Community, Trade and Economic Development (**CTED**). The BLR reviewed and evaluated development activity during the 1993-1996 and 1996-2000 timeframe and the County supply of land in 2001. On September 29, 2004, King County adopted Ordinance No.15028, amending the King County Comprehensive Plan (**Plan Update**). The notice of adoption of Ordinance No. 15028 was published on October 7, 2004. The BLR provided information to the County for the Plan Update process.

On December 3, 2004 the Central Puget Sound Growth Management Hearings Board (**Board**) received a petition for review (**PFR**) from the Seattle-King County Association of Realtors (**S/K Realtors**). The S/K Realtors challenged the County’s Plan Update, including the adequacy of the BLR, upon which the Plan Update was based.

The Board conducted the prehearing conference on January 4, 2005, and following receipt of an amended PFR, the Board issued the prehearing order (**PHO**). The January 6, 2005 PHO established the briefing schedule, hearing date and framed the legal issues to be decided by the Board. The Index to the record was received January 3, 2005; and agreed upon “core documents” were provided to the Board on January 26, 2005. There were no motions to supplement the record or dispositive motions filed in this matter.

All prehearing briefs were timely filed, and are hereafter referenced as: **S/K Realtors PHB, County Response** and **S/K Realtors Reply**.

On April 7, 2005, the Board held a hearing on the merits (**HOM**) at the Board’s offices in Suite 2470, 900 4th Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, Bruce C. Laing and Margaret A. Pageler were present for the Board. Petitioner Seattle King County Association of Realtors was represented by Michael Spence. Respondent King County was represented by Peter G. Ramels. Also present were Sam Pace, David Crowell and Randy Bannecker for S/K Realtors. Board extern, Rob Trickler also attended. Court reporting services were provided by Eva P. Jankovits of Byers and Anderson, Inc. The hearing convened at 1:00 p.m. and adjourned at 4:10 p.m. The Board ordered a transcript of the proceeding.

On April 12, 2005, the Board received the transcript of the proceedings (**HOM Transcript**).

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<sup>1</sup> See Appendix A for the complete procedural history in this matter.

## **II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF and STANDARD OF REVIEW and SCOPE OF REVIEW**

Petitioner challenges King County's 2004 Plan Update, as adopted by Ordinance No. 15028. Pursuant to RCW 36.70A.320(1), Ordinance No. 15028 is presumed valid upon adoption.

The burden is on Petitioner, S/K Realtors, to demonstrate that the actions taken by King County are not in compliance with the requirements of the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board "shall find compliance unless it determines that the action taken by [King County] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." For the Board to find the County's actions clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

Pursuant to RCW 36.70A.3201 the Board will grant deference to King County in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. The State Supreme Court's most recent delineation of this required deference states: "We hold that deference to county planning actions that are consistent with the goals and requirements of the GMA . . . cedes only when it is shown that a county's planning action is in fact a 'clearly erroneous' application of the GMA." *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, [docket number 75076-9; 2005 Wash. Lexis 371 (May 5, 2005), at 12 of 15]. The Quadrant decision affirms prior State Supreme Court rulings that "Local discretion is bounded . . . by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearing Board (King County)*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). Division II of the Court of Appeals further clarified, "Consistent 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." *Cooper Point Association v. Thurston County*, 108 Wn. App. 429, 444, 31 P.3d 28 (2001); *affirmed Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn2d 1, 15, 57 P.3<sup>rd</sup> 1156 (2002) and cited with approval in *Quadrant*, fn. 7, at 13 of 15.

The scope of the Board's review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to those issues presented in a timely petition for review.

### **III. BOARD JURISDICTION and PREFATORY NOTE**

#### **A. BOARD JURISDICTION**

The Board finds that Petitioner S/K Realtors' PFR was timely filed, pursuant to RCW 36.70A.290(2); Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged ordinance – Ordinance No. 15028, which constitutes King County's 2004 Comprehensive Plan Update, pursuant to RCW 36.70A.280(1)(a).

#### **B. PREFATORY NOTE**

##### **The Petition for Review and Prehearing Order:**

Petitioners original PFR, filed December 3, 2004, appeared to challenge three separate documents adopted by the County: 1) the County's Critical Areas Ordinance Update, with associated ordinances, (CAO); 2) the County's Buildable Lands Report, completed in September 2002; and 3) the Plan Update adopted by Ordinance No. 15028. However, at the January 5, 2005 prehearing conference, S/K Realtors clarified that they were challenging the Plan Update, but not the CAO. However, Petitioners intended to use impacts of the BLR and CAO in their challenge to the Plan Update. Thus, the action challenged is the County's Plan Update, as adopted by Ordinance No. 15028. A revised PFR reflecting these changes was filed with the Board on January 5, 2005. The Legal Issues from that PFR are carried forward in the Board's January 6, 2005 PHO.

##### **The Legal Issues:**

Petitioner framed nine separate Legal Issues for the Board to resolve. In briefing, Petitioner combined argument on several issues; and the County responded accordingly. This Order will address the Legal Issues in the following sequence: Legal Issues 7 [public participation], Legal Issues 3 and 8 [BLR], Legal Issues 1 and 9 [.115], Legal Issue 5 and 6 [internal consistency], Legal Issue 4 [goals], and Legal Issue 2 [affordable housing].

##### **The County's 2002 Buildable Lands Report:**

The County's 2002 BLR explains that the major elements included in the County's BLR program include:

- Annual data collection to determine the amount and density of new development;
- Updated inventories of the supply of land suitable for development;

- Assessment of the capacity of each jurisdiction and the entire Urban Growth Area to accommodate expected growth;
- Preparation of a Five-Year Evaluation Report; and (later)
- Adoption of remedial measures where necessary to address density and capacity shortfalls.

BLR, Executive Summary, at 1.

Chapter 1 of the BLR includes the background and methodology used for the evaluation. *See* BLR, at 11-20. Chapter 2 of the BLR deals with urban growth in the County broken into four subareas (East County, Sea-Shore, South County and Rural Cities). *Id.* at 21-40. Chapter 3 includes a breakdown of the buildable lands profile for each of the 40 cities and the unincorporated urban area within the County. Thus, in Chapter 3 there are details for each city within each of the subareas and the unincorporated urban County in that subarea. *Id.* at 41-208.

The County's BLR explains that the program strives to answer four main questions:

- What is the amount and actual density of growth in recent years?
- Is the capacity of the land supply adequate to accommodate current growth targets?
- Has development occurred at densities consistent with planning assumptions and targets?
- Are urban densities being achieved within the Urban Growth Area?

*Id.* at 1. The BLR notes that the answers to the questions are detailed in the body of the report, but goes on to provide these answers:

- King County has achieved 38% of its household target in 40% of the twenty-year planning period (*i.e.* the first eight years of the 1993-2012 period).
- King County has housed more than 50% of the population forecast for that period.
- King County has capacity for 263,000 more housing units – more than twice the capacity needed to accommodate the remaining household target.
- King County has the capacity for over 600,000 more jobs – several times the remaining target of 110,000 jobs.
- Densities being achieved in the four urban sub-areas are sufficient to accommodate targeted growth. Overall residential urban densities exceed 7 dwelling units per acre.

*Id.* at 1-2. The BLR also summarizes its conclusions. It provides:

King County has been successful in accommodating strong population and employment growth from 1993 to 2000.

- King County has well over the capacity needed to accommodate the growth that is expected to occur by 2012.
- Sufficient capacity exists to accommodate further growth beyond the 2012 planning horizon.
- However, the supply of vacant land is limited, especially of large parcels for single family development. The remaining supply must be used efficiently.
- Densities of recent residential and commercial/industrial projects indicate efficient use of the land supply.
- All of the sub-areas of King County show adequate capacity for the target period through 2012, and beyond. A few individual cities have a potential for shortfall with respect to their target.
- The remedy phase of Buildable Lands is not addressed in this report. Capacity issues at the city level are being addressed in part by the targets review now underway.
- Density issues will be addressed by jurisdictions individually.

*Id.* at 9.

Petitioners vehemently object to the BLR and state, “The essence of this appeal is that *the BLR is so deficient that it poisons the rest of the plan.*” S/K Realtors Reply, at 26-27; (emphasis supplied).

The Plan Update – Ordinance No. 15028:

The Plan Update did numerous things: 1) it amended the policies, text and maps of the Plan; 2) it amended the Future Land Use Map – the official land use designations for the unincorporated County; 3) it updated and replaced four technical appendices to the Plan (A-Capital Facilities, B-Housing, C-Transportation, and D - Growth Targets and Urban Growth Area 2004).<sup>2</sup> The Growth Targets were updated to extend until 2022. *See* Ordinance No. 15028, Section 2, at 9.

The County’s Plan Update is the basis for S/K Realtors challenge, yet Petitioners do not directly challenge any particular provision in the Plan Update itself as noncompliant with the GMA. In their briefing, Petitioners clarify,

Contrary to popular perceptions, SKCAR is not asking for an expansion of the Urban Growth Area at this time, nor is SKCAR asking for an order of

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<sup>2</sup> As noted *supra*, the Plan Update is presumed valid. Only issues specifically challenged by a timely PFR are reviewed by the Board for compliance with the Act.

the Board compelling an increase in land capacity inside the UGA. SKCAR is asking the Board to direct King County to prepare a BLR that is fully compliant with RCW 36.70A.215, and to then begin the process of identifying and adopting reasonable measures as required.

S/K Realtors PHB, at 35.<sup>3</sup>

#### **IV. LEGAL ISSUES AND DISCUSSION**

##### **A. LEGAL ISSUE NO. 7 [Public Participation]**

The Board's PHO set forth Legal Issue No. 7:

7. *Does King County's adoption of the Ordinance No. 15028, the 2004 Comprehensive Plan Update fail to comply with RCW 36.70A.020 (11) because it does not "encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts?"*

##### **Applicable Law**

Goal 11 – RCW 36.70A.020(11) – the public participation goal of the GMA provides:

Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

##### **Discussion**

In this issue Petitioners challenge whether the public participation process used by the County for the Plan Update was guided by, and complied with, Goal 11. However, in briefing, S/K Realtors also cite to the public participation requirements of the Act found at RCW 36.70A.140 [the GMA's basic public participation requirement provisions] and a King County Plan Policy – U-463.<sup>4</sup>

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<sup>3</sup> At the HOM, Petitioners did suggest that the County should have looked at expanding capacity in its own "urban centers" as well as increasing the capacity of "urban centers" in King County cities. HOM Transcript, at 21-22.

<sup>4</sup> Plan Policy U-463 provides, in relevant part:

*King County shall work with the Growth Management Planning Council or its successor and the private sector to support development of an adequate supply of housing commensurate with job growth within the county and its cities. To attain this goal, King County shall:*

- a. Support job and household growth targets and policies established in the County-wide Planning Policies;
- b. Establish performance measures to gauge how jurisdictions are accommodating growth;

Position of the Parties:

Petitioners summarize their participation in King County's GMA planning process going back to 1993 and continuing through the 2004 Plan Update. Interestingly, S/K Realtors argue "Because of this level of participation, SKCAR is uniquely positioned to review the technical work of King County jurisdictions in connection with housing issues. . . . However, in order for SKCAR's experts to review such work, two things are required: First, the jurisdiction must first actually do the work; Second, the jurisdiction must "show their work" as required by well established Board decisions." S/K Realtors PHB, at 45.

