To: Jefferson County Planning Commission and Critical Areas Advisory Committee

From: George Yount

Date: April 4, 2007

Subject: Growth Management Hearings Board Findings and Conclusions related to Critical Areas

The following is a revision of the document I submitted on March 1, 2007, summarizing extractions from the Central and Western Growth Management Hearings Board Findings and Conclusions. They are intended to provide guidance to the current deliberations.

They are grouped under the following broad headings: Property Rights, Public Participation, Establishment of Record, Goals of the Growth Management Act, Best Available Science, Definition of Critical Areas, Agricultural Lands, Fish and Wildlife Conservation Habitat Areas, Frequently Flooded Areas, Forestlands, Geologic Hazard Areas, and Wetlands.

I hope you will find this helpful.

Property Rights

• The property rights goal, while an important cornerstone of the GMA, is not supreme among the 13 goals. The Act requires local governments to balance all 13 goals and to consider the process recommendations of the Attorney General's Office. [*Vashon-Maury, 5308c,* FDO, at 89.]

• While the preamble to RCW 36.70A.020 clarifies that the goals are not listed in any order of priority, a close examination of the 13 goals reveals that there are some important distinctions that can be drawn among them. Unlike the other ten, three planning goals [(1) urban growth; (2) reduce sprawl; and (8) natural resource industries] operate as organizing principles at the county-wide level. Thus, they have not only a procedural dimension, but they also direct a tangible and measurable outcome. In contrast, Goal 6, regarding property rights, and Goal 11, regarding public participation, do not specifically or implicitly describe the physical form or configuration of the region that should evolve. Rather, they address how local government is obligated to undertake the comprehensive planning and implementing actions that will shape the region (i.e., without taking private property and with enhanced public participation). [*Bremerton, 5339c,* FDO, at 25.]

• The Board rejects the argument that Goal 6 (Property Rights) must be interpreted to mean that the imposition of zoning which limits the uses on a property gives rise to the County's duty to compensate for the uses which are not allowed. [*Alberg, 5341c,* FDO, at 45.]
• A county or city need not affirmatively demonstrate that it has utilized the Attorney General's Process to meet the requirement of RCW 36.70A.370. [*Alberg, 5341c,* FDO, at 47.]

• Open space is an inevitable byproduct of land being put to an agricultural use. However, this fact alone is insufficient grounds for a claim that agricultural designation by a local government requires development rights acquisition pursuant to RCW 36. 70A.160. Only if a government restricts the use of designated agricultural lands solely to maintain or enhance the value of such lands as open space, must the City or County acquire a sufficient interest in the property. *[Benaroya I, 5372c, FDO, at 13.]*

• In order for petitioners to prevail in this type of challenge, they must prove that the action taken by a city or county is both arbitrary and discriminatory. Showing either an arbitrary or discriminatory action is insufficient to overcome the presumption of validity that actions of cities and counties are granted by the Act. *[Shulman, 5376, FDO, at 12.]*

• A private party is not granted the right to seek judicial relief for alleged noncompliance with RCW 36.70A.370 (Protection of private property). The Board does not have jurisdiction to determine whether there has been a violation of RCW 36.70A.370. *[Shulman, 5376, FDO, at 14.]*

• It is well-settled law that cities and counties have constitutional police powers that include the authority to regulate land use. *[Rabie, 8305c, FDO, at 11.]*

• A map symbol of notation on an informational map in the comprehensive plan does not affect any individual owner's property rights. Likewise, the removal of such notation does not affect any individual owner's property rights. [Green Valley, 8308c, 4/17/98 Order, at 2-4.]

• Petitioners cite to no authority for its ["necessary linkage" assertion that the Board must determine the constitutionality of an action to determine compliance with Goal 6.] [The Board agrees with the City] the Board does not have to 'necessarily' determine the constitutionality of a city's action when reviewing a challenge under Goal 6. Under Goal 6, the requirement to find both arbitrary and discriminatory action is not the same as finding a violation of a constitutional provision. [The Board has jurisdiction to review an action for whether it complies with Goal 6, but not for whether it is constitutional.] [HBA II, 1319, 10/18/01 Order, at 2-3.]

• Petitioners allege that Goal 6 would require a City, which legally acquired title to property some 20 years ago, to offer this property, as 12 individual parcels, to the original owners. Prior property owners have no current property rights in the property and therefore, they could experience no infringement of rights. [SOS, 04319, FDO, at 24.]

• Petitioners state they have a "right to have the [Olson Creek] watershed protected from the high adverse impact which will result from the high density development allowed" thereby maintaining the wetland's value and function. [Citation omitted] Though the right to a healthful environment is provided for in SEPA, the Board does not see the same right attached to Goal 6's property rights, and it is not encompassed within the traditional fundamental rights of private property ownership – exclude, possess, alienate. [SOS, 04319, FDO, at 24.]

• [General Discussion of Goal 6 – property rights, in the context of King County's CAO.] The board asks four questions: Is the challenge within the Board's jurisdiction? Did the local government take landowner rights into consideration in its procedure? Was the challenged action arbitrary? Was the challenged action discriminatory? [Keesing CAO, 05301, FDO, at 28-33.]

• [Procedural compliance with Goal 6 was shown where] the record demonstrates that County officials took note of citizen concerns about limitations on ordinary use of [rural] land and then proposed and passed responsive amendments. [Keesling CAO, 05301, FDO, at 30.]

• Petitioner challenged the County's rural lot clearance rules as contrary to common sense and everyday experience [therefore violating private property rights]. Under the property rights goal, the challenger must prove the County's regulations were "baseless" and "in disregard of the facts and circumstances," not merely, in Petitioner's opinion, misguided or an error in judgment. [The Board finds County's basis for rural land clearing restrictions was contained in its BAS report.] [Keesling CAO, 05301, FDO, at 32.]

• See Pageler Concurring Opinion in Camwest III, 05345, FDO, at 41-43.

Public Participation

• The GMA establishes public participation requirements separate from the SEPA. [Tracy, 2301, FDO, at 11.]

• The GMA's enhanced public participation requirements, as specified in RCW 36.70A.140, do not apply to the process for adopting development regulations pursuant to RCW 36.70A.060. [Tracy, 2301, FDO, at 13.]

• The [advisory body] may exercise authority delegated to it to perform certain tasks such as establishing specific population and employment goals, but its work remains only recommendations unless and until the [legislative body] adopts them by amending the [jurisdiction's] CPPs [or other GMA documents]. The [advisory body's] actions alone have no binding effect. . . . The actions of the [legislative body] are controlling − the Board will review only the [legislative body's] actions for compliance with the GMA and not those of [an advisory body]. [Snoqualmie, 2304, FDO, at 26.]

• 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. [Poulsbo, 2309c, FDO, at 36.]

• "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, 3303c, FDO, at 77.]

• Unlike GMA, the SEPA statute does not require "enhanced public participation"; absent legislative direction, the Board will not create an enhanced citizen participation requirement for SEPA. [Rural Residents, 3310, 2/16/94 Order, at 12.]

• Talking to local government staff or, in the case of elected officials, talking to them off the record (i.e., not at a public hearing or meeting), as opposed to communicating in writing to either or talking to elected officials on the record at a public hearing or meeting, does not constitute appearance. [FOTL I, 4303, 4/22/94 Order, at 9.]

• For purposes of enabling a representative organization or association such as FOTL to obtain standing, a member of the organization must appear and indicate that he or she represents that organization. Simply being a member of an organization and being in attendance at a public hearing without indicating that one represents the organization will not suffice to confer standing upon the organization. [FOTL I, 4303, 4/22/94 Order, at 9.]

• Cities and counties are required to undertake "early and continuous" public participation in the development and amendment of comprehensive plans and development regulations, and that while the requirement to consider public comment does not require elected officials to agree with or obey such comment, local government does have a duty to be clear and consistent in informing the public about the authority, scope and purpose of proposed planning enactments. [WSDF I, 4316, FDO, at 71.]

• For purposes of satisfying the requirements of RCW 36.70A.140, written comments carry just as much weight as oral comments. [WSDF I, 4316, FDO, at 75-76.]

• If a local legislative body wishes to make changes to the draft of a proposed comprehensive plan that, to that point, has ostensibly satisfied the public participation requirements of RCW 36.70A.020(11) and .140, it has the discretion to do so.

> However, if the changes the legislative body wishes to make are substantially different from the recommendations received, its discretion is contingent on two conditions:
>
> > (1) that there is sufficient information and/or analysis in the record to support the Council's new choice (e.g., SEPA disclosure was given, or the

> requisite financial analysis was done to meet the Act's concurrency requirements); and
> (2) that the public has had a reasonable opportunity to review and comment upon the contemplated change. If the first condition does not exist, additional work is first required to support the Council's subsequent exercise of discretion. If the second condition does not exist, effective public notice and reasonable time to review and comment upon the substantial changes must be afforded to the public in order to meet the Act's requirements for "early and continuous" public participation pursuant to RCW 36.70A.140. [*WSDF I, 4316,* FDO, at 76-77.]