Petitioners then argue that the County did an insufficient analysis in its BLR and did not show its work. *Id.* Petitioners note that a King County Plan Policy that indicates King County shall work with the private sector in relation to housing issues. *Id.* at 46, (Citing King County Plan Policy U-463). Petitioners then assert that the Count failed to work with the private sector (*i.e.* S/K Realtors and Multiple Listing Association), and the County failed to do the required work, and show it, in the BLR. Therefore, Petitioners were denied the opportunity to comment in a meaningful way. *Id.*

The County contends it has a model public participation program that exceeds the requirements of the GMA. Respondent notes that the GMA allows the County discretion in designing its particular public participation program so long as it provides a reasonable opportunity for review and comment on GMA enactments. County Response, at 76-77. The County notes that in their briefing, Petitioners document their own extensive participation in the County's lengthy GMA planning process. As additional evidence of its own process, the County references a transmittal letter from the King County Executive to the Council detailing the public participation process accompanying the Plan Update. *Id.* at 77-78. Numerous exhibits are noted documenting the Plan Update Public Involvement Summary and the County's notices for Council Committee and Council meetings. *Id.* (referencing, Exs. 26 through 33, and pages R 9429 through R 9481). The County questions whether there is any legal basis for S/K Realtors' allegation of violation of public participation requirements of the Act as they might relate to the BLR; nonetheless, the County argues that it completed the BLR which fully sets forth the County's methodology, data, analysis and conclusions. *Id.*

In reply, Petitioners suggest that the County misunderstands the nature of their complaint. "The essence of this appeal is that the BLR is so deficient that it poisons the rest of the

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- c. Participate in buildable lands inventories, market analyses and other studies to evaluate if sufficient land capacity is available for residential development; and
  - d. Work with cities to ensure additional actions are taken throughout the county to accommodate and promote residential development when job growth causes great demand for housing and severe shortages in the availability of housing for new workers in the community.

Plan Update, at 2-43; (emphasis supplied).

plan. And as SKCAR pointed out, and as the County confirms in its response brief, the BLR was prepared by a group of planners and staff technicians.” S/K Realtors Reply, at 26-27. Petitioners continue, “The facts have shown that the private sector is right, and the county is wrong [regarding the sufficiency of land within the UGA], at least as regards the impact of land capacity on housing affordability. To the extent that the county ignored this input, they have violated the public participation requirements of the GMA.” *Id.*

#### Board Discussion:

The Buildable Lands program is a review and evaluation program directed at certain GMA planning jurisdictions requiring an inventory of growth and development during a set timeframe. This information is to be used as a basis for assessing their plans and regulations – particularly as they relate to Urban Growth Areas (UGAs). The BLR process, parameters and methodology are to be jointly developed by the County in coordination with its cities<sup>5</sup> and ultimately to be reflected in the County’s County-wide Planning Policies<sup>6</sup> (CPPs). The BLR effort is largely an internal governmental data-gathering exercise, but the Act does direct jurisdictions, in undertaking the program, to “consider information from *other appropriate jurisdictions and sources.*” See RCW 36.70A.215(1), (emphasis supplied). The Board notes that while RCW 36.70A.215 does not directly reference the BLR program to the GMA public participation requirements, the BLR provides important information for updates, amendments and revisions to GMA Plans and regulations which are clearly within the gambit of the GMA’s notice and public participation requirements [*i.e.* RCW 36.70A.140, .130(2)(a), .035 and Goal 11].

The focus of the Legal Issue posed by Petitioners for the Board is whether the public participation *for the Plan Update* was flawed. See Legal Issue 7, *supra*. However, Petitioners do not dispute that there was notice, meetings,<sup>7</sup> public hearings and the opportunity for public comment on the Plan Update. S/K Realtors PHB, at 43-46. Nor do Petitioners dispute that they were participants in the Plan Update process. *Id.* Instead, Petitioners focus on defects they perceive in the BLR, its process, and *product*, which allegedly “poisoned” the Plan Update.

It is clear from the record that S/K Realtors have long been active participants in the GMA planning process for King County and its cities. Most telling to the Board about Petitioners’ perceived impact of the “poisoned BLR” is the fact that the S/K Realtors prepared a White Paper critiquing the County’s BLR. See White Paper – A Critical

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<sup>5</sup> See RCW 36.70A.215(1).

<sup>6</sup> Appendix 4 to the CPPs notes that, “In compliance with RCW 36.70A.215, the April 1994 Land Capacity Work Program was deleted and replaced with the Growth Management Act review and evaluation program.” CPPs, at 74.

<sup>7</sup> At the HOM, S/K Realtors conceded that they had attended and participated in various monthly meetings with the staff that were preparing the BLR where they were “briefed” and that “they got to say some things at various spots in meetings or briefings.” However, “When we provided information, that information was ignored, and because of that we don’t think the County showed its work.” HOM Transcript, at 34.

Analysis of King County's September 2002 Buildable Lands Evaluation Report "Fatal Flaws in the Content, Analysis and Conclusions of King County's *Buildable Lands Evaluation Report* that Compromise the County's Ability to Satisfy the Affordable Housing Mandates of the GMA and Exacerbate the Consequences of Proposed Critical Areas Ordinance (CAO) Amendments," by Erwin B. 'Sam' Pace, dated August 31, 2004. (**White Paper**). S/K Realtors PHB, attached exhibit A, R 00714 through R 00804.

At the HOM Petitioners affirmed that this White Paper critiquing the BLR "was submitted not only in response to the Critical Areas Ordinance, but also in response to the Plan Update." HOM Transcript, at 44-45. This White Paper spends 90 pages explaining and detailing why the Petitioners believe the September 2002 BLR is flawed. One of the conclusions of the White Paper states,

The Executive Branch's reliance on the County's September 2002 Buildable Lands Evaluation Report for the proposition that there is more than enough remaining capacity for housing is misplaced and unwarranted. The implication that Housing, and Housing Affordability, will not be adversely affected is untenable.

...

[Defects in the BLR identified by S/K Realtors] render it insufficient as a basis on which to evaluate either the efficacy of the comprehensive plan policies, or the impacts of proposed amendments to the CAO.

White Paper, at 84-85; R 00797-R 00798.

This conclusion clearly comports with what Petitioners characterize as "The essence of this appeal is that the BLR is so deficient that it poisons the rest of the plan." S/K Realtors Reply, at 26.

In short, the briefing and argument suggests that Petitioners: 1) reached different conclusions than the County about the integrity and usefulness of the BLR; 2) would have made different decisions than the County did in considering the Plan Update; and 3) feel their input was ignored.

It seems apparent, by the very existence of the White Paper, that Petitioners had access to the information contained in the BLR. The BLR included all its data and explained the methodology used in the required review and evaluation. Its conclusions were explicit. See BLR, at 1-208 and Appendices. The existence of the White Paper also verifies that the Petitioners had the opportunity to review and critique the BLR. The White Paper ultimately was a vehicle by which S/K Realtors provided meaningful input to the County on the Plan Update. The White Paper clearly outlined what Petitioners believed to be fatal flaws in the BLR methodology, analysis and conclusions; thereby making it unfit for the County to rely upon in the Plan Update process. Further, given Petitioners' continuing, active and visible participation in the County's GMA planning process, it is reasonable to conclude that Petitioners' input, including the White Paper, was taken into

account by the County decision-makers. It appears to the Board that S/K Realtors simply did not persuade the County that their perspective was the “right” view of the usefulness of the BLR.

The Board has explained the parameters of public participation in some of its earliest cases,

The “public participation” that is one of the hallmarks of the GMA does not equate to “citizens decide.” The ultimate decision-makers in land use matters under the GMA are the elected officials of cities and counties, not neighborhood activists or neighborhood organizations.

*City of Poulsbo, City of Port Orchard and City of Bremerton v. Kitsap County*, CPSGPHB 92-3-0009c, Final Decision and Order, (Apr. 6, 1993), at 36. Additionally, several months later, the Board stated, and has consistently held,

“Take into account public input” means “consider public input.”  
“Consider public input” means “to think seriously about” or “to bear in mind” public input; “consider public input” does not mean “agree with” or “obey” public input.

*Twin Falls Inc, Weyerhaeuser Real Estate Co., Snohomish County Property Rights Alliance and Darrell Harting v. Snohomish County*, CPSGPHB 93-3-003c, Final Decision and Order, (Sep. 7, 1993), at 77.

No one questions whether Petitioners have special expertise in relation to the housing market. As a business association, S/K Realtors clearly are representatives from the private sector. However, in the GMA public process at issue here, Petitioners’ have no different status than neighborhood groups or citizen organizations or any other member of the general public. Consequently, not having a decision “go your way” does not equate to a failure of the GMA’s public participation process.

Review of the material presented and the arguments made on this issue lead the Board to conclude that: 1) King County’s public participation process for the Plan Update complies with the Act; 2) Petitioners S/K Realtors have been continuous and active participants in the County’s GMA planning process, and Petitioners’ made their concerns clearly known; and 3) S/K Realtors concerns were considered, but not persuasive. Consequently, in the context of Petitioners’ challenge, as stated in Legal Issue 7, the Board concludes that the County’s public participation process for the Plan Update complies with the GMA and was guided by Goal 11 – RCW 36.70A.020(11).

### **Conclusion – Legal Issue 7 [Public Participation]**

The Board concludes that the County's public participation process for the Plan Update **complies with** the GMA and **was guided by** Goal 11 – RCW 36.70A.020(11). The Board is not persuaded that the County's action was clearly erroneous.

### **B. LEGAL ISSUE NOS. 3 and 8**

The Board's PHO set forth Legal Issue Nos. 3 and 8

3. *Does the County's adoption of the Plan Update and Buildable Lands Report (BLR) fail to comply with RCW 36.70A.215(4) because they represent affirmative steps that are inconsistent with the requirement to "adopt and implement measures that are reasonably likely to increase consistency?"*
8. *Does the County's BLR fail to comply with RCW 36.70A.215 because it is not based on a legally sufficient review and evaluation program?*

These two Legal Issues are discussed together since the both allege noncompliance with the GMA's Buildable Lands provisions – RCW 36.70A.215.

### **Applicable Law**

In 1997, the Legislature amended the GMA to require certain jurisdictions, including King County and all of its cities, to undertake a review and evaluation program – the Buildable Lands Program [RCW 36.70A.215]. See Appendix B for the full text of RCW 36.70A.215. The purposes of the BLR are twofold; 1) determine whether a county and its cities are achieving urban densities within UGAs by comparing actual growth and development with the jurisdiction's Plan targets and objectives governing development; and 2) identify reasonable measures, other than adjusting UGAs, that will be taken to comply with the GMA. See RCW 36.70A.215(1)(a) and (b).

RCW 36.70A.215(2) generally outlines the type of data to be collected to determine the quantity and type of land suitable for residential and nonresidential development. This section also requires the first BLR to be completed by September 1, 2002. The BLR is also to provide a method for resolving disputes among jurisdictions and amendment procedures to remedy inconsistencies identified in the BLR.

Subsection 3 of .215 sets forth the minimum requirements for the evaluation component of the BLR. It provides:

- (a) Determine whether there is sufficient suitable land to accommodate the county-wide population projection established for the county pursuant to RCW 43.62.035 and the subsequent population allocations within the

county and between the county and its cities and the requirements of RCW 36.70A.110;

(b) Determine the actual density of housing that has been constructed and the actual amount of land developed for commercial and industrial uses within the urban growth area since the adoption of a comprehensive plan under this chapter or since the last periodic evaluation as required by subsection (1) of this section; and

(c) Based on the actual density of development as determined under (b) of this subsection, review commercial, industrial, and housing needs by type and density range to determine the amount of land needed for commercial, industrial, and housing for the remaining portion of the twenty-year planning period used in the most recently adopted comprehensive plan.

Subsection 4 of .215 establishes the “reasonable measures” requirement. In short, if the BLR evaluation “demonstrates an inconsistency” between the development that has occurred and what was envisioned by the Plans, “the county and its cities shall adopt and implement measures that are reasonably likely to increase consistency during the subsequent five-year period [*i.e.* 2002-2007].”

Petitioners’ Legal Issue 8 questions whether the County’s BLR is a legally sufficient review and evaluation, per RCW 36.70A.215(3). Legal Issues 3 questions whether the County has followed RCW 36.70A.215(4) in adopting and implementing reasonable measures. The Board will address Legal Issue 8 first, then Legal Issue 3.

### **Discussion – Legal Issues 8**

#### **Legal Issue 8 - Timeliness of the BLR Sufficiency Challenge:**

In the response brief, the County asserts that the Petitioners’ challenge to the sufficiency of the BLR is untimely,<sup>8</sup> since the required review and evaluation was completed and transmitted to the state in September of 2002, over three years prior to the recent Plan Update and Petitioners’ filing of the present challenge. County Response, at 25. The County cites to language from a prior decision of this Board to support its argument.

In reply, Petitioners also refer to the same language and Board decision to claim the County “failed to act” in taking corrective action, and, therefore, they may challenge the entire BLR including its sufficiency. S/K Realtors Reply, at 2.

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<sup>8</sup> The County also argues in the alternative that the BLR complies with the requirements of RCW 36.70A.215.

In *City of Bremerton v. Kitsap County (Bremerton II)*, CPSGMHB Consolidated Case No. 04-3-0009c, Final Decision and Order, (August 9, 2004), at 9, the Board stated,

In Kitsap County's case . . . the County's BLR was not challenged. Whether *the data, methodology, and evaluation contained in the BLR complies with the requirements of .215*<sup>9</sup> is not presently before the Board. Any such challenge of that document would be untimely, *unless the County failed to act*.<sup>10</sup>

Both parties ignore the fact that this language is *dicta* since neither the timeliness nor the sufficiency of Kitsap County's BLR was before the Board. The Board's comment pertaining to "timeliness" was based upon a premise that Kitsap County's BLR was adopted by legislative action and published, thereby establishing a 60-day timeframe for appeal; in which case a 2004 challenge would be untimely. The reference to "failure to act" merely acknowledged that if statutory deadlines are missed, the failure to meet a deadline can be challenged.

In the present case, it is undisputed that the County completed its BLR in September 2002 – no statutory deadline was missed. If the County had taken legislative action to "adopt" the BLR in 2002, and "published" notice of that action, then the Petitioners' present challenge to the sufficiency of the BLR would clearly be untimely. However, at the HOM, when asked if the BLR was adopted by legislative action of the Council, the County stated, "There was not legislative action. The language [of RCW 36.70A.215(2)(b)] said it must be completed by September 2002." HOM Transcript, at 50.

In this context, the question for the Board is whether "completion" of the BLR review and evaluation by September 2002 establishes a deadline for a challenge, or whether a "legislative action" related to that review and evaluation is necessary to establish a deadline for appeal.

RCW 36.70A.290(2)(a) and (b) establish the "adopt," "publish," and "60-day filing" requirements for presenting a timely petition to the Board for review. This section of the Act is the sole basis for the Board to determine the timeliness of filing of a petition for review.

As the County notes, RCW 36.70A.215 does not direct that the BLR review and evaluation be adopted through legislative action, but merely directs it to be completed by a date certain. However, the BLR is not the *only* "review and evaluation" that is directed under the GMA. The Board finds guidance in RCW 36.70A.130(1) and (4) which also

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<sup>9</sup> The County uses this language to assert that *S/K Realtors are prohibited from challenging 'the data, methodology and evaluation contained in the BLR.'* See County Response, at 25.

<sup>10</sup> S/K Realtors claim that this language allows a challenge if the County fails to *take corrective action* – 'failure to act.' S/K Reply, at 2; (emphasis supplied).

set a deadline for required reviews and evaluations.<sup>11</sup> RCW 36.70A.130(1) addresses how completion of the review and evaluation is to be acknowledged – through legislative action. This section goes on to define legislative action to mean, “the adoption of a resolution or ordinance following notice and public hearing indicating at a minimum, a finding that a review and evaluation has occurred and identifying the revisions made, or that a revision was not needed and the reasons therefore.” *Id.*

This requirement provides the means to limit a jurisdiction’s exposure to challenges before the Board. Likewise, if a jurisdiction wants to establish a limitation on its exposure from appeal, a similar course should be followed for its BLR. **Therefore, it logically follows that to establish a timeframe for appeals to the Board, the completion of a BLR should be acknowledged through legislative action and the adoption of a resolution or ordinance finding that the review and evaluation has occurred and noting its major conclusions.**

Consequently, the Board cannot accept the timely “completion” of a document as a basis for determining timeliness of a petition for review. The basis for the Board to determine the timeliness of a petition is confined to the provisions of RCW 36.70A.290(2)(a) and (b). The County did not acknowledge completion of the BLR through legislative action, nor publish notice of its completion. Therefore, the County did not establish a timeframe for its appeal. **S/K Realtors PFR challenging King County’s BLR, specifically Legal Issue 8, is timely.**

#### Legal Issue 8 – Sufficiency of the BLR:

##### *Compliance with RCW 36.70A.215:*

Since the provisions of RCW 36.70A.215 establish very broad parameters for the type of data to be collected, the methodology to be used, and requires the design of the review and evaluation program be the product of a collaborative process between a county and its cities, the Board will give deference to the agreed-upon approach used by jurisdictions participating in the program. However, if the legal sufficiency of a BLR is challenged, the Board’s scrutiny will focus on whether the resulting BLR fulfills the *purposes* of the program and whether the BLR contains the key evaluation components – *i.e.* compliance with RCW 36.70A.215(1) and (3). Simply put, based upon the review and evaluation contained in a BLR, have the jurisdictions been able to determine whether they are achieving urban densities within the UGAs and are reasonable measures needed to avoid adjusting the UGA? **Thus, if a county and its cities agree upon an evaluation methodology that satisfy the minimum evaluation components of RCW 36.70A.215(3), and the results of that review and evaluation meet the purposes of RCW 36.70A.215(1), the Board will find compliance.**

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<sup>11</sup> However, this review and evaluation is more comprehensive and is to ensure that a jurisdiction’s plan and development regulations comply with the Act. Given the significance and value of the periodic BLR information, it should be an integral part of the .130 Plan Update reviews and acknowledged as such.

The Board notes that the significance of BLR review and evaluation is that it provides important information to jurisdictions to consider in reviewing and updating their Plans and development regulations. Consequently, it should be part of the record and used to verify the basis for a variety of proposed Plan or development regulation amendments – especially UGA adjustments.

In the present case, the County’s BLR is the product of an agreed upon review and evaluation process. *See* King County CPP FW-1, especially Step 5(b).<sup>12</sup> King County’s BLR is organized as follows: Chapter 1 includes the background and methodology used for the evaluation. *See* BLR, at 11-20. Chapter 2 of the BLR deals with urban growth in four “subareas” of the County (East County, Sea-Shore, South County and Rural Cities). *Id.* at 21-40. Chapter 3 includes a breakdown of the buildable lands profile for each of the County’s 40 cities and the unincorporated urban area of the County. Thus, in Chapter 3 there are details for each city within each of the subareas and the unincorporated urban County in that subarea. *Id.* at 41-208.

For each jurisdiction, including unincorporated King County, data is collected, arrayed in tables and analyzed pertaining to: 1) number of net new dwelling units developed over the study period 1993-2000, specifically breaking out development activity between 1996 and 2000 for single-family and multi-family by permit activity and plat activity; 2) explicit assumed future residential densities; 3) residential land supply of vacant and redevelopable land, starting with gross acreage, taking deductions (critical areas, ROW, and public purposes), yielding net acres, then applying a market factor that ultimately yields adjusted net acres; 4) residential capacity, indicating the capacity of the jurisdiction to support a specific number of units (single and multi-family and mixed uses); 5) residential capacity in relation to the 2012 household target; 6) net number of new jobs 1995-2000; 7) commercial and industrial development activity; 8) commercial and industrial land supply; 9) commercial and industrial capacity; and 10) employment capacity in relation to jobs target. *See* BLR, at 1-208.

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<sup>12</sup> CPP Framework Policy 1, Step 5(b) provides:

The Growth Management Planning Council or its successor shall conduct a review and evaluation program in compliance with RCW 36.70A.215. The purpose of the review and evaluation program shall be to determine whether King County and its cities are achieving urban densities within the Urban Growth Areas. This shall be accomplished by comparing the growth and development assumptions, targets and objectives contained in these policies (and in county and city comprehensive plans) with actual growth and development that has occurred. If the results of the program are inconsistent with the requirements of the Growth Management Act (GMA), King County and its cities shall identify reasonable measures in accordance with the GMA, other than adjusting the Urban Growth Areas, that will be taken to comply with those requirements.

The Board notes that CPP FW-1, Step 6 establishes an annual monitoring and benchmark program to continuously evaluate GMA planning over time.

The data arrayed and analyzed in King County's BLR clearly addresses the minimum evaluation components required by RCW 36.70A.215(3)(a), (b) and (c). It addresses whether there is sufficient land to accommodate the 20-year population forecast [.215(3)(a)], it addresses actual residential densities achieved and the actual land developed for commercial and industrial uses in the UGAs [.215(3)(b)], and it evaluates the amount of land needed for the various uses for the remainder of the 20-year planning period [.215(3)(c)]. See BLR, at 1-208. The BLR's review and evaluation supports the conclusion that the County is achieving urban densities within the UGA and that it has adequate capacity to meet the remaining housing and jobs targets [.215(1)(a) and (b)]. See BLR, at 1-2 and 9, quoted *infra*.

While Petitioners dispute the caveats and conclusions of the BLR, the Petitioners offer no alternative analysis. It seems that the thrust of Petitioners' argument is that since the methodology is flawed, the analysis is flawed and therefore the conclusions are likewise flawed. The White Paper is a critique. However, even the extensive White Paper does not provide a "*corrected* review and evaluation." The White Paper does not show how, if all the "objected to" caveats were changed, the BLR's tables and figures would be different; or whether the product of that analysis would lead to substantially different conclusions than those drawn by the County. Petitioners have not demonstrated how, or persuaded the Board, that the County's 2002 BLR fails to meet the purposes and minimum evaluation requirements of RCW 36.70A.215(1) and (3). Simply based on this review **the Board concludes that King County's BLR is legally sufficient and complies with RCW 36.70A.215.** However, since the parties devoted a large portion of their briefing to this issue; the Board will address some of the specific concerns raised in briefing.