• In RCW 36.70A.140, the Act envisions a "response" to public comments and "open discussion" to occur within a variety of forums including vision workshops, open houses, focus groups, opinion surveys, charettes, committee meetings and public hearings. It does not entitle citizens to a face-to-face confrontation and verbal exchange with elected officials about the Plan. [Robison, 4325c, FDO, at 30.]

• When a change [amendment] is substantially different from the prior designation, the public needs a reasonable opportunity to comment. [Vashon-Maury, 5308c, FDO, at 58.]

• While the preamble to RCW 36.70A.020 clarifies that the goals are not listed in any order of priority, a close examination of the 13 goals reveals that there are some important distinctions that can be drawn among them. Unlike the other ten, three planning goals [(1) urban growth; (2) reduce sprawl; and (8) natural resource industries] operate as organizing principles at the county-wide level. Thus, they have not only a procedural dimension, but they also direct a tangible and measurable outcome. In contrast, Goal 6, regarding property rights, and Goal 11, regarding public participation, do not specifically or implicitly describe the physical form or configuration of the region that should evolve. Rather, they address how local government is obligated to undertake the comprehensive planning and implementing actions that will shape the region (i.e., without taking private property and with enhanced public participation). [Bremerton, 5339c, FDO, at 25.]

• In order to raise issues before the Board, it is not necessary for participants and petitioners to have addressed those specific issues when they appeared before the county or city during the public participation process regarding the adoption of the comprehensive plan. [Bremerton/Port Gamble, 5339/7324c, 4/22/97 Order, at 6.]

• To have meaningful public participation and avoid "blind-siding" local governments, members of the public must explain their land use planning concerns to local government in sufficient detail to give the government the opportunity to consider these concerns as it weighs and balances its priorities and options under the GMA. [Bremerton/Alpine 5339c/8332c, 10/7/98 Order, at 8.]

• If the amendments to a draft that were included in the final Plan were within the range of options discussed in the EIS, considered by the Planning Commission, and/or raised at

the Council's public hearings, and were presented with sufficient detail and analysis at a adequately publicized hearing, then the public has had an opportunity to review and comment. [Sky Valley, 5368c, FDO, at 31.]

• Citizen disappointment with a local government's choice does not equate to a violation of the process by the government if citizens have had a reasonable opportunity to comment. [Sky Valley, 5368c, FDO, at 36.]

• The Act does not permit a "neighborhood veto", whether de jure or de facto, and the policies challenged cannot achieve such an outcome. 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. [*Benaroya I, 5372c,* FDO, at 22.]

• In cases where a GMA enactment is remanded but not declared invalid, the following test will be applied to determine how much public participation was appropriate under the circumstances. The Board will apply the following factors to the facts:

1) the general public's expectation of the public participation process that would apply on remand, based on:
    a) the locally established public participation program and ;
    b) actual past practice in conformance with that program;
2) the amount of time given to a jurisdiction to comply;
3) the scope of the remand;
4) the nature of the corrective action that must be taken to bring an enactment into compliance; and
5) the level of discretion afforded a jurisdiction in taking actions to bring an enactment into compliance. [*WSDF III, 5373,* FDO, at 15.]

• Where a petition alleges noncompliance with both the public participation goal and the specific public participation requirement of the Act, the Board will scrutinize only the latter. [Litowitz, 6305, FDO, at 7.]

• Consider public input does not mean agree with or obey public input. [Buckles, 6322c, FDO, at 22.]

• RCW 36.70A.130(2) requires local governments to establish a public participation process and procedure for plan amendments. The Board's jurisdiction extends only to determining compliance with that requirement, not to reviewing the circumstances, situations or events that may precipitate a proposed amendment. [Wallock I, 6325, FDO, at 10.]

• The public participation requirements of RCW 36.70A.140 do not apply to plan amendments adopted in response to emergencies. [Wallock I, 6325, FDO, at 12.]

• Although the purchase of [certain parcels or property] was linked to subsequent Plan and development regulation amendments, the purchase itself is not a GMA action and thus not subject to RCW 36.70A.140. (See also Footnote 4, [T]he Board recognizes that

local government must undertake many steps, internal communications and activities prior to the development of a proposed amendment to a GMA plan or regulation, at least some of which actions are not GMA actions. The Board has not previously articulated, and does not here articulate, a standard for when such local government steps, communications and activities arise to the status of a "proposed GMA amendment" that would be subject to the requirements of RCW 36.70A.140 or other provisions of the Act. [Green Valley, 8308c, FDO, at 10.] 426

• The Act requires early and continuous public participation on proposed amendments of GMA plans and development regulations; the Act does not require public participation prior to the development and consideration of a proposal to amend the plan or development regulations. [Green Valley, 8308c, FDO, at 10.]

• The negotiation and execution of an Interlocal Agreement, that is a non-GMA action, is not subject to the public participation requirements of the GMA over which the Board has jurisdiction. [Burien, 8310, FDO, at 9.]

• The ultimate decision-makers in land use matters are the local elected legislative officials. As part of the decision-making process, an opportunity for public comment must be provided; however, the decision-makers are not required to agree with or obey public comments. Nonetheless, they have a responsibility to educate and inform the public [including surrounding jurisdictions] about their pending actions, [including] ILAs and their implication for amendments to plans and development regulations. [Burien, 8310, FDO, at 10.]

• Citizen or surrounding community disappointment in local government decisions is not a violation of the public participation requirements of the GMA, so long as a reasonable opportunity to comment has been provided. [Burien, 8310, FDO, at 11.]

• [For purposes of analyzing challenges to RCW 36.70A.020(6),] a clearly erroneous action is not necessarily an arbitrary action. "Arbitrary" means to be determined by whim or caprice. Washington's courts have further defined "arbitrary or capricious" action to mean willful and unreasoning action taken without regard to or consideration of the facts and circumstances surrounding the action. Citing cases. [LMI/Chevron, 8312, FDO, at 31.]

• [T]he most appropriate definition of "respond" within the context of RCW 36.70A.140 is "to react in response." Applying this definition does not mean that jurisdictions must react in response to all citizens questions or comments; applying this definition means only that citizens comments and questions must be considered and, where appropriate, jurisdictions must take action in response to those comments and questions. [Bremerton/Alpine, 5339c/8332c, FDO, at 24.]

• "Response" may, but need not, take the form of an action, either a modification to the proposal under consideration, or an oral or written response to the [citizen] comment or question. [Bremerton/Alpine, 5339c/8332c, FDO, at 24.]

• Limiting the length of oral testimony and limiting the subject of oral testimony allowed at public hearings is fair and reasonable, so long as written testimony is accepted throughout the jurisdiction's process. [*Bremerton/Alpine, 5339c/8332c,* FDO, at 26.]

• Public participation requirements regarding changes made by the legislative body are contained in RCW 36.70A.035. [Bremerton/Alpine, 5339c/8332c, FDO, at 27.]

• As long as the amendments adopted by the legislative body are within the scope of alternatives available for public comment, additional opportunity for public notice and comment is not required. RCW 36.70A.035(2)(b)(ii). [Bremerton/Alpine, 5339c/8332c, FDO, at 27.]

• [As stated in the July 30, 1997 FDO] what the Board found noncompliant with the public participation requirements of the GMA was the erroneous notice regarding the [property]. The Board never addressed the substance of the redesignation of the property. However, since the notice was in error, the public participation process consequently failed to comply with the GMA, and that amendment adopted pursuant to the defective notice was found invalid. . [Kelly, 7312c, 3/31/99 Order, at 5.]

• The GMA "[e]ncourage[s] the involvement of citizens in the planning process," RCW 36.70A.020(11). To achieve this goal, the Act requires cities and counties to have a public participation program that provides for "early and continuous public participation in the development and amendment of comprehensive land use plans" and for 'broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice." RCW 36.70A.140; see also, RCW 36.70A.070(preamble) and RCW 36.70A.130(2)(a). It is axiomatic that without effective notice, the public does not have a reasonable opportunity to participate; therefore, the Act requires local jurisdictions' notice procedures to be "reasonably calculated to provide notice to property owners and other affected and interested individuals, ..." RCW 36.70A.035(1). [Andrus, 8330, FDO, at 6-7.]

• When a change is proposed to an amendment to a comprehensive plan, the public must have an opportunity to review and comment on the proposed change before the legislative body votes on the proposed change. RCW 36.70A.035(2)(a), but see RCW 36.70A.035(2)(b)(i-iii) for exceptions. [Andrus, 8330, FDO, at 7.]

• [Given the facts of this case,] [a]t best the public was notified of the City's consideration of revisions to the [plan] . . . as early as six days and as late as one day prior to the April 16 public meeting. A citizen receiving all forms of notice published by the City would reasonably conclude that no comments would be accepted after the April 17 [published written comment] deadline. Although the April 16 meeting was continued, no explicit revision of the April 17 deadline for written comments was issued by the City, and the record does not show that the City indicated by any means that it would accept written comments during the time between the announced April 17 deadline and the May 21, 1998 adoption [date]. [Andrus, 8330, FDO, at 9.]