In challenging the legal sufficiency of the BLR [Legal Issue 8], Petitioners rely heavily on the White Paper mentioned *supra*. Petitioners contend that the BLR is legally flawed because it includes the following fatal flaws – "the caveats:" 1) [the BLR] is not a market feasibility study; 2) it does not answer whether or not land identified in the report will be available for development; 3) it is not an infrastructure capacity analysis; 4) it does not address housing affordability; and 5) it does not predict economic market conditions. Consequently, Petitioners conclude that the BLR is merely a physical inventory that does not comply with the provisions of RCW 36.70A.215. S/K Realtors PHB, at 8-11; and BLR.

*Market feasibility study, economic market conditions and identifying developable land:*

King County contends that the "caveats" clarify the scope of the BLR's coverage - it explains what it is, and what it is not. The County states that the BLR is not: "a comprehensive market feasibility study of the type a developer would rely on to predict where there is sufficient demand for housing to justify short-term investment decisions to develop land;" nor is it "designed to predict whether the economy in the region will be such that there will be enough demand to actually build out the suitable land." *Id.* at 41.

Instead, the County explains, the BLR “is a long-range document designed to show there is sufficient land that is suitable for development to accommodate projected targets.” *Id.*

The County also relies on guidance provided by CTED, which states, “The [BLRs] are not intended to be an inventory of marketable land, but viewed as a general indication of state and local policy effectiveness in achieving urban land use patterns.” *Id.* (Citing Ex. 56, at 3; the *Buildable Lands Program: 2002 Evaluation Report – Summary of Findings*, June 2003, prepared by CTED).

In short, the County acknowledges that the BLR is not the “market feasibility study” or “a prediction of the economic climate over the next 12 to 20 years” that Petitioners apparently would have preferred. However, the County contends the BLR does comply with the provisions of RCW 36.70A.215. *Id.* The Board agrees. The BLR is not intended to be a comprehensive market feasibility study, a predictor of the economic climate in the future, or source for identifying parcels ripe for development. The BLR is a tool for monitoring policy outcomes – it looks *back*, not forward, to see if the policies embodied in a jurisdiction’s Plan and implementing development regulations are being achieved. The BLR simply provides information about prior development activity that may influence future decision-making. Therefore, with respect to these “caveats” [(1),(2) and (5), *supra*] the BLR complies with the provisions of RCW 36.70A.215.

*Infrastructure capacity:*

S/K Realtors argue that “the BLR lacks an analysis of infrastructure availability and capacity upon the true development potential of the remaining land supply.” S/K Realtors PHB, at 12-14. In response, the County contends that Petitioners conflate the text of the GMA’s concurrency requirement, the capital facilities goal, and the capital facility element requirement with the capital facilities data needed to conduct the review and evaluation required by RCW 36.70A.215. In essence, the County contends that Petitioners read too much into the capital facility reference in RCW 36.70A.215(2)(a). The County explains that its Plan does comply with the capital facilities requirements of RCW 36.70A.070(3), Goal 12 and the Act’s concurrency requirements. However, the County contends that “these provisions of the GMA have nothing to do with the BLR.” *Id.* at 42; (*citing* various Plan Policies and King County Code provisions).

RCW 36.70A.215(3)(a) says that the collection of data on capital facilities should be considered in the BLR “to the extent necessary to determine the quantity and type of land suitable for development.” The County’s position is that this language allows the County to deduct from the inventory of land that land area that is devoted to existing capital facilities or land needed for such improvements in the future. Lands such as public rights-of-ways, drainage tracts, parks and open spaces were excluded for purposes of calculating achieved densities. County Response, at 43-46. Again the Board agrees with the County. The BLR was not intended to be an assessment of infrastructure capacity. That assessment has generally been done in sizing and locating the UGAs. Petitioners should remember that one of the considerations in sizing and delineating the UGA was

that all land included within it will be urban in nature, the urban land will be provided with adequate urban facilities and services within the 20-year planning period and the land will ultimately be developed at urban densities and intensities. *See Johnson II v. King County*, CPSGMHB Case No. 97-3-0002, Final Decision and Order, (Jul. 23, 1997), at 10. There should be little dispute that land within a UGA will have adequate urban infrastructure capacity over the planning period. With respect to this “caveat” [(3), *supra*] the BLR complies with the provisions of RCW 36.70A.215.

*Affordable housing and market factor:*

Petitioners argue, “The BLR failed to acknowledge the existence of the County’s Affordable Housing Targets” and “The BLR uses ‘market factor’ discount assumptions that are unwarranted based on the County’s own data, definitions and reporting methodologies.” S/K Realtors PHB, at 14-22. The County counters that the BLR does not require a review and evaluation of affordable housing, nor does the statute require the uses of any particular market factor. County Response, at 46-51.

The County suggests that the phrase in .215(3)(c) that directs the BLR to review “housing needs *by type and density ranges* to determine the amount of land needed for . . . housing for the remaining portion of the twenty-year planning period” does not direct an affordable housing assessment. Instead the County asserts that the reference to “type and density range” refers to the “type” of housing such as single family, mixed use or multifamily, and that “density ranges” merely refer to the differing densities achieved by the different housing types. Petitioners contend that “housing types” must address the characteristics of the population – the people living in the units. S/K Realtors Reply, at 9. The Board agrees with the County in its interpretation of RCW 36.70A.215(3)(c).

Affordable housing, while a significant issue in the state and the CPS region, is not an issue the BLR was designed to address. Neither the BLR statute nor the County’s methodology requires the collection of data regarding income, land costs, housing prices or occupants of various housing types. This type of data is critical in evaluating affordable housing, but it is not information to be collected in the context of a BLR.<sup>13</sup> With regard to this “caveat” [(4) *supra*] the BLR complies with RCW 36.70A.215.

Regarding the market factor used by the County in the BLR, the Board is not persuaded by Petitioners. The market factor is a subjective judgment about how much of the total land in the jurisdiction may be held off the market for various reasons and therefore not be “available” for development. The statute does not specify any particular market factor to be used in conducting the BLR review and assessment. The BLR includes a range of

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<sup>13</sup> However, the Board notes that the County has collected and published extensive information and analysis on housing affordability and trends. It appears in the Plan Update’s Housing Appendix. *See King County Plan Update, Technical Appendix B – Housing*, at B-27 through B-49 (Core 304-326); *see also King County Annual Benchmarks Report on Affordable Housing*.

market factors established and employed by different cities and for different zones. Therefore, the Board concludes that the market factor(s) selected by the County in doing the review and evaluation is a policy judgment that falls within the jurisdiction's discretion to determine. Using a market factor that was less than that used on previous occasions for different purposes does not run afoul of any of the provisions of RCW 36.70A.215. With regard to this "caveat" [(2) *supra*] the BLR complies with RCW 36.70A.215.

*Capacity assumptions:*

Petitioners appear to object to the fact that the County's BLR is organized according to three urban subareas within the County – the East, South and Sea-Shore subareas.<sup>14</sup> Each subarea includes numerous cities as well as unincorporated urban portions of the County. Petitioners object primarily to the assumptions used in the Sea-Shore subarea, which includes Seattle, Shoreline, Lake Forest Park and unincorporated King County. Petitioners refer to data, from the cities profiles, to argue that the assumptions for land lost to critical areas, public rights of way, and the extent of multi-family development used in the subarea analysis are wrong. Because these factors differ among the different jurisdictions, Petitioners contend that the subarea analysis mischaracterizes, by overstating, the land available for development. S/K Realtors PHB, at 22-25.

The County explains that the subareas construct was useful for aggregating data into regions in order to evaluate and assign the 2022 household and jobs targets. The County concedes that the subareas are not meaningful in terms of compliance with RCW 36.70A.215, since .215 is directed at local governments – the County and its cities – it does not require subarea analyses. County Response, at 52. Consequently, the County notes that it is not only the County, but also each of its forty cities, that are bound to comply with the requirements of RCW 36.70A.215, and that Petitioners' concerns regarding the BLR review and evaluation for an individual King County city cannot be brought in an action challenging the County. *Id.* at 53. The County notes that, in the BLR context, it can only be held accountable for its decisions related to unincorporated urban King County, which Petitioners do not directly challenge. The County also notes that according to the BLR, Seattle has adequate remaining capacity to meet its 2012 housing target. *Id.* at 57. In reply, Petitioners question how an "already built out" city like Seattle can meet the GMA's goals. S/K Realtors Reply, at 12.

The Board notes that the BLR has specific information about the unincorporated urban areas of the County, yet Petitioners do not appear to challenge this evaluation. It appears to the Board that Petitioners' concerns are misplaced on the County. While the County as a whole is achieving urban densities and has adequate land within the unincorporated areas to accommodate growth, the BLR acknowledges that "A few individual cities have a potential shortfall with respect to their target." BLR, at 9. Nonetheless, Petitioners launch their challenge against the County, not against any of the individual cities.

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<sup>14</sup> Actually there are four subgroups identified, the fourth being rural cities.

The Board understands the notion that the use of the subarea technique, aggregating data from numerous jurisdictions, may mask or dilute particular issues apparent in a particular jurisdiction, nonetheless, the Board notes that the BLR contains *specific data for each of the 40 cities within King County as well as urban land within unincorporated King County*. With regard to these “caveats” [(1)(2) and (5) *supra*] the BLR complies with RCW 36.70A.215.

*Consult other sources:*

Petitioners argue that the BLR fails to satisfy the statutory requirements to “consider information from other sources. . .” S/K Realtors PHB, at 25-28. In response, the County cites to various sources in the record where other jurisdictions and entities were consulted. County Response, at 58. In reply, Petitioners again assert that the information provided by them was ignored. S/K Realtors Reply, at 11. The Board agrees with the County, other sources were considered, including the S/K Realtors. However, as discussed in Legal Issue 7, *infra*, not following specific recommendations from the public or special interest groups in making decisions does not equate to a GMA violation. With regard to this general “caveat” the BLR complies with RCW 36.70A.215.

### **Conclusion – Legal Issue 8 [Timeliness of Challenge and Legal Sufficiency of BLR]**

- Petitioners challenge to the legal sufficiency of the County’s BLR was **not time barred** since the County never legislatively acted to acknowledge completion of the report.
- The County’s September 2002 BLR is **legally sufficient**, and **complies** with the requirements of Buildable Lands review and evaluation provisions of RCW 36.70A.215. The Board is not persuaded that the County’s action was clearly erroneous.

### **Discussion – Legal Issues 3 [Reasonable Measures]**

Petitioners contend that the Board has established in three prior county decisions<sup>15</sup> that “[A]n urban growth area cannot be expanded without a showing that there are inconsistencies between what was planned and what has happened in the interim. This appeal involves the corollary to that principle – that in order to avoid the necessity to expand the UGA, there must be adequate true capacity within the UGA itself.” S/K Realtors PHB, at 35. Petitioners offer no new argument, but rely on reasons discussed *supra*, in Legal Issue 8 (*i.e.* the caveats); to assert that there is insufficient land within the UGA. Therefore, Petitioners argue, inconsistencies exist and reasonable measures are merited. *Id.*

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<sup>15</sup> Petitioners cite to: *CTED I v. Snohomish County*, CPSGMHB Case No. 03-3-0017, Final Decision and Order, (Mar. 8, 2004); *Hensley VI v. Snohomish County*, CPSGMHB Consolidated Case No. 03-3-0009c, Final Decision and Order, (Sep. 23, 2003); and *Bremerton II v. Kitsap County*, CPSGMHB Consolidated Case No. 04-3-0009c, Final Decision and Order, (Aug. 9, 2004).

The County acknowledges that Petitioners may challenge the County if the BLR “demonstrates inconsistencies as noted in RCW 36.70A.215(3), then jurisdictions must adopt and implement [reasonable measures] to increase consistency.” County Response, at 26. However, the County asserts that the BLR did not demonstrate any inconsistencies that the County was required to address through reasonable measures. *Id.* The County argues, relying upon the BLR, that: 1) it has achieved urban densities as documented in the BLR; 2) the housing or dwelling unit capacity needs [household targets] for the remainder of the planning period [until 2012], have been documented in the BLR; 3) there is adequate and sufficient land capacity within the UGA to accommodate the remaining population encompassed in the household targets; 4) the BLR showed that there were no inconsistencies related to accommodating growth within the UGA; 5) existing capacity is adequate and does not necessitate the adoption of reasonable measures; and 6) there is no need to adopt reasonable measures because the reasonable measure provision of RCW 36.70A.215 is meant to avoid expanding the UGA. County Response, at 26-40.

In reply, Petitioners question whether urban densities are being achieved, and argue that several cities<sup>16</sup> are behind schedule<sup>17</sup> in meeting their 2012 household targets. S/K Realtors Reply, at 13. Additionally, Petitioners contend that the County is obliged to work with its cities to address inconsistencies and that the GMA’s “reasonable measures” provision is not limited to avoiding the expansion of the UGA. *Id.* at 16.

The Board notes that the three “reasonable measure” cases cited by Petitioner are all “county cases,” but the Board has also interpreted the reasonable measure requirements as applying to cities. In *FEARN v. City of Bothell (FEARN)*, CPSGMHB Case No. 04-3-0006c, (May 20, 2004), the Board interpreted the “reasonable measures” provisions of RCW 36.70A.215(4) and stated, “[I]f the buildable lands review and evaluation that is completed by September 1, 2002 demonstrates inconsistencies as noted in RCW 36.70A.215(3), then jurisdictions must adopt and implement the identified measures [reasonable measures] to increase consistency.” *FEARN*, at 7. In that case, the Board also indicated the deadline for adopting reasonable measures: “[T]he outside limit for a local government to adopt reasonable measures to avoid the need to adjust the UGA is the December 1, 2004 deadline established in .130(4).” *Id.* at 8.

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<sup>16</sup> The White Paper suggests that the following cities are behind schedule in meeting their household targets: Redmond, Tukwila, Algona, Burien, Des Moines, Enumclaw, Lake Forest Park, SeaTac, Shoreline, Pacific, Woodinville, Auburn, Black Diamond, Carnation and Bellevue. See White Paper, at 39-47.

<sup>17</sup> It is not clear to the Board what “behind schedule” is intended to mean. Jurisdictions must accommodate 20-years of forecasted growth over a 20-year period. If a very simplistic “schedule” is to accommodate 5% each year – a linear projection – is assume, then by the year 2000 jurisdictions should have achieved 40% of their household targets. The BLR indicates that all the Cities listed in the White Paper have achieved less than 40% of their target, except Bellevue (54%). However, all but 4 of the 15 cities listed had achieved at least 25% of their household targets by 2000. Compare White Paper to BLR. However, the Board is unaware of any GMA mandated “schedule” other than accommodating the forecast growth within the 20-year planning period. The % of target achieved is merely an indicator or progress through 2000.

This case is significant simply because the specific evidence that Petitioners rely upon to make their argument for inconsistency and the resulting need for reasonable measures is information pertaining to individual King County *cities*. Other than attacking the sufficiency of the BLR generally, which has been addressed in Legal Issue 8, *supra*, Petitioners do not argue any inconsistencies noted in the BLR related to the unincorporated urban areas in the County. Granted, the BLR addresses the entire county, including all its cities, but Petitioners seem to be attempting to enforce a provision of the GMA related to the adoption and implementation of reasonable measures against King County instead of against particular cities that it has concerns about. Perhaps, Petitioners' challenge on this point would have been better directed at the individual cities believed to be "behind schedule".

Petitioners have **failed to carry their burden of proof** in demonstrating that the BLR identified any inconsistencies pertaining to unincorporated urban County areas that merit the adoption of reasonable measures by the County. The Board is not persuaded that the County's action was clearly erroneous.

Petitioners also contend that the reasonable measures provision of RCW 36.70A.215 [the statutory language in .215(1)(b) is "reasonable measures, other than adjusting urban growth areas"] is not solely triggered by UGA expansion pressures but is meant to remedy other inconsistencies between on-the-ground development and a jurisdiction's planned urban growth and densities. S/K Realtors Reply, at 16. The Board need not decide that question on this record. Regardless of the UGA, Petitioners have made no showing of inconsistencies within the County's regulatory jurisdiction (unincorporated King County) requiring adoption of reasonable measures.<sup>18</sup>

### **Conclusion – Legal Issue 3 – Reasonable Measures**

- Petitioners have **failed to carry their burden of proof** in demonstrating that King County's 2002 BLR identified any inconsistencies related to unincorporated land within the County thereby triggering the need for the County to adopt and implement reasonable measures applicable to lands within the County's regulatory jurisdiction.

### **Conclusions – Legal Issue 8 and 3**

- Petitioners challenge to the legal sufficiency of the County's BLR was **not time barred** since the County never legislatively acted to acknowledge completion of the report. [Legal Issue 8]

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<sup>18</sup> This is not to say that the County has no obligation to work with any of its cities to find ways to support them in achieving compliance with the Act. RCW ;36.70A.215(4) contemplates such activity if amendments to the CPPs are necessary.

- The County’s September 2002 BLR is **legally sufficient**, and **complies** with the requirements of Buildable Lands review and evaluation provisions of RCW 36.70A.215. Petitioners have not persuaded the Board that the County’s action was clearly erroneous. [Legal Issue 8]
- Petitioners have **failed to carry their burden of proof** in demonstrating that King County’s 2002 BLR demonstrated any inconsistencies, thereby triggering the need for the County to adopt and implement reasonable measures applicable to unincorporated urban land within the County. Petitioners have not persuaded the Board that the County’s action was clearly erroneous. [Legal Issue 3]

### C. LEGAL ISSUES NO. 1 and 9

The Board’s PHO set forth Legal Issue Nos. 1 and 9:

1. *Does the County’s adoption of the Plan Update and BLR fail to comply with RCW 36.70A.115 because they represent affirmative steps that are inconsistent with the requirement to “provide sufficient capacity of land suitable for development within their jurisdictions to accommodate their allocated housing and employment growth, as adopted in the applicable countywide planning policies and consistent with the twenty-year population forecast from the office of financial management?”*
9. *Does the County’s adoption of the Plan Update fail to comply with RCW 36.70A.115 because it is not based on a current and sufficient land capacity analysis?*

#### Applicable Law

Both these Legal Issues allege noncompliance with the provisions of RCW 36.70A.115, which provides:

Counties and cities that are required or choose to plan under RCW 36.70.040 shall ensure that, taken collectively, adoption of and amendments to their comprehensive plans and/or development regulations provide sufficient capacity of land suitable for development within their jurisdictions to accommodate their allocated housing and employment growth, as adopted in the applicable countywide planning policies and consistent with the twenty-year population forecast from the office of financial management.

“Taken collectively” could be read in two ways. One meaning could be that a county and its cities, collectively, are to ensure that they accommodate the OFM forecasted growth. Here, the County, in conjunction with its cities, has reallocated growth by adjusting its 2002 household and jobs targets. Another reading of “taken collectively,” the reading

apparently assumed by these Petitioners, is that each jurisdiction is directed to consider its Plan and development regulations amendments collectively<sup>19</sup> to ensure that there is sufficient land to accommodate the growth “allocated” by the County. Thus, in the present case, this section of the GMA directs King County in doing its Plan Update (Ordinance No. 15028) to ensure that all of its proposed Plan and development regulation amendments, taken collectively, provide sufficient capacity of land suitable for development to accommodate their allocated housing and employment growth.

### **Discussion Legal Issues 1 and 9**

Petitioners combine their argument on Legal Issues 1 and 9 with the argument offered for Legal Issue 8, discussed, *infra*. Petitioners do not distinguish between compliance with RCW 36.70A.215 and RCW 36.70A.115. S/K Realtors PHB, at 7 through 28. The County even urges the Board to find that Petitioners have abandoned their challenge of whether the 2004 Plan Update complies with RCW 36.70A.115, because Petitioners offer only conclusory remarks indicating that the Plan Update does not comply with .115 because it is based upon a BLR that does not comply with .215. County Response, at 58-61. In reply, Petitioners argue they have not abandoned Legal Issues 1 and 9 because they have combined their arguments on Legal Issues 1, 8 and 9 and “Devoting twenty-one pages of legal argument to three issues is anything but abandonment.” S/K Realtors Reply, at 18. In essence, Petitioners have put their .115 challenge egg in their .215 challenge basket.

It is significant to the Board that Petitioners are adamant in that they “are not asking for an expansion of the Urban Growth Area at this time, nor is [S/K Realtors] asking for an order compelling an increase in land capacity inside the UGA. [Petitioners are] asking the Board to direct King County to prepare a BLR that is fully compliant with RCW 36.70A.215, and to then begin the process of identifying and adopting “reasonable measures” required. S/K Realtors PHB, at 35. Petitioners did not seek UGA expansions or increases in density within the UGA as remedies for the perceived deficiencies with the UGA’s land capacity. Petitioners did not ask the County then, nor do they ask the Board now, to make such adjustments. As Petitioners state, “The essence of this appeal is that the BLR is so deficient that it poisons the rest of the plan.” S/K Realtors Reply, at 27.

However, the Board has already concluded in its discussion of Legal Issue 8 *supra*, that the County’s 2002 BLR **complies** with the requirements of RCW 36.70A.215. Therefore, using Petitioners rationale, since the BLR is not poisoned, the Plan Update is not poisoned and complies with RCW 36.70A.115.

The Board notes that the Plan Update assigned 2022 household and employment targets. The BLR and the White Paper provided information and opinions related to these allocations. It is undisputed that the 2002 BLR was part of the record and considered by

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<sup>19</sup> This is consistent with the cumulative assessment of amendments in RCW 36.70A.130.

the King County Council in undertaking its Plan Update which led to the adoption of Ordinance No. 15028. It is also undisputed that the S/K Realtors White Paper was part of the record and considered in the Plan Update decision-making. Given these two facts, the Board can surmise that the BLR was more influential than the White Paper in convincing the King County Council and Executive that there was sufficient capacity of land suitable for development within the County to accommodate forecast housing and employment growth (*i.e.* population growth). Absent any evidence or argument to the contrary, Petitioners challenge on this Legal Issue must fail. The Board is not persuaded that the County's action was clearly erroneous. The Board concludes that the County's adoption of Ordinance No. 15028, the Plan Update, **complies** with the requirements of RCW 36.70A.115.