• Review of the reasonableness of the opportunity provided for review and comment is measured against all the proposed revisions to the [plan]; it is not measured against only the proposed revisions to [one area or provision]. [Andrus, 8330, FDO, at 10, footnote 5.]

• Under the facts of this case, the Board concludes that the opportunity provided for public review and comment on the proposed revisions to the [plan] was not reasonable. [Andrus, 8330, FDO, at 10.]

• [RCW 36.70A.470] recognizes a distinction between specific project review [subject to RCW 36.70B] and comprehensive land use planning. The action challenged. . . was a legislative action involving comprehensive land use planning; the action was not a project review pursuant to Chapter 36.70B RCW. [Andrus, 8330, FDO, at10.]

• Petitioners make no attempt to explain how .470 precludes any citizen, including one with a pending development proposal, from commenting on proposed land use planning legislation; neither do petitioners explain how .470 prohibits the City from considering comments from all citizens when it considers a proposed legislative action. [Andrus, 8330, FDO, at 11.]

• The Legislature's scheme for broad and continuous public participation during the development and adoption of plans and regulations is distinct from the Legislature's scheme for appellate review of GMA actions. Any person may participate in the local government's GMA plan development and adoption process. Persons who participated may file a PFR, but only under the Legislature's statutorily prescribed conditions set out at RCW 36.70A.280(2) and .290(2). [Montlake, 9302c, 4/23/99 Order, at 4.]

• Public notice is at the core of public participation. Effective notice is a necessary and essential ingredient in the public participation process. [WRECO, 8335, FDO, at 6.]

• Notice is reasonably related to public participation. Raising concerns about a local government's public participation process is sufficient to challenge the jurisdiction's notice procedures before this Board. [WRECO, 8335, FDO, at 6.]

• Local governments have discretion in designing and establishing their required RCW 36.70A.130 plan amendment procedures, including setting different submittal and review timeframes. However, the Act does require [the governing body] to consider all Plan amendments concurrently. It is during this final deliberative phase that the decision-makers must have all proposals before them, at the same time, in order to ascertain the cumulative effects of the various proposals and make their decisions. [WRECO, 8335, FDO, at 8-9.]

• The City's notice provisions [mailed to adjacent property owners] fall woefully short of the required "broad dissemination" and "notice procedures that are reasonably calculated to provide notice to property owners and other affected and interested individuals, tribes,

government agencies, businesses and organizations [of RCW 36.70A.140 and .035(1)]." [WRECO, 8335, FDO, at 13.]

• The City's decision to enable the Planning Agency to hold its public hearings on plan amendments without requiring a public hearing before the City Council is not clearly erroneous. [WRECO, 8335, FDO, at 14.]

• [S]ome cities have delegated to a Planning Commission (or planning agency) the responsibility for conducting public hearings on amendments to plans and regulatory codes. Others have chosen to have the legislative bodies themselves conduct such hearings, either in addition to or in place of those held by the planning commission. While neither might constitute a clear error of law under the GMA, taking either approach to extremes could have serious negative consequences. For example, consistently refusing to ever have a public hearing on plan amendments could undermine the public's faith in the accessibility and accountability of its elected officials. Conversely, always conducting duplicative hearings by the legislative body on actions already heard by the planning commission could erode the credibility and effectiveness of an important advisory body. [WRECO, 8335, FDO, footnote 7, at 13.]

• Petitioner's arguments regarding public participation amount to a disagreement with the City over the policy choices made by the City Council. Petitioner's dissatisfaction and disappointment with the decision made by the City does not mean that the public participation process used by the City for amending its Plan failed to comply with the requirements of RCW 36.70A.140. [Montlake, 9302c, FDO, at 9.]

• [Where] the subject matter of a [planning commission's] public hearing includes the possible redesignation of property; "consideration" of a revision to a land use designation includes the possibility of not revising the designation. [Screen II, 9312, FDO, at 11.]

• [Confusion on behalf of the public regarding the distinction between project specific approvals and plan redesignations does not necessarily result in a GMA public participation failure.] [Screen II, 9312, FDO, at 12.]

> (A jurisdiction may appropriately rely on RCW 36.70A.390 for amending a zoning map.] The nature of a "moratorium, interim zoning map, interim zoning ordinance or interim official control" is that it controls the use of land and the issuance of permits. In an emergency situation where the County wishes to prevent inappropriate vesting it would be necessary to act first to amend the land use controls (e.g., zoning map) and then have a public hearing within sixty days. To give notice of the consideration of an emergency interim control could precipitate a "rush to the permit counter" and undermine the objectives of adopting the interim control. [*Bear Creek, 3508c*, 11/3/00 Order, at 8-9.]

• [Plans are not development regulations. Comprehensive plans do not control the issuances of permits (footnote omitted) nor directly control the use of land. Plans are directive to development regulations and capital budget decisions.] The foundation for

plan making under the GMA is public participation. The same is true even for plan amendments. RCW 36.70A.130 explicitly recognizes the use of emergency ordinances to amend plans. Significantly, however, such emergency actions can only be taken "after appropriate public participation." [The public has a reasonable expectation that it will be alerted about plan amendments before a jurisdiction adopts the plan amendments.] [Bear Creek, 3508c, 11/3/00 Order, at 9-10.]

• If reassessment action [per .070(3) or (6)] is triggered, the local government's response must culminate in public action in the public forum. [pursuant to RCW 36.70A.020(11), .035, .130 and .140] This includes, but is not limited to, disclosure of the need for a reassessment, disclosure of options under consideration, and public participation prior to local legislative action. (Footnote omitted.) [McVittie, 9316c, FDO, at 27.]

• [Show your work applies to sizing UGAs, it has not been required to demonstrate compliance with the mandatory elements requirements of the Act.] [MacAngus, 9317, FDO, at 11.]

• The UGA-sizing requirements of RCW 36.70A.110 rely to a great extent on mathematical calculations (allocation of population growth, assumptions regarding numbers of persons per dwelling, land needs based on planned densities and market factors, etc.) Without a clear showing in the record of the mathematical calculations and assumptions, interested persons have no criteria against which to judge a county's UGA delineation. Such is not the case here. [Petitioner] disagrees with the land use designation of its property and wants the County to show or explain why it did not change the [agricultural] designation. This is not required since the record clearly shows the basis for the County's [designation. The county relied upon Soil Conservation Service Prime Farmland List for the County.] [MacAngus, 9317, FDO, at 11.]

• [Petitioner wants the County to explain why it disagreed with them. While the Act requires a jurisdiction to respond to public testimony, it] does not require the kind of response demanded by Petitioner. The County action of maintaining the [agricultural] designation as it relates to Petitioner's property is ample "response" that speaks for itself. [MacAngus, 9317, FDO, at 12.]

• These provisions [RCW 36.70A.035] require the opportunity for the public to review and comment on proposed amendments and changes to those proposed amendments. However, an additional opportunity for public review and comment is not required if the proposed change is within the scope of the alternatives available for public comment. RCW 36.70A.035(2)(b)(ii). In other words, if the public had the opportunity to review and comment on the changes to the proposed amendments, then the County is not required to provide an additional opportunity for public participation. There is no GMA requirement that the County must have prepared a document for public inspection specifically proposing all elements of the amendments ultimately adopted by the County; it is enough that the changes to the County-proposed amendments were within the scope of alternatives available for public comment. [Burrow, 9318, FDO, at 10.]

• The State Court of Appeals for Division One recently clarified the Legislature's intended meaning of the word "matter" in [RCW 36.70A.280(2)(b)]. The Court stated: "We conclude that [the Legislature] intended the word 'matter' to refer to a subject or topic of concern or controversy." (Citation omitted.) [Also, to determine whether a petitioner has participation standing, the Court affirmed the CPSGMHB reasonable relationship test adopted in Alpine, 8332c, 10/7/98 Order, at 8.] [Ramey Remand, 9302, 12/15/00 Order, at 3.]

• Off-the-record and informal conversations [and telephone conversations] with advisory board members and staff do not constitute 'meaningful' public participation with the local government decision-makers since these concerns [raised in conversations] are not part of the decision record. [Ramey Remand, 9302, 12/15/00 Order, at 9-10.]

• The Act mandates that the public must have an opportunity to be heard and comment before an "11th hour" change [that is not within the exceptions of RCW 36.70A.035(2)(b)] is adopted as part of comprehensive plan. [Radabaugh, 0302, FDO, at 16.]

• [O]nce a shortfall is established and a reassessment precipitated, the GMA's public participation requirements come into play. [Conversely, if a shortfall is not established, and reassessment is unnecessary, public participation is not required.] [McVittie IV, 0306c, at 23.]
• [Petitioner challenged the lack of GMA public participation in adoption of the challenged ordinances. The City's response was that it was under no statutory duty to do so, because adoption of these ordinances were not GMA actions; the ordinances were intended to pre-date the City's GMA Plan [2001 deadline]. Yet the City ignored the fact that in 1997 it adopted portions of King County's GMA Plan and regulations as they related to the newly incorporated city. The City never claimed to have complied with the public participation requirements of the GMA. The Board found noncompliance and entered a determination of invalidity.] [WHIP, 0312, 11/6/00 Order, at 8.]

• [Publication of the City Council Agenda, with the notation "Revision to Critical Areas Ordinance," without describing the nature of the proposed changes is insufficient notice.] It would be difficult for a potentially interested member of the public at large to ascertain what the pending ordinance was proposing. [Homebuilders, 0314, FDO, at 10-11.]

• The County simply did not provide any notice or opportunity for public comment on its consideration of the proposed Plan and development regulation amendments contained in the two emergency ordinances. . . . A jurisdiction may not bar GMA participation standing by providing no notice of, nor opportunity for, public participation at any time either prior to, or after, the adoption or amendment of a GMA plan or development regulation or other related GMA measure. [McVittie V, 0316, 11/6/00 Order, at 4-5]

• It is contrary to the spirit and substance of .140 for local government to provide effective notice of a proposed GMA action to only those property owners whom it deems are "interested" by dint of having made some prior comment or their membership in a

neighborhood association. Significantly, the ineffectiveness of the County's mailed notice would not have been fatal to the County's .140 compliance if the County had also employed another form effective form of notice (e.g. publishing in a newspaper or posting the site with an accurate notice, including sufficient locational and topical information). [Buckles, 6322c, 4/19/01 Order, at 10.]

• General Discussion of the GMA's public participation goals and requirements. [McVittie V, 0316, FDO, at 16-21.]

• [The County asserted that its Charter did not require public participation for emergency ordinances, and that its Charter supersedes special and general laws of the state.] A PFR has been filed with the Board challenging the County's compliance with the public participation requirements of the Act. This Board is obliged to reach a determination on this question. If that determination yields a conflict with the County's Charter, it is not for this Board to determine whether a general law of the state, such as the GMA, or the County Charter prevails. The Courts are the appropriate forums for addressing that question. [McVittie V, 0316, FDO, at 12-13.]

• [The public participation goal RCW 36.70A.020(11)] provides an umbrella under which all the GMA public participation requirements fit. It articulates a premium on involving citizens in the entire GMA planning process; and specifically emphasizes the importance of public participation for comprehensive plans and development regulations. [McVittie V, 0316, FDO, at 16.]

• RCW 36.70A.140 is the primary public participation requirement section of the Act. It directs local jurisdictions to provide early and continuous public participation in the development and amendment of comprehensive land use plans and implementing development regulations. Public participation is part of the development process preceding adoption, continues after adoption through the development of amendments, and again precedes adoption of amendments. This early and continuous [enhanced] public participation process applies to comprehensive plans and development regulations, as well as, both the initial development and adoption and amendment of such plans and development regulations. [McVittie V, 0316, FDO, at 17.]

• [RCW 36.70A.035] clarifies and emphasizes that effective notice is an essential and necessary part of the public participation requirements of the Act. It also applies to the entire GMA planning process [Note: This section did not apply to actions taken prior to July 27, 1997.] Effective notice precedes adoption. [McVittie V, 0316, FDO, at 17.]

• [RCW 36.70A.070(preamble)] emphasizes the importance of public participation in adopting and amending comprehensive plans. A plan cannot be adopted or amended without providing the opportunity for public participation. This section specifically emphasizes the application of .140 for adopting and amending comprehensive plans. This section of the Act does not apply to development regulations. [McVittie V, 0316, FDO, at 18.]

• [RCW 36.70A.130] outlines the procedures for consideration and adoption of proposed plan amendments. This process amplifies and refines the broader .140 public participation process that applies to the adoption and amendment of plans and development regulations. Providing the opportunity for public participation is a condition precedent to adoption or amendment of a plan. Here, a special process for plan amendments is required. The limitation on considering proposed plan amendments "no more frequently than once every year," or annual concurrent review provision, necessitates the establishment of deadlines and schedules for filing and review of such amendments so they can be considered concurrently. Although this section provides exceptions to the annual concurrent plan review limitation, none of these exceptions are excused from public participation requirements. [McVittie V, 0316, FDO, at 19.]

• [RCW 36.70A.390] does not apply to plan amendments. It does not apply to permanent changes in development regulations or controls. It applies only to the adoption or amendment of temporary controls or development regulations, those measures that are adopted for an interim period – generally six-months. This section of the Act is unique in that it permits a deviation from the norm of providing the opportunity for public participation prior to action; here a jurisdiction can act or adopt first, then provide the opportunity for public participation after adoption. However, this post-adoption opportunity for public participation must occur within 60-days of adoption. [McVittie V, 0316, FDO, at 20.]

• [Plan] Amendments precipitated by emergencies are clearly governed by .130(2)(b), not .140 or even .130(2)(a). Within the confines of the goals and requirements of the Act, local governments have discretion to determine what "appropriate public participation" to provide before they take action on emergency plan amendments. The word "after" [in .130(2)(b)'s phrase "after appropriate public participation] evidences the clear and explicit Legislative intent to prohibit adoption of a plan amendment until "after" (behind in place or order, subsequent in time, late in time than, following) (citation omitted) appropriate public participation takes place. [McVittie V, 0316, FDO, at 23-24.]

• [A jurisdiction] has discretion to define "appropriate," but deciding to provide "zero" opportunity for public participation is not "appropriate" and an abuse of that discretion and contrary to the Act. [Providing no notice or opportunity for public participation before the adoption of the emergency plan amendment emasculates the GMA. [It is irreconcilable with the public participation requirements and renders the GMA's public participation provisions absolutely meaningless. [McVittie V, 0316, FDO, at 24.]

• A jurisdiction must provide notice and the opportunity for the public to participate prior to adopting any GMA plan or amendment to that plan. [McVittie V, 0316, FDO, at 25.]

• [RCW 36.70A.035] is unambiguous; it is not limited. It applies to all development regulation amendments, permanent, temporary or interim. [McVittie V, 0316, FDO, at

Ignoring public participation may be permissible for [a jurisdiction] when it is not [adopting or] amending its GMA Plan, development regulations or other GMA required

document; but it is impermissible and contrary to the spirit of the Act when GMA Plans regulations or other GMA documents are affected. [McVittie V, 0316, FDO, at 26.]

• A jurisdiction must provide notice and the opportunity for the public to participate prior to adopting any GMA development regulation or any amendment to that development regulation, unless an action is being taken pursuant to RCW 36.70A.390, in which case, notice and the opportunity for public participation may be provided after the GMA action is taken. [McVittie V, 0316, FDO, at 27.]

• The GMA requires a jurisdiction to provide notice and the opportunity for public participation, either prior to, or after, any GMA action – the adoption or amendment (permanent, temporary or interim) of comprehensive plans or implementing regulations. The GMA is clear; a jurisdiction must always provide the opportunity for public participation, including notice. [McVittie V, 0316, FDO, at 28.]

• A jurisdiction may not bar GMA public participation standing by not providing notice or the opportunity to participate at any time, either prior to, or after, adoption of an amendment to a GMA Plan, development regulation or other related GMA document. If no notice or opportunity for public participation is provided for a GMA action, a petitioner may assert GMA participation standing pursuant to RCW 36.70A.280(2)(b). [McVittie V, 0316, FDO, at 29.]

• Failure to adopt additional findings of fact at a subsequent public hearing (within 60- days) after adopting findings of fact at the initial adoption of the moratorium is not a failure to comply with the requirements of RCW 36.70A.390. [*SHAG, 1314*, 8/3/01 Order, at 8.]

• Amendments to the Plan considered at the adoption hearing were substantially different from prior designations in the draft Plan.] The question, then, is whether the means by which they were introduced afforded the public "a reasonable opportunity to comment." [The Board reviewed the issue in light of its prior FDO in Andrus, 8330 and concluded that Edgewood did not provide the public with a reasonable opportunity to comment.] [*Lewis, 1320*, FDO, at 7-9.]

• The Board holds that a public participation program under RCW 36.70A.140 must provide sufficient time to enable meaningful public review and comment. The amount of time provided must be commensurate with the complexity and magnitude of the material to be considered. [*Lewis, 1320*, FDO, at 10.]

• Petitioner seems to misunderstand that [action] refers to the final adoption of the legislation, not the scheduling of public hearings. Notice and public hearings, as well as environmental review, are part of the process that leads to the final action – the decision, here, the adoption of the legislation. [*Miller, 02303*, FDO, at 9.]