### **Conclusion – Legal Issues 1 and 9**

- King County's adoption of Ordinance No. 15028, the Plan Update, **complies** with the requirements of RCW 36.70A.115. Petitioners have not persuaded the Board that the County's action was clearly erroneous. [Legal Issues 1 and 9]

### **D. LEGAL ISSUE NOS. 5 and 6 [Internal Consistency]**

The Board's PHO set forth Legal Issue Nos. 5 and 6:

5. *Does the County's adoption of the Plan Update fail to comply with RCW 36.70A.120 and 070 because it is inconsistent with Comprehensive Plan Policies E-205, U-455 and I-407 [sic I-107], calling for no net loss of housing?*
6. *Does the County's adoption of the Plan Update fail to comply with RCW 36.70A.070, which requires that comprehensive plans be internally consistent documents?*

### **Applicable Law**

The relevant provision of RCW 36.70A.070(preamble) provides:

The plan shall be an internally consistent document and all elements shall be consistent with the future land use map.

RCW 36.70A.120 provides:

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall perform its activities and make capital budget decisions in conformity with its comprehensive plan.

King County Plan Policy E-205 states:

King County shall, in cooperation with the cities, ensure no net loss of housing capacity that preserves the ability to accommodate the 2022 targets, while pursuing compliance with the Endangered Species Act requirements. To achieve this goal, densities shall be increased on buildable lands, consistent with Policy U-463.<sup>20</sup>

Plan Update, at 4-25.

King County Plan Policy I-107 states:

King County shall develop, as part of the buildable lands analysis, a zoning yield and housing production monitoring program to determine whether housing capacity is being lost in the context of compliance with the Endangered Species Act, and shall propose revisions to the countywide planning policies to implement such a program.

Plan Update, at 9-4.

Petitioner did not cite or brief argument related to King County Plan Policy U-455, therefore, pursuant to WAC 242-02-570(1) it is **abandoned**. See S/K Realtors PHB, at 1-48.

### **Discussion of Legal Issues 5 and 6**

#### **Legal Issue 5 [Internal Consistency – Plan Policies E-205 and I-107]:**

Petitioners assert that the Board has held in prior cases<sup>21</sup> that once a jurisdiction designates land for housing in its Plan, the jurisdiction's implementing development regulations may not decrease or diminish that land supply. S/K Realtors PHB, at 39-40. Petitioners then argue that the County's adoption of its Critical Areas Ordinance (CAO) "took away remaining capacity for housing both in the rural areas, and in high value basins inside the UGA." *Id.* at 40-41. [Apparently contrary to King County Policies E-205 and I-107, yet these policies are not discussed in the argument.] To support this allegation, S/K Realtors refer to: 1) a letter dated February 28, 2003 from the Master Builders Association of King and Snohomish Counties to Stephanie Warden of King County specifically objecting to provisions of the pending CAO Update [One paragraph in this 12 page letter suggests that the proposed increased buffers for wetlands, streams and lakes can consume large portions of buildable land.] *See* Ex. C to S/K Realtors PHB, at 5, (R06674); 2) a letter dated August 5, 2004 from the Master Builders Association of King and Snohomish Counties to the King County Council raising the same concerns

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<sup>20</sup> See page 7-8 *supra*, footnote 4.

<sup>21</sup> Petitioners cite to: *Snoqualmie v. King County*, CPSGMHB Case No. 92-3-0004, Final Decision and Order, (Mar. 1, 1993), at 17; and *Children's Alliance I v. Bellevue*, CPSGMHB Case No. 95-3-0011, Final Decision and Order, (Jul. 25, 1995), at 6 and 8.

about the potential impact of increased buffers on buildable lands [This letter quotes a footnote in the BLR also offered by Petitioners.] *See Id.* at 7-8 (R09635-R09636); and 3) a quote from footnote 2, on page 17 of the BLR. The footnotes states:

Future updates to the land supply inventory may need to re-analyze the impact of critical areas in response to several potential updates of the regulatory scheme. They include updates to critical areas ordinances (based on best available science), updates to shorelines programs (in accordance with newly revised Shoreline Management Act guidelines), and implementation measures to protect fish species habitat under the Endangered Species Act. Development restrictions associated with these designations will have an impact on the developable land supply, and further work likely will be necessary to identify the extent to which they further encumber potentially developable parcels of land.

(Emphasis in S/K Realtors PHB, at 41.) Petitioners then argue that following the adoption of the Plan Update the County adopted its CAO which, Petitioners contend, decreases land capacity in violation of the no net loss of housing policy. *Id.* at 41.

In response, the County notes that it is undisputed that the Plan Update was adopted prior to the CAO, and that the Petitioners did not challenge the County's adoption of the CAO – where they might have argued the CAO is not consistent with, nor does it implement the Plan – nonetheless, Petitioners did not challenge the CAO: the present challenge is to Ordinance No. 15028, the Plan Update. Further, the County correctly notes that RCW 36.70A.130 applies to plan amendments, and does not require Plans *and development regulations* to be adopted concurrently. County Response, at 72.

The County also argues that King County Plan Policy E-205 does not mean that “net housing capacity cannot be reduced at all, even by a single unit. Rather it means that the housing capacity cannot be reduced through seeking compliance with the Endangered Species Act in a way that interferes with the ability to accommodate the 2022 growth targets.” *Id.* at 74. The County then argues that Petitioners have offered no evidence to show that the CAO in anyway interferes with the 2022 growth targets. *Id.* The County then cites to numerous exhibits in the record that support the notion that the CAO buffer provisions would have little or no impact on the ability to achieve the 2022 growth targets. *Id. Citing:* Ex. 36 (R1272-1285), Ex. 49 (R9716), Ex. 50 (R9717), Ex. 47 (R9708) and Ex. 48 (R9714).

The County then observes that it is unclear how King County Plan Policy I-107, which provides for a separate monitoring program related to Endangered Species Act compliance, has any bearing on Petitioners' challenge to the Plan Update. *Id.* at 74-75.

Petitioners offer only the CAO as a basis for inconsistency, they point to nothing in the Plan Update – the subject of this challenge – to demonstrate internal inconsistency with the cited Plan Policies. Nor do Petitioners identify any capital budget decisions or

“activities,” per RCW 36.70A.120, that are inconsistent with the Plan. After review of the exhibits and the arguments presented on this issue the Board is not persuaded that the County’s action in adopting the Plan Update was clearly erroneous. The Board agrees with the County that the Plan Update is what is challenged here, not the CAO, so the Board cannot review the merits of the CAO in the context of this appeal. Further, the Board agrees with the County that the focus of Plan Policy E-205 is maintaining adequate land capacity to meet growth targets in light of Endangered Species Act requirements; it is not an absolute prohibition on land capacity being affected by regulations. Additionally, the exhibits cited by the County in relation to the impact of buffers support this conclusion. Further, Petitioners offer nothing to suggest anything in the Plan Update is inconsistent with Plan Policy I -107, nor is there any indication of how the CAO is implicated by this Plan Policy. Consequently, the Board concludes that Petitioners have **failed to carry their burden of proof** in demonstrating internal inconsistencies in the Plan Update or persuading the Board that the County’s action was clearly erroneous.

Legal Issue 6 – Internal Consistency – “Unspecified”:

Here Petitioners acknowledge again that a Plan must be internally consistent and then argue that the Plan Update is inconsistent because it: 1) does not provide sufficient land capacity to accommodate growth; 2) does not further the affordable housing goal due to lack of capacity; 3) exacerbates sprawl since housing is developing outside of King County; and 4) puts the County’s economic vitality at risk due to high housing costs which affect the County’s ability to compete. S/K Realtors PHB, at 41.

The County simply counters that the four points are all conclusory statements and that Petitioner has not identified any inconsistencies. County Response, at 75. In reply, Petitioners claim that they “went into significant details regarding the deficiencies of the BLR and the effect of this on the efficacy of the Plan.” S/K Realtors Reply, at 26.

The Board has already addressed the legally sufficiency of the BLR. The Board found that the 2002 BLR complied with RCW 36.70A.215. *See* Legal Issue 8, *infra*. Given the limited nature of Petitioners’ argument on this issue and Petitioners reliance upon a BLR which the Board has found to be compliant, the Board must again conclude that Petitioners have **failed to carry their burden of proof** in demonstrating any internal inconsistencies in the Plan Update. Petitioners have not persuaded the Board that the County’s action was clearly erroneous.

Conclusions – Legal Issue 5 and 6

- Petitioners have **failed to carry their burden of proof** in demonstrating any internal inconsistencies in the Plan Update. Petitioners have not persuaded the Board that the County’s action was clearly erroneous. [Legal Issue 5 and 6]

**E. LEGAL ISSUE NO. 4**

The Board's PHO set forth Legal Issue No. 4

4. *Does the County's adoption of the Plan Update fail to comply with RCW 36.70A.020 because it is based on incomplete information, including but not limited to the BLR, that precludes a proper balancing of the 13 goals set forth in RCW 36.70A.020?*

#### Applicable Law

The preamble to the GMA's listing of the 14 goals [13 are listed, number 14 pertains to the shoreline master programs and regulations] in RCW 36.70A.020 provides:

The following goals are adopted to guide the development and adoption of comprehensive plans and development regulations of those counties and cities that are required or choose to plan under RCW 36.70A.040. The following goals are not listed in order of priority and shall be used exclusively for the purpose of guiding the development of comprehensive plans and development regulations.

#### Discussion of Legal Issue 4

Petitioners interpret the language "the following goals are not listed in order of priority" to mean "the goals are not to be prioritized." S/K Realtors PHB, at 36. Petitioners then assert that since the deficiencies in the BLR led the County to "overstate the amount of housing capacity . . . to meet targets within the UGA, thereby creating an artificial shortage of housing and exacerbating the county's lack of affordable housing. [Consequently, the County has not properly balanced the affordable housing goal.]" S/K Realtors PHB, at 38.

The County responds by asserting the County's BLR complies with RCW 36.70A.215 and "shows that there is substantial and more than enough capacity remaining in King County to meet the 2012 and 2022 targets." County Response, at 72. Additionally, the County contends that there is no merit to Petitioners' framing of the issue to suggest that the Plan Update violates the preamble of RCW 36.70A.020. *Id.* In reply, Petitioners restate their assertion that the *deficiencies in the BLR* led to a Plan Update that does not properly balance goals. S/K Realtors Reply, at 24.

Since the Board has found that the BLR is not deficient, but legally sufficient and in compliance with the requirements of RCW 36.70A.215, there is no longer a basis for Petitioners allegation and argument. Therefore, the Board concludes that Petitioners have **failed to carry their burden of proof** in demonstrating that the County's Plan Update was not guided by, and did not appropriately consider and balance the various goals of the Act. Petitioners have not persuaded the Board that the County's action was clearly erroneous.

#### **Conclusion Legal Issue 4**

- Petitioners have failed to carry their burden of proof in demonstrating that the County's Plan Update was not guided by, and did not appropriately consider and balance the various goals of the Act. Petitioners have not persuaded the Board that the County's action was clearly erroneous.

#### **F. LEGAL ISSUE NO. 2**

The Board's PHO set forth Legal Issue No. 2:

2. *Does the County's adoption of the Plan Update and BLR fail to comply with RCW 36.70A.020(4) because they represent affirmative steps that are inconsistent with the requirement to "Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types and encourage preservation of existing housing stock?"*

#### **Applicable Law**

RCW 36.70A.020(4), Goal 4 of the GMA, provides:

Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage the preservation of existing housing stock.