• The Planning Commission is an advisory body that makes recommendations and proposals to the County Council that the Council may or may not agree with and adopt. The County Council has discretion, and is not bound only to the Planning Commission's recommendations. However, RCW 36.70A.035 does place bounds on the County Council's discretion. RCW 36.70A.035 generally requires the Council to provide the opportunity for public review and comment if the Council chooses to change or amend a proposal *after* the opportunity for public review and comment is closed. This additional review and comment period is required *unless* the proposed change is within the range of alternatives considered in an EIS or the proposed change is within the scope of alternatives previously available for public comment. RCW 36.70A.035(2)(b)(i) and (ii). [*Hensley IV* and *V*, *1304c/2304*, 6/17/02 Order, at 10.]

• [Petitioner asserted that five amendments to the zoning code were introduced and adopted, after the opportunity for review and comment had closed and the amendments did not fit within the exceptions or RCW 36.70A.035(2)(b) that eliminates the need for additional notice and comment. The Board concluded that three of the amendments fit within the exceptions, but two others did not.] The site-obscuring buffer and maximum lot coverage for the Northern node [of the LAMIRD] amendments . . . fell beyond the scope of the exceptions of RCW 36.70A.035(2)(b). [*Hensley IV* and *V*, *1304c/2304*, 6/17/02 Order, at 7-13.]

• [Six-days notice and the opportunity to comment, prior to enactment of the first emergency ordinance, and ten-days notice and the opportunity to comment, prior to enactment of the second emergency ordinance, in this case] met the "after appropriate public participation" requirements of RCW 36.70A.130(2)(b) in enacting its emergency ordinances, adopting the [interim FLUM]. [*Clark, 02305*, FDO, at 16.]

• [In adopting or amending SMPs] the SMA public involvement requirements of RCW 90.58.130 would control rather than the GMA public participation provisions of RCW 36.70A.020(11), .035 and .130 or .140. Thus, adoption or amendment to the Shoreline Element of the comprehensive plan and development regulations must be done in conformance with RCW 90.58.130. [*Everett Shorelines Coalition, 02309c*, FDO, at 27.]

• If a legislative body chooses to consider a change to a plan or development regulation after the opportunity for public review and comment has passed, "an opportunity for public review and comment *shall* be provided before the legislative body votes on the proposed change." RCW 36.70A.035(2)(a). However, RCW 36.70A.035(2)(b)(i through v) lists exceptions, where additional opportunity for review and comment is *not required*. [*MBA/Brink, 02310*, FDO, at 7.]

• [The Board was not persuaded that the exceptions of RCW 36.70A.035(2)(b) applied where,] the only public notice that was provided was the title of the ordinance, which is extremely broad and general and never even suggested that

amendments could or would be considered at [the final adoption hearing.] [*MBA/Brink, 02310*, FDO, at 9.]

• The effect of the City's actions resembles the classic advertising "bait and switch." The City advertised that it intended to do one thing, then, at the eleventh hour, it did something else entirely. The City gave notice and held public hearings to accept testimony on Amendment 02-027, with attached maps. The Amendment indicated the *status quo* would be maintained but anticipated a two-tiered scheme for commercial designations that would be applied in the future. Then, during December of 2002, the City considered and adopted, on December 17, 2002, *only the text* of Amendment 02-027, and a FLUM and Zoning Map, which applied the new designations on the FLUM and Zoning Map. This is not what was "advertised" or available for public comment. The [Petitioner's] property was clearly redesignated and rezoned without Petitioner having any notice or the opportunity to participate on the Council's ultimate decision. The City's actions related to these Ordinances were clearly erroneous and utterly failed to comply with the notice and public participation requirements of the GMA. [*WHIP/Moyer, 03306c*, FDO, at 28-29.] 436

• The Board has previously held that a local government has no GMA duty to provide a specific response, either written or oral, to each comment or criticism offered by members of the public. Likewise the GMA imposes no duty upon a local government to "meet with petitioners" for the purposes of discussing their comment, nor with in the context of a potential settlement conference. While the Board commonly inquires whether the parties might wish to avail themselves of other Boards' resources in order to pursue settlement, nothing in the Act, the Board's rules or orders mandates that a local government engage in settlement conference proceedings. Likewise a local government decision to decline to participate in such proceedings does not constitute a violation of RCW 36.70A.140. [*Kent CARES III, 03312*, FDO, at 11.]

• Petitioners' arguments seem to suggest that the GMA mandates that such "ongoing interaction" continue into the permit processing, issuance and enforcement phases, including the consideration of possible amendments. This is a mistaken impression. Once the highly discretionary and public participation-intensive legislative process culminates in the adoption of plans and regulations, the opportunity for "public participation" is greatly reduced, and rightly so. The "timeliness" and "predictability" that must be assured by the development permit process (RCW 36.70A.020(7)) would be thwarted if a city were obliged to engage in the kind of "ongoing interaction" during the permit phase that Petitioners describe. [*Kent CARES III, 03312*, FDO, at 11.]

• [Petitioners testified and communicated in writing with the City during its consideration of the challenged Ordinance.] [T]he question of participation standing presumes that the public has been put on notice regarding a proposed GMA action (pursuant to RCW 36.70A.035), was encouraged to participate (pursuant to RCW 36.70A.020(11) and was afforded an opportunity for early and continuous public participation (pursuant to RCW 36.70A.130 and .140). . . . [T]he City itself, during

> the process leading up to the adoption of [the challenged Ordinance] never made mention of the GMA. In this light, the City's complaint that the Petitioners never mentioned the GMA during their comments rings particularly hollow. How would it have been possible for Petitioners to perfect their participation standing under GMA when the City assiduously avoided describing or conducting it as a GMA proceeding? . . . To reward the City for this failing by denying participation standing to Petitioners would be manifestly unjust and fly in the face of RCW 36.70A.020(11). [The Board found Petitioners had standing to pursue their challenge.] [*Laurelhurst II, 03316*, FDO, at 19.]

• [The Board has previously held that in the Central Puget Sound region, comprehensive land use planning is now done exclusively under Chapter 36.70A RCW – the Growth Management Act. (Citation omitted.)] The Board continues to stand by this holding as the law in this region. Why does it matter, as a matter of public policy, that a development regulation must be adopted, and likewise amended, subject to the public participation goal and requirements of the GMA? Absent a GMA process, the public is not entitled as a matter of law to "notice procedures that are reasonably calculated to provide notice to . . . affected and interested individuals" (RCW 36.70A.035); elected officials are not obliged to be "guided by" (i.e., to consider) the Act's planning goals (RCW 36.70A.020, (preamble)), including the goal to "encourage the involvement of citizens in the planning process" (RCW 36.70A.020(11); nor are they required to provide for "broad dissemination of proposals and alternatives" while engaging the public in "early and continuous participation" in the development (RCW 36.70A.140) and amendment (RCW 36.70A.130) of plans and regulations. In short, as the Board has previously observed: "To inappropriately truncate or eliminate the public's opportunity to participate in the making of local government policy would fly in the face of one of the Act's most cherished planning goals and separate the "bottom up" component of GMA planning from its true roots – the people." (Citation omitted.) [Laurelhurst II, 03316, FDO, at 24-25.]

• The heart of Petitioners' complaint is the assertion that local elected officials have a duty to hear from their constituents before taking legislative action. The Board would agree that this principle is a hallmark of good government, good planning and has constitutional antecedents as well. Nevertheless, as the Board has consistently held, allegations regarding constitutional matters are beyond the Board's jurisdiction. Likewise it is not the Board's role to determine whether local government action constitutes wise policy, or the choice the Board might have made; rather, the Board's charge is to discern whether the GMA duty articulated at RCW 36.70A.020(11) and RCW 36.70A.140 has been violated. [BridgeportWay, 04303, FDO, at 12.]

• Deciding where the "cut-off" point for public testimony [during the legislative body's consideration of an action, or even prior to it] is one logically left to the local government. This decision is one in which the Board will typically defer to the local government's choice. Here, the City Council opted for no public testimony prior to making its decision on Plan amendments. However, as Petitioners' argued, the City has an explicit provision in its code, which is consistent with RCW 36.70A.140, directing that the City Council provide its citizens a reasonable opportunity to be heard at any

meeting in regard to any matter being considered there at. [Citation omitted.] This the City did not do. Significantly, the City did not respond to this argument. [Citations omitted.] Therefore, the Board concludes the City clearly erred in precluding public comment on the proposed Plan amendments in this instance, due to failure to follow its own GMA compliant public process procedures. [BridgeportWay, 04303, FDO, at 13.]

• [T]he [Shoreline Management Act's provisions], not the GMA's notice and public participation procedures have governed the procedures for adoption of SMPs [shoreline master programs] for almost a decade. The [recent amendments to the GMA/SMA provisions] did not revise, alter or modify this longstanding requirement. [Samson, 04313, &/6/04 Order, at 5.]

• While citizens should be involved in influencing the land use decisions to be made, it is not up to petitioner or other citizen organizations to prioritize and decide land use issues; this is the job of local elected officials. [Shaffer II, 04323, FDO, at 12-13.]

• 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 and ultimately to be reflected in the County's County-wide Planning Policies. The BLR effort is largely an internal governmental data-gathering exercise, but the Act does direct jurisdictions, in undertaking the program, to 438 "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. [S/K Realtors, 04328, FDO, at 9.]

• G]iven 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. . . . 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. [S/K Realtors, 04328, FDO, at 10- 11.]

• Not following specific recommendations from the public or special interest groups in making decisions does not equate to a GMA violation. [S/K Realtors, 04328, FDO, at 21.]

• Notice that wetland buffer widths were being considered for reduction was adequate. However the scope of the last minute buffer reductions that occurred without the opportunity for public review and comment did not comply with the public participation requirements of the Act. [*Pilchuck V, 05329*, FDO, at 16-19.]

• It is apparent from Kitsap County's record that KAPO's comments were considered and analyzed by County staff, although they were not given the weight to which KAPO believes they were entitled. . . .Under the GMA, the County has a duty to provide reasonable opportunity for public input but no duty to accept citizen comments or adopt them. "Citizen disappointment in the final choices made by local government does not mean that the citizens have not had a chance to express their view." [Citation omitted.] [The Board concluded that the County had complied with the public participation requirements of the GMA.] [Hood Canal, 06312c, FDO, at 14.]

• The bedrock of GMA planning is public participation. The GMA's public participation provisions require cities and counties to adopt specific procedures to ensure "early and continuous" public involvement. Thus, a jurisdiction's failure to follow the public participation procedures it has adopted pursuant to RCW 36.70A.040 constitutes noncompliance with the statute. [McNaughton, 06327, FDO, at 22.]

• Record •

• When this Board reviews supplemental evidence, it will only use that additional evidence to assist the Board in determining whether the underlying legislative action complies with the GMA; it will not substitute its judgment for that of a local legislative body based on supplemental evidence that, by its definition was not before 446 the local legislative authority, to ascertain how the legislative action is applied to a particular parcel of property. The Board's use of supplemental evidence "as applied" evidence will be used merely to assist the Board in determining whether the legislative action taken by the local jurisdiction complies with the GMA. [*Twin Falls, 3303c,* FDO, at 55.]

• A jurisdiction is required to include as part of the record of its development of its [critical areas regulations or amendments] the scientific information that was developed by the jurisdiction and presented to the jurisdiction by others during its development of its regulations. The City included the best available science when it developed its amendments to its critical areas regulations, and did not violate RCW 36.70A.172. [*HEAL, 6312,* FDO, at 21.]

• Each GMA case is a discrete entity and the entire record before the Board in a prior case does not automatically become part of the record before the Board in a subsequent case. A party wishing to have the Board considers an exhibit from the record in a prior case must file a motion to supplement the record pursuant to WAC 242-02-540 and attach a copy of the proposed exhibit to the motion. [*COPAC, 6313c,* FDO, at 5.]

• A jurisdiction's Index to the Record need not be organized topically.[*Bremerton/Alpine, 5339c/8332c,* FDO, at 25.]

• Filing motions (dispositive or to supplement the record) are untimely if filed after the deadline established in the prehearing order, unless written permission is granted by the Board. [*WRECO, 8335,* FDO, at 2-3.]

• The record supports the County's determination that the [property] is forested in character. Petitioners have not shown that the County's portrayal of the property as "forested in character" was clearly erroneous. [*Screen II, 9312,* FDO, at 8.]

• Copies of the exhibits proposed for supplementing the record must accompany the motion to supplement. [*Ramey Remand, 9302*, 11/11/00 Order, at 5, 8-9.]

• [There is] a burden on the respondent jurisdiction to compile an Index that documents the proceeding undertaken by the jurisdiction. The Index should contain information obtained by the jurisdiction in its proceedings that it used in reaching the decision that is the subject of the GMA challenge before the Board. . . . The Board does not direct the contents of the jurisdiction's Index, it accepts it as a good faith effort by the jurisdiction to document the record of the proceedings and the materials used by the jurisdiction in taking to the GMA action. Amendments to the Index, by the jurisdiction, or motions to supplement the record are the means to finalize the record for Board review. [*Ramey Remand, 9302*, 11/11/00 Order, at 9.]

• The purpose of an exhibit list is to identify those documents listed in the Index that the party intends to use as an exhibit. (Citation omitted.) It may not contain exhibits that are not listed in the Index or exhibits that have not been admitted as supplemental evidence by the Board. [*Ramey Remand, 9302*, 11/11/00 Order, at 11.]

• If in Petitioner's prehearing opening brief, Petitioner attaches as an exhibit and relies upon the recently admitted exhibits [declarations] to support argument in the opening brief; then the City may include rebuttal declarations along with its prehearing response brief and move the Board to supplement the record with such new City declarations. [*Ramey Remand, 9302*, 12/15/00 Order, at 2.]

• Off-the-record and informal conversations [and telephone conversations] with advisory board members and staff do not constitute 'meaningful' public participation with the local government decision-makers since these concerns [raised in conversations] are not part of the decision record. [*Ramey Remand, 9302*, 12/15/00 Order, at 9-10.]

• The only supporting evidence for a 1000' buffer that Tacoma cites seems to be statements based on perception, unsubstantiated fear or community displeasure. [DOC showed that there was no evidence indicating that work release facilities increase criminal activity, or that recidivism tends to occur within 1000' of a facility itself. DOC provided substantial evidence to the City regarding its work release program, success rates, number of [local] offenders, escapes from work release facilities and crimes related to escapes.] [*DOC/DSHS, 0307,* FDO, at 10.]

• [If the parties attach exhibits to their briefs that are not part of the record, without moving to supplement; and each party addresses the exhibits in their response or reply briefs, without moving to strike or objecting; the Board will determine whether they would be necessary or of substantial assistance in rendering its decision, and rule accordingly.] [*MBA/Brink, 02310*, FDO, at 4-5.]

• [Regarding whether the land had long term commercial significance, the Board reviewed the County's findings and evidence in the record. Basing a finding upon] Anecdotal testimony, particularly from an individual whose direct experience with the area is decades removed from the present and whose declared expertise was in dairy rather than crop farming, does not constitute credible evidence on which to support the County's action. [Other anecdotal evidence also contradicted this testimony.] Further damaging to the credibility of the County's reasoning is that nowhere do Respondent or Intervener cite to credible, objective evidence to refute or reconcile the substantial record evidence (*i.e.* the PDS report, the DSEIS, USDA soils survey) to the contrary. [*1000 Friends, 03319c*, FDO, at 28.]

• The Board construes any declarations or conclusions entered from [consultant reports prepared on behalf of the proponent of the action] to be reflections, if not direct expressions, of "landowner intent" and assigns them the appropriate weight (*i.e*. expressions of landowner intent, alone, are not determinative). [*1000 Friends, 03319c*, FDO, at 29.]

• The County's Ordinance draws scant credible evidence and objective support from the record. In contrast, the arguments advanced by Petitioners, are supported by credible and objective evidence in the record. The record suggests that the land continues to meet the criteria for the designation of agricultural land. [*1000 Friends, 03319c*, FDO, at 29-30.]

• [T]he land use plan and zoning designations wrought by [the ordinance adopted on remand] are identical to those created by [the prior] noncompliant and invalid [ordinance]. The only remedial action taken by the County on remand from the Board was to place more testimony in its record, both pro and con, regarding the historical or speculative future ability of specific individuals to profitably farm specific parcels within the Island Crossing triangle. The County insists that, notwithstanding soil characteristics, the Council may divine the long-term commercial significance of agricultural lands by weighing the credibility of opposing opinions. [None of the testimony relied upon addressed the criteria listed at WAC 448 365-190-050, or testimony reflected land-owner intent.] . . . In the final analysis, however, the relative weight or credibility that the County assigned to the opinions expressed by individuals during the [public] hearing sheds little light on the question of whether agricultural lands at Island Crossing have long-term commercial significance. While the Board would agree that soils information alone is not determinative, neither is reliance on anecdotal, parcel-focused expression of opinion nor is landowner intent. Instead, to cull from the universe of lands that are "devoted to" agriculture the subset that also has "long-term commercial significance" demands an objective, area-wide inquiry that examines locational factors (footnote

omitted) as well as the adequacy of infrastructure to support the agricultural industry. [*1000 Friends I, 03319c*, 6/24/04 Order, at 16-17.]

• The County's reliance on anecdotal, parcel-focused witness testimony as the primary determining factor of LTCS has too narrow a focus – it misses the broad sweep of the Act's natural resource goal, which is to maintain and enhance the agricultural resource *industry*, not simply agricultural operations on individual parcels of land. (Citations omitted.) This breadth of vision informs a proper reading of the Act's requirements for resource lands designation under .10 and conservation under .060. Reading these provisions as a whole, it is apparent that agricultural lands with "long-term commercial significance" are *area-wide patterns of land use*, not localized parcel specific ownerships. Historical or speculative statements by individuals regarding their personal inability to profitably farm certain parcels does not inform a GMA-required inquiry into the *long-term commercial significance* of *area-wide patterns of land use* that are to *assure the maintenance and enhancement of the agricultural land resource base to support the agricultural industry*. [*1000 Friends I, 03319c*, 6/24/04 Order, at 18.]