#### **Discussion – Legal Issue 2**

##### **Position of the Parties:**

The thrust of S/K Realtors argument on this issue is that, based upon its reading of a 2003 Court of Appeals case,<sup>22</sup> "the Board has the duty to inquire into the efficacy of the plan in achieving the stated GMA goals. And the Board must articulate its reasons for its findings, either for or against the plan." S/K Realtors PHB, at 32. Petitioners also cite to several King County CPPs, arguing the Plan Update did not pay enough attention to the referenced CPPs. *Id.* at 31-32. Petitioners then contend that the BLR and Plan Update fail to be guided by Goal 4 since these documents:

[F]ail to specify the estimated number of units which will be affordable for the specified income segments of 0%-50%, 50%-80%, 80%-120% and

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<sup>22</sup> See *Low Income Housing Institute v. City of Lakewood*, 119 Wash. App. 110, 77 P.3d 653, Wash. App. Div. 2, (2003), (*LIHI*).

120+% if median income under CPP AH-1. Most importantly, they are completely silent on the affordable housing targets contained in CPP AH-2, calling for 17% household growth to be affordable to 50-80% of median income and 21 or 24% to be affordable to households below 50% or medium income . . .

*Id.* at 32.

Petitioners conclude by suggesting that “There is ample evidence in this appeal for the Board to enter findings of fact stating that the 2004 comprehensive plan is inconsistent with the County’s legal responsibility to encourage the accomplishment of the GMA’s affordable housing goal, now or in the future.” *Id.* at 33.

The County responds that the Plan Update does comply with Goal 4. The County then notes that the BLR is not subject to the goals of the GMA, nor was the BLR required to address affordable housing. County Response, at 61. **The Board agrees that Plans and development regulations are subject to the Goals of the Act, not the BLR.** The Board has already concluded that the BLR need not deal with the affordability of housing, Legal Issue 8, *supra*. The only question then is whether the Plan Update was guided by and complies with Goal 4.

The County contends that it has complied with the noted CPPs. However, the County objects to the Petitioners reference to CPPs in the context of Legal Issue 2, since neither the PFR nor PHO Legal Issue statements refer to the Plan Update being inconsistent with any CPP. Therefore, the County argues, the Board is precluded from reviewing this argument, per RCW 36.70A.290(1).<sup>23</sup> The Board agrees. **Reference to the County’s compliance with any CPP does not appear in Petitioners’ statement of the issues (PFR) or the PHO. Therefore, the Board cannot address the County’s compliance with the noted CPPs.**

The County’s response focuses on the primary theme of Petitioners’ challenge - the first phrase of Goal 4 – “Encourage the availability of affordable housing to all economic segments of the population . . .” County Response, at 62. To support its position – that the Plan Update complies with Goal 4 - the County argues that the Plan Update contains 63 housing policies, with an emphasis on affordable housing. (*Citing* Plan Update, at 2-35 through 2-43). *Id.* at 63. The Plan Update added and modified various policies to further support housing opportunities. *Id.* The Plan Update Housing Policies address:

- 1) Range of Housing Choices [18 Policies];
- 2) Affordable Housing and Development, [11 Policies that include Development Incentives for Low and Moderate Income Housing [4 Policies] and Housing Development Subsidies [7 Policies];

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<sup>23</sup> RCW 36.70A.290(1) provides in relevant part, “The Board shall not issue advisory opinions on issues not presented to the Board in the statement of the issue [PFR], as modified by any prehearing order.”

- 3) Preservation of Existing Affordable Housing [8 Policies];
- 4) Access to Housing [8 Policies];
- 5) Reducing Development Costs [6 Policies];
- 6) New Housing Models [6 Policies];
- 7) Direct Assistance to Households [5 Policies, including Homeowner Assistance [2 Policies] and Renter Assistance and Homeless Prevention [3 Policies]; and
- 8) Balancing Jobs and Housing [1 Policy].

*Id.*

The County points out that the Plan Update also includes a 56 page Housing Appendix (Core 278-333). *Id.*, at 64. The County explains that the Housing Appendix “ascertained how much affordable housing has been available, how much affordable housing will be needed in the future, how much affordable housing is likely to be available in the future, and what steps can be taken to increase the amount of affordable housing.” *Id.* The County then notes that while the Housing Appendix covers *all* of King County, it also includes information and analysis of affordable housing in unincorporated King County where the County itself has specific obligations and requirements, as specified in its CPPs [noting AH-1 through AH-6]. *Id.*

Based upon the Housing Appendix, the County summarizes the affordability of housing for various income levels, indicating that:

- 11% of the rental housing stock<sup>24</sup> is affordable to very low income households<sup>25</sup> (less than 30% of median income);
- 16% of the rental housing stock is affordable to households<sup>26</sup> making 50% of median income or less; and
- the affordable housing stock for households making above 80% of median income appeared to be adequate.

*Id.* at 65.

The County also includes reference to an analysis done for *large private sector apartment complexes* that shows:

- only .2% of such units are affordable to those earning less than 30% of median income;

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<sup>24</sup> The housing stock figure includes both private and subsidized housing. Only 4% is affordable to this group if subsidized housing is excluded.

<sup>25</sup> The County notes that over 1/3 of the available units in this category were occupied by households with higher incomes.

<sup>26</sup> The County notes that almost 1/2 of the available units in this category were occupied by households with higher incomes.

- 58.2% is affordable to those earning less than 50% of median income;
- 96% is affordable to those earning less than 80% of median income; and
- 99% is affordable to those earning less than 120% of median income.

*Id.* at 66. The County notes that the Housing Appendix conducts a similar analysis for single family rental units. *Id.* at 67.

The County goes on to explain that the Housing Appendix also reviewed the contributions made to assisted housing by the King County Consortium<sup>27</sup> noting that there are over 40,000 units of assisted housing in King County. *Id.* at 68. The County refers to its “Benchmarks” Program that provides annual assessment reports on affordable housing in King County and each of its cities. *Id.* The County notes that *most affordable housing will be provided through multi-family units* and points to the Housing Appendix to show that in unincorporated King County within the UGA there is capacity for approximately 25,000 (citing the BLR) new units which exceeds the County’s household target of 13,400. *Id.* 68-69.

In reply, Petitioners contend that the Plan Update “does not comply with the housing goal . . . because it is based on a BLR that overstates true land capacity, artificially reducing land supply and seriously jeopardizing housing affordability.” S/K Realtors Reply, at 19. Petitioners again urge the Board “to inquire as to the efficacy of the plan in achieving this goal.” *Id.* S/K Realtors then argue that the housing goal includes the specific housing CPPs referenced in their opening brief, therefore they are not precluded from Board review. These CPPs indicate that the Plan Update “must measure the 17% and 24% low and moderate income targets contained in CPP AH-1 and AH-2 and AH-6. It doesn’t.” *Id.*

Petitioners reiterate their criticism of the BLR’s caveats as further evidence of the County not complying with the housing goal. *Id.* at 20. In response to the County’s discussion about its 63 housing policies Petitioners argue, “[T]his appeal is not entirely about the 63 policies currently on the books – it’s also about the policies the County did not adopt. Regarding the 63 policies, the obvious question is: If the County has 63 policies aimed at affordable housing, why is housing not affordable?”<sup>28</sup> *Id.* at 21. Petitioners then quote several phrases and sentences<sup>29</sup> from the Housing Appendix to support the proposition that more policies are needed since the present 63 are not working. *Id.*

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<sup>27</sup> The Consortium includes the County and 36 King County cities.

<sup>28</sup> The Board notes that this rhetorical question is one that needs to be answered by more than governmental entities – including Petitioners.

<sup>29</sup> The following quotes were from the Housing Appendix: 1) “. . . calculations of housing affordability are likely overstated. . .”; 2) [Home ownership rose in King County from 58.8% to 59.9% between 1999 and 2000. This increase was slower than national and regional rates which increased at about 3%.]; 3) “. . . If interest rates increase in the coming years, affordability would be reduced.”; and 4) [Home ownership remains out of reach for many, even those at or near median income.] S/K Realtors Reply, at 21, citing Technical Appendix B [Housing], at B-4, B-23, B-41 and B-47, respectively.

Petitioners argue that the County's own brief shows that the County "missed the affordable housing targets in CPP AH-2, calling for 17% of household growth to be affordable to 50-80% of median income and 21 or 24% to be affordable to households below 50% of median income. *Id.* at 21-22. S/K Realtors comment that the County's reference to the study on rental rates for private-sector apartment buildings was merely a snapshot of rental rates for those apartments. *Id.* Finally, Petitioners contend it is the County that provides housing capacity through zoning, not the private sector. *Id.*

Board Discussion:

**The *LIHI* case, referenced by Petitioners, did not alter the law. The County's action in adopting the Plan Update is presumed valid, the burden is on Petitioners to demonstrate noncompliance with the GMA, and the Board is to find compliance unless it finds the County's action was clearly erroneous. See RCW 36.70A.320(1), (2) and (3); Section V of the PHO, at 5; and Section II of this Order, *supra*. The Board has no authority to review Plans for compliance with the GMA of its own accord. Petitioners must bring their grievances to the Board and make their case. The Act places a heavy burden on Petitioners in demonstrating noncompliance with the Act, but it is Petitioners' burden nonetheless.**

Further, if Petitioners sought to challenge the County's compliance with certain CPPs, Petitioner must allege them in their statement of the issues. These Petitioners did not do so. Therefore, as discussed *supra*, the Board is prohibited from "issuing advisory opinions on issues not presented to the board in the *statement of the issues*, as modified by any *prehearing order*." RCW 36.70A.290(1).

While CPPs are certainly part of the "cascading hierarchy of policy" that the Board has previously described, the CPPs *are not the same as the goals of the GMA*. Further, the CPPs are binding not only on the County, but also on each of the 40 cities located within the County. Thus, they are a basis for determining whether the 20-year Plans of the various jurisdictions are coordinated and consistent, as required by RCW 36.70A.100. Had Petitioners wished to challenge whether provisions of King County's Plan Update complied with Goal 4 *and* with CPPs AH-1 through AH-6, they should have done so – again, they did not.

The Board recognizes that King County and its cities have established for themselves certain affordable housing percentage targets for different income levels. These percentage targets are included in the CPPs<sup>30</sup> and in a specific Plan Policy<sup>31</sup> of King County's Plan.<sup>32</sup> Having such clear and specific affordable housing targets in the County's Plan certainly complies with, and goes beyond, Goal 4's directive to "encourage the availability of affordable housing to all economic segments of the

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<sup>30</sup> See CPP AH-2B.

<sup>31</sup> See Plan Policy U-402.