• [A jurisdiction's BLR] 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. [*S/K Realtors, 04328*, FDO, at 16.] • The Board finds that the [Petitioners] assertion concerning inefficient land use is supported by the CTED comment letter and the assertion concerning premature expansion of UGA boundaries is supported by a comment letter from King County. [*Camwest II, 05341*, FDO, at 21-23.]

• The Board reads Goal 12 as referring to specific capacity analysis and adopted levels of service. In reading the voluminous transcripts of City meetings in this case, the Board is struck by the repeated acknowledgments of lack of infrastructure plans, lack of concurrency standards (except for roads), lack of impact fees – in short, that the GMA tools for identifying and addressing infrastructure deficits are not in place. While the burden is on Petitioners here, the Board notes that Petitioners have argued that the City has no hard evidence – only anecdotal complaints – of capital facility deficits. In the face of this assertion, the Board anticipated the City would point to staff reports, consultant studies, capital facility financing plan, and the like. No such information has been supplied. [*Camwest II, 05341*, FDO, at 24.]

• The Board notes that several of the City Interveners asked whether they would have to move to supplement the record with copies of their Plans and development regulations, etc. by the motions filing deadline or prior to briefing. The Board, through its Administrative Officer, informed the Cities that the Board can, and will [pursuant to WAC 242-02-660], take official notice of such matters of law providing they have been officially enacted by the local government. [*Pilchuck VI, 06315c*, 5/4/06 Order, at 3.]

Goals

• Cities and counties planning under the Act must consider the planning goals listed at RCW 36.70A.020 before adopting comprehensive plans and development regulations.

(The easiest way to show that a jurisdiction has "considered" planning goals is to acknowledge their existence in writing.) [Gutschmidt, 2306, FDO, at 14-15.]

• Prior to GMA, plans were voluntary and advisory and there was no requirement that plans be guided by state goals or be consistent with the plans of others. Under GMA, plans are now mandatory (RCW 36.70A.040) and directive. RCW 36.70A.100, .103 and .120. Plans must now be guided by planning goals (RCW 36.70A.020) and be mutually consistent. RCW 36.70A.110 and .210. [Rural Residents, 3310, FDO, at 17.]

• A major purpose of UGAs is to serve Planning Goal 1 and Planning Goal 2. [Rural Residents, 3310, FDO, at 17.]

• Compact urban development is the antithesis of sprawl. [Rural Residents, 3310, FDO, at 19.]

• While cities have broad discretion as to the content of their comprehensive plans, this discretion is not limitless. It is subject to several practical and legal limitations.

1. As a practical matter, the localized rate of growth within a UGA or within a city is strongly dependent upon the dynamics of the market.
2. The Act's requirement of internal consistency between the elements of the plan, and with the future land use map, will require the local choices to reflect the capabilities of the existing capital facilities and/or the ability to create sufficient future capabilities.
3. The broad discretion enjoyed by a city regarding the location and configuration of growth within its boundaries is tempered by the GMA's requirement that the legislative body must substantively comply with the planning goals of RCW 36.70A.020 when adopting comprehensive plans.
4. Critical area and natural resource land designations and development regulations must be adopted pursuant to RCW 36.70A.060 and .170 separate from and prior to adoption of the comprehensive plan.
5. There are certain specific provisions of the Act that permit state or regional policy decisions to limit the range of local discretion in a comprehensive plan. [Aagaard, 4311c, FDO, at 9.]

• The Act requires cities and counties to preserve existing housing while promoting affordable housing and a variety of residential densities and housing types. No jurisdiction is required to reconcile these seemingly inconsistent requirements by totally focusing on one requirement, for instance preserving existing housing, to the exclusion of other requirements, such as encouraging more affordable housing. Instead, jurisdictions must reconcile the Act's seemingly contradictory requirements by applying and necessarily balancing them. [WSDF I, 4316, FDO, at 30.]

• Any smaller rural lots will be subject to increased scrutiny by the Board to assure that the pattern of such lot sizes (their number, location and configuration) does not constitute urban growth; does not represent an undue threat to large scale natural resource lands, such as forest lands, and large scale critical areas, such as aquifers; will not thwart the long term flexibility to expand the UGA; and will not otherwise be inconsistent with the goals and requirements of the Act. [Vashon-Maury, 5308c, FDO, at 79.]

• The property rights goal, while an important cornerstone of the GMA, is not supreme among the 13 goals. The Act requires local governments to balance all 13 goals and to consider the process recommendations of the Attorney General's Office. [Vashon-Maury, 5308c, FDO, at 89.]

• While the preamble to RCW 36.70A.020 clarifies that the goals are not listed in any order of priority, a close examination of the 13 goals reveals that there are some important distinctions that can be drawn among them. Unlike the other ten, three planning goals [(1) urban growth; (2) reduce sprawl; and (8) natural resource industries] operate as organizing principles at the county-wide level. Thus, they have not only a procedural dimension, but they also direct a tangible and measurable outcome. In contrast, Goal 6, regarding property rights, and Goal 11, regarding public participation, do not specifically or implicitly describe the physical form or configuration of the region that should evolve. Rather, they address how local government is obligated to undertake the comprehensive planning and implementing actions that will shape the region (i.e., without taking private property and with enhanced public participation). [*Bremerton, 5339c,* FDO, at 25.]

• The Board concludes that there are at least eight major negative consequences of sprawl: (1) it needlessly destroys the economic, environmental and aesthetic value of resource lands; (2) it creates an inefficient land use pattern that is very expensive to serve with public funds; (3) it blurs local government roles, fueling competition, redundancy and conflict among those governments; (4) it threatens economic viability by diffusing rather than focusing needed public infrastructure investments; (5) it abandons established urban areas where substantial past investments, both public and private, have been made; (6) it encourages insular and parochial local policies that thwart the siting of needed regional facilities and the equitable accommodation of locally unpopular land uses; (7) it destroys the intrinsic visual character of the landscape; and (8) it erodes a sense of community, which, in turn, has dire social consequences. [Bremerton, 5339c, FDO, at 28.]

• RCW 36.70A.020(4) does not prohibit the demolition of existing housing structures. Instead, cities and counties must balance the Act's requirements to "encourage preservation of existing housing stock" with the demand to "encourage the availability of affordable housing" and the promotion of a "variety of residential densities and housing types." . . . It does not mandate that single-family residences be preserved at the expense of every other housing type. [WSDF II, 5340, FDO, at 25.]

• RCW 36.70A.320 requires the Board to presume that a comprehensive plan and development regulations are valid. It does not condition this presumption on the record containing an explicit statement by the local government that it considered the Act's planning goals. Instead, substantive compliance with those goals remains a requirement of the Act that all jurisdictions are presumed to have met unless and until a petitioner proves otherwise. [Alberg, 5341c, FDO, at 13.]

• The Board rejects the argument that Goal 6 (Property Rights) must be interpreted to mean that the imposition of zoning which limits the uses on a property gives rise to the County's duty to compensate for the uses which are not allowed. [Alberg, 5341c, FDO, at 45.]

• A pattern of 10-acre lots is clearly rural and the Board now holds that, as a general rule, a new land use pattern that consists of between 5- and 10-acre lots is an appropriate rural use, provided that the number, location and configuration of lots does not constitute urban growth; does not present an undue threat to large scale natural resource lands; will not thwart the long-term flexibility to expand the UGA; and will not otherwise be inconsistent with the goals and requirements of the Act. As a general rule, any new land use pattern that consists of lots smaller than 5 acres would constitute urban growth and is therefore prohibited in rural areas. The greater the density becomes, the more difficult it will become to justify an exception to the general rule. The exceptions to this general rule are few, both because the circumstances justifying them are rare and because excessive exceptions will swallow a general rule. [Sky Valley, 5368c, FDO, at 46.]

• Counties are required to be guided by the goals set forth at RCW 36.70A.020, and that the requirement has both a procedural and a substantive component. RCW 36.70A.280 gives the Board jurisdiction over that requirement; RCW 36.70A.300 directs the Board to determine whether compliance with that requirement has occurred. [Sky Valley, 5368c, FDO, at 124.]

• In order for petitioners to prevail in this type of challenge, they must prove that the action taken by a city or county is both arbitrary and discriminatory. Showing either an arbitrary or discriminatory action is insufficient to overcome the presumption of validity that actions of cities and counties are granted by the Act. [Shulman, 5376, FDO, at 12.]

• Where a petition alleges noncompliance with both the public participation goal and the specific public participation requirement of the Act, the Board will scrutinize only the latter. [Litowitz, 6305, FDO, at 7.]

• Neither goal (1) and (2) nor Anderson Creek, establish a GMA duty that precludes a jurisdiction from limiting the scope and magnitude of development in critical areas or environmentally sensitive areas. [Litowitz, 6305, FDO, at 9.]