<sup>32</sup> This Policy is not included in Petitioners' challenge.

population.” But apparently the crux of Petitioners’ frustration and complaint is that: 1) those percentages are not currently being met; 2) the County is ignoring affordable housing issues; and 3) the County should do something more to address affordable housing.<sup>33</sup>

First, the Board observes that the affordable housing percentages for income levels are targets to be adjusted and/or met *over the 20-year life of the Plan*. One should not expect them to be achieved half-way into the Plan’s time horizon. Peaks and valleys in progress will obviously occur over time depending upon numerous factors. But monitoring progress toward the targets is essential – which the County clearly does as reflected in the Housing Appendix and the Benchmarks Reports. Second, review of the Housing Appendix clearly demonstrates that *the County is not ignoring affordable housing*. The Housing Appendix helps define problems and candidly discusses housing affordability trends. *See* King County Plan Update, Technical Appendix B – Housing, at B-27 through B-49 (Core 304-326). Third, the same document discusses planning for the future and identifies Plan Policies to be retained and supplemental actions that will be taken, and have been taken, by the County. *Id.*, at B-50 through B-56 (Core 327-333). Therefore, the Board cannot find that the County’s action in adopting the Plan Update has not been guided by Goal 4 – RCW 36.70A.020(4).

Petitioners have **failed to carry the burden of proof** in demonstrating that the County’s actions in adopting the Plan Update did not comply with RCW 36.70A.020(4). The County’s action was not clearly erroneous. This is not to say that the County in cooperation with its cities and private groups like the S/K Realtors could not embark upon a collaborative effort to find additional strategies to address ongoing affordable housing concerns. The Board would certainly encourage the parties to pursue such a course of action.

### Conclusion

- Petitioners have **failed to carry the burden of proof** in demonstrating that the County’s actions in adopting the Plan Update did not comply with RCW 36.70A.020(4). Petitioners have not persuaded the Board that the County’s action was clearly erroneous.

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<sup>33</sup> See S/K Realtors PHB, at 32; and S/K Realtors Reply, at 19.

## V. ORDER

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

- King County's 2002 Buildable Lands Report **complies** with the review and evaluation requirements of RCW 36.70A.215.
- King County's adoption of its Plan Update, Ordinance No. 15028, **complies** with the public participation goal of the Act – RCW 36.70A.020(11); and **complies** with the requirements of RCW 36.70A.115.
- Petitioners have **failed to carry their burden of proof** in demonstrating that the Plan Update, Ordinance No. 15028, does not comply with the internal consistency requirements of RCW 36.70A.070(preamble) and RCW 36.70A.120; **failed to carry their burden of proof** in demonstrating that the Plan Update was not guided by the goals of the Act generally – RCW 36.70A.020; and **failed to carry their burden of proof** in demonstrating that the Plan Update failed to be guided by Goal 4 – RCW 36.70A.020(4).
- The Board was not persuaded that the County's action in adopting the Plan Update, Ordinance No. 15028, was clearly erroneous with respect to the provisions of the Plan Update that were challenged.

So ORDERED this 31<sup>st</sup> day of May 2005.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Bruce C. Laing, FAICP  
Board Member

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Edward G. McGuire, AICP  
Board Member

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Margaret A. Pageler  
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

## APPENDIX A

### Procedural Background

#### **A. General**

On December 3, 2004, 2005, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the Seattle-King County Association of Realtors (**Petitioner** or **S/K Realtors**). The matter was assigned Case No. 04-3-0028. Petitioner challenges King County's (**County** or **Respondent**) adoption of its Comprehensive Plan Update [Ordinance No. 15028 and effected by Ordinance Nos. 15051 (critical areas), 15052 (surface water) and 15053 (clearing and grading)]. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**).

On December 10, 2004, the Board issued a "Notice of Hearing and Potential Consolidation" in the above-captioned case and three other related cases.

On January 4, 2005, the Board conducted the PHC at the Board's Office in Seattle. Board member Bruce C. Laing, Presiding Officer for the PHC,<sup>34</sup> conducted the conference, which involved numerous parties all challenging the same or similar ordinances adopted by the County. Michael Spence represented Petitioner S/K Realtors and Peter G. Ramels and Steve Hobbs represented Respondent King County. Board members Margaret A. Pageler and Edward G. McGuire joined the Presiding Officer at the PHC. Representatives of S/K Realtors - David Crowl and Sam Pace also attended the PHC.

On January 5, 2005, as authorized by the Board, the S/K Realtors submitted a revised Petition for Review clarifying the scope of their challenge.

On January 6, 2005, the Board issued a "Prehearing Order" setting the schedule and Legal Issues for this case. This matter was not consolidated.

#### **B. Motions to Supplement the Record and Amend the Index**

On January 3, 2005, the Board received King County's Initial Index of the Record (**Index**).<sup>35</sup>

On January 26, 2005,<sup>36</sup> the Board received the following Core Documents that were specific to the S/K Realtor matter: Ordinance No. 15028 [Plan Update with Maps]; and the King County

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<sup>34</sup> Board member Edward G. McGuire has assumed the role of Presiding Office for the remainder of this case.

<sup>35</sup> The Petitioners and the Board noted concerns with the magnitude and scope of the County's Initial Index and the *general nature* of its references ( *i.e.* "e-mails" or "correspondence"). To clarify the record for this matter, the S/K Realtors agreed to submit a list of "potential exhibits" to the County and an "inquiry" regarding the location of responses to such exhibits or related documents pertaining to S/K Realtors issues. The County agreed to confirm a "potential exhibit's" presence in the record and identify the location of responses or related documents for Petitioners' review. The parties agreed to complete this interchange *prior to the deadline for filing motions to supplement the record*, thereby allowing adequate time for such motions, if necessary. The County also indicated that it may submit an "Amended Index" subsequent to the interchange among the parties.

Countywide Planning Policies (CPPS). The Board notes the parties agreed that all documents and exhibits would be “Bates” stamped for identification purposes, including the Core Documents.

No motions to supplement the record were filed with the Board by the parties.

### C. Dispositive Motions

No dispositive motions were filed with the Board by the parties.

### D. Briefing and Hearing on the Merits

On March 8, 2005, the Board received the Seattle/King County Realtor’s “Petitioner’s Prehearing Brief” (S/K Realtors PHB), with three attached exhibits.<sup>37</sup>

On March 29, 2005, the Board received King County’s “Respondent’s Prehearing Brief” (County Response), with 60 attached exhibits.

On April 5, 2005, the Board received “Petitioner’s Reply Brief” (S/K Realtors Reply), with one attached exhibit.

On April 7, 2005, the Board held a hearing on the merits at the Board’s offices in Suite 2470, 900 4th Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, Bruce C. Laing and Margaret A. Pageler were present for the Board. Petitioner Seattle King County Realtors were represented by Michael Spence. Respondent King County was represented by Peter G. Ramels. Also present were Sam Pace, David Crowell and Randy Bannecker for the Realtors. Board extern, Rob Trickler also attended. Court reporting services were provided by Eva P. Jankovits of Byers and Anderson, Inc. The hearing convened at 1:00 p.m. and adjourned at 4:10 p.m. The Board ordered a transcript of the proceeding.

On April 12, 2005, the Board received the transcript of the proceedings (HOM Transcript).

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<sup>36</sup> At the PHC, the County provided copies of the following documents that were involved in the four cases that were being considered for consolidation: Ordinance Nos. 15028 [Plan Update and Maps], 15029, 15030, 15031, 15032; and the September 2002 King County Buildable Lands Report.

<sup>37</sup> The exhibits included: 1) a Realtor white paper entitled A Critical Analysis of King County’s September 2002 Buildable Lands Evaluation Report, prepared by Erwin “Sam” Pace, August 31, 2004; 2) a document entitled Buildable Lands Program Guidelines, prepared by the Department of Community, Trade and Economic Development, June 2000; and 3) Correspondence from the Master Builders Association to: a) Stephanie Warden, King County DDES, dated February 29, 2003; and b) King County Council, dated August 5, 2004. Both letters commented on the County’s proposed Critical Areas Ordinance. All pages in the exhibits were Bates stamped.

## APPENDIX B

### **RCW 36.70A.215**

#### **Review and evaluation program.**

(1) Subject to the limitations in subsection (7) of this section, a county shall adopt, in consultation with its cities, county-wide planning policies to establish a review and evaluation program. This program shall be in addition to the requirements of RCW 36.70A.110, 36.70A.130, and 36.70A.210. In developing and implementing the review and evaluation program required by this section, the county and its cities shall consider information from other appropriate jurisdictions and sources. The purpose of the review and evaluation program shall be to:

(a) Determine whether a county and its cities are achieving urban densities within urban growth areas by comparing growth and development assumptions, targets, and objectives contained in the county-wide planning policies and the county and city comprehensive plans with actual growth and development that has occurred in the county and its cities; and

(b) Identify reasonable measures, other than adjusting urban growth areas that will be taken to comply with the requirements of this chapter.

(2) The review and evaluation program shall:

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

(b) Provide for evaluation of the data collected under (a) of this subsection every five years as provided in subsection (3) of this section. The first evaluation shall be completed not later than September 1, 2002. The county and its cities may establish in the county-wide planning policies indicators, benchmarks, and other similar criteria to use in conducting the evaluation;

(c) Provide for methods to resolve disputes among jurisdictions relating to the county-wide planning policies required by this section and procedures to resolve inconsistencies in collection and analysis of data; and

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

(3) At a minimum, the evaluation component of the program required by subsection (1) of this section shall:

(a) Determine whether there is sufficient suitable land to accommodate the county-wide population projection established for the county pursuant to RCW 43.62.035 and the subsequent population allocations within the county and between the county and its cities and the requirements of RCW 36.70A.110;

(b) Determine the actual density of housing that has been constructed and the actual amount of land developed for commercial and industrial uses within the urban growth area since the adoption of a comprehensive plan under this chapter or since the last periodic evaluation as required by subsection (1) of this section; and

(c) Based on the actual density of development as determined under (b) of this subsection, review commercial, industrial, and housing needs by type and density range to determine the amount of land needed for commercial, industrial, and housing for the remaining portion of the twenty-year planning period used in the most recently adopted comprehensive plan.

(4) If the evaluation required by subsection (3) of this section demonstrates an inconsistency between what has occurred since the adoption of the county-wide planning policies and the county and city comprehensive plans and development regulations and what was envisioned in those policies and plans and the planning goals and the requirements of this chapter, as the inconsistency relates to the evaluation factors specified in subsection (3) of this section, the county and its cities shall adopt and implement measures that are reasonably likely to increase consistency during the subsequent five-year period. If necessary, a county, in consultation with its cities as required by RCW 36.70A.210, shall adopt amendments to county-wide planning policies to increase consistency. The county and its cities shall annually monitor the measures adopted under this subsection to determine their effect and may revise or rescind them as appropriate.

(5)(a) Not later than July 1, 1998, the department shall prepare a list of methods used by counties and cities in carrying out the types of activities required by this section. The department shall provide this information and appropriate technical assistance to counties and cities required to or choosing to comply with the provisions of this section.

(b) By December 31, 2007, the department shall submit to the appropriate committees of the legislature a report analyzing the effectiveness of the activities described in this section in achieving the goals envisioned by the county-wide planning policies and the comprehensive plans and development regulations of the counties and cities.

(6) From funds appropriated by the legislature for this purpose, the department shall provide grants to counties, cities, and regional planning organizations required under subsection (7) of this section to conduct the review and perform the evaluation required by this section.

(7) The provisions of this section shall apply to counties, and the cities within those counties, that were greater than one hundred fifty thousand in population in 1995 as determined by office of financial management population estimates and that are located west of the crest of the Cascade mountain range. Any other county planning under RCW 36.70A.040 may carry out the review, evaluation, and amendment programs and procedures as provided in this section.

[1997 c 429 § 25.]