• Nothing in the Act suggests that either the planning goal [housing .020(4)] or the housing element requirements [.070(20(c) and (d), specifically] are determinative of a specific land use outcome as to any given parcel of property. Rather, the broad discretion that the Act reserves to local governments to make site-specific land use decisions suggests that the above cited provision provide direction that is to be addressed at a larger scale, such as the community or jurisdiction-side level. Thus,
the Board construes these sections to read, in effect: ". . . identify sufficient land within your jurisdiction"; or "make adequate provisions within your jurisdiction...". [Litowitz, 6305, FDO, at 19.]

• The Board has jurisdiction to determine a challenged local government action's compliance with the goals and requirements of the Act. [Cole, 6309c, FDO, at 11-13.]

• The GMA's planning goals guide the development and adoption of comprehensive plans, and guide the adoption of amendments to comprehensive plans. [Cole, 6309c, FDO, at 15.]

• RCW 36.70A.070(2)(a) does not require a jurisdiction to include in its planning goals, policies and objectives for each and every neighborhood within its jurisdiction. No such GMA duty exists. [Buckles, 6322c, FDO, at 21.]

• Where a petition alleges noncompliance with both the housing goal and the specific housing element requirement of the Act, the Board will scrutinize only the latter. [Children's II, 6323, FDO, at 9.]

• There are no specific GMA requirements that implement goals RCW 36.70A.020(8) and (9) − Natural Resource Industries and Open Space and Recreation. [Tulalip, 6329, FDO, at 15.]

• The Board will review the challenged enactments to "determine whether [they] achieve the legislature's intended results: consistency with the planning goals of the Act." In other words, to show substantive noncompliance with a planning goal, a petitioner must identify that portion of the challenged enactment that is not consistent with, or thwarts, the planning goal, and explain why the identified portion does not comply with that goal. Citing Rural Residents, 3310, FDO. [Rabie, 8305c, FDO, at 6.]

• The GMA does not list the goals in any rank order; it is also true that there is no conflict between Goals 8 and 9 in the abstract, or where they are applied to different parcels of land. The conflict arises when they are both invoked as the goal rationale for a specific land use on a single parcel. In such an instance, it is notable that, by their very choice of words, Goals 8 and 9 do not convey an equal level of guidance. Comparing the active verbs, we find that Goals 9 conveys that local governments are to encourage the development of recreational opportunities while Goal 8 conveys that local governments are to maintain and enhance resource-based industries. It is plain that less directive and specific language, such as encourage, must yield to more specific and directive language, such as maintain and enhance. [Green Valley, 8308c, FDO, at 16.]

• [RCW 36.70A.020(7) provides guidance for processing applications for permits not plan amendments]. [LMI/Chevron, 8312, FDO, at 9.]

• RCW 36.70A.020(7), .470, and 130, read individually or collectively, [do not] establish a duty [for jurisdictions] to consider specific plan amendments on an annual basis. [LMI/Chevron, 8312, FDO, at 12.]

• General discussion of the Board's treatment of challenges to goals and consistency analysis. [LMI/Chevron, 8312, FDO, at 21.]

• Fundamental to a city's complying with Goals 1 and 2 is that its land use element, including its future land use map, permits appropriate urban densities throughout its jurisdiction. [LMI/Chevron, 8312, FDO, at 24.]

• [A plan, or subarea plan, policy that seeks to protect and maintain the large lot, low density, residential character of a city without encouraging urban growth at appropriate urban densities or reducing the conversion of undeveloped land to low density development is inconsistent with, thwarts, and does not comply with Goals 1 and 2 (RCW 36.70A.020(1) and (2).] [LMI/Chevron, 8312, FDO, at 28.]

• RCW 36.70A.020(3) does not require that each and every land use designation of a jurisdiction permit residential densities that support all modes of transportation. [Reliance on urban density designations alone is not enough to demonstrate noncompliance with Goal 3.] [LMI/Chevron, 8312, FDO, at 29.]

• [RCW 36.70A.020(4) does not require that each and every land use designation of a jurisdiction provide for affordable housing. [LMI/Chevron, 8312, FDO, at 29.]

• Although common sense suggests that longer, more detailed project review will increase the costs of developing property, common sense alone is not probative. To prevail, argument must be accompanied by factual evidence [from the record]. [LMI/Chevron, 8312, FDO, at 30.]

• [For purposes of analyzing challenges to RCW 36.70A.020(6),] a clearly erroneous action is not necessarily an arbitrary action. "Arbitrary" means to be determined by whim or caprice. Washington's courts have further defined "arbitrary or capricious" action to mean willful and unreasoning action taken without regard to or consideration of the facts and circumstances surrounding the action. Citing cases. [LMI/Chevron, 8312, FDO, at 31.]

• [The GMA does not compel redevelopment of existing developed parcels, but it does require that the plans that govern new development or redevelopment allow compact urban development at appropriate urban densities in order to be consistent with the goals of the GMA.] [LMI/Chevron, 8312, FDO, at 37.]

• The GMA [goal 3] does not explicitly identify the regional transportation priorities. However, these priorities may be identified by reference to other statutes. Chapters 81.104 RCW and 81.112 RCW give substance to RCW 36.70A.020(3). [Sound Transit, 9303, FDO, at 9.]

• [Notwithstanding possible mootness, in this case, the County asked the Board for guidance "with regards to the capital facility element and the idea of the level of service standards being tied to a type of concurrency enforcement mechanism." Petitioners also ask the Board to address the "reassessment provision" of the CFE.] [McVittie, 9316c, FDO, at 13.]

• [To provide the guidance requested by the parties, regarding the interrelationship of Goal 12 (RCW 36.70A.020(12)) with other requirements sections of the GMA, the Board fashioned four questions – which it subsequently answered.] [McVittie, 9316c, FDO, at 22.]

• While Board review of a challenge to RCW 36.70A.070(3) or (6) focuses on the specific requirements of the section, the Board's review must be done in light of Goal 12, not in lieu of Goal 12. [McVittie, 9316c, FDO, at 22.]

• The answer to question 1 – Does Goal 12 create a duty beyond the capital facility planning that is required by RCW 36.70A.070(3)? – is yes. Goal 12's reach extends to compliance with RCW 36.70A.070(6). Additionally, Goal 12 may go beyond a challenge to compliance with the requirements of RCW 36.70A.070(3) or (6). Goal 12 also requires substantive compliance. Other plan or development regulation provisions of the local government may not thwart its provisions. [McVittie, 9316c, FDO, at 23.]

• [R]eading RCW 36.70A.070(3) in light of Goal 12, the Board concludes that the CFE must include locally established minimum standards, a baseline, for included public facilities, so that an objective measurement test of need and system performance is available. [McVittie, 9316c, FDO, at 25.]

• The answer to question 2 – Does Goal 12 requires the designation of a single Level of Service (LOS) standard for the facilities and services contained in the CFE? – is yes. Goal 12 gives context to RCW 36.70A.070(3). Goal 12 requires a locally established single minimum (level of service) standard to provide the basis for objective measurement of need and system performance for those facilities locally identified as necessary. The minimum standard must be clearly indicated as the baseline standard, below which the jurisdiction will not allow service to fall. The minimum standard may be the lowest point indicated within a range of service standards for a type of facility. [McVittie, 9316c, FDO, at 25.]

• Goal 12 explicitly provides an action-forcing requirement [trigger mechanism] if public facilities cannot support development without decreasing levels of service below the locally established minimums. [McVittie, 9316c, FDO, at 23.]

• The answer to question 3 – Does Goal 12 require an enforcement mechanism or "trigger" that forces a reassessment action or implement concurrency by a jurisdiction? – is yes. The GMA is to work as an integrated whole. RCW 36.70A.070(3) and (6) operate to achieve and implement Goal 12. These provisions require a "trigger mechanism" to compel reevaluation. However, local governments have numerous options to consider during reassessment. Also, if reassessment action is "triggered" the responsive action must occur in compliance with the public participation provisions of the GMA. [McVittie, 9316c, FDO, at 27.]

• Goal 12 enables local governments to exercise their discretion in making the reasoned determination of which public facilities and services are necessary to support development within the jurisdiction. (Concurring with the Western Washington Growth Management Hearings Board's decision in Taxpayers for Responsible Growth v. City of Oak Harbor, WWGMHB Case No. 96-2-0002, Final Decision and Order (Jul. 16, 1996), at 10-11.) [McVittie, 9316c, FDO, at 28.]

• Unlike the transportation element, the capital facilities element does not use the phrase "concurrent with development" and does not specify an enforcement procedure. [However, read in light of Goal 12] a local government is obligated to take steps to ensure that those facilities and services it has identified as being necessary to support development are adequate and available to serve development. [McVittie, 9316c, FDO, at 29.]

• Goal 12 requires enforcement and, just as it allows discretion in identifying necessary facilities to support development, it allows local discretion in developing the type of enforcement mechanism or programs to ensure public facilities are adequate and available to support development. These enforcement mechanisms and programs . . . may involve the use of existing regulatory techniques that are authorized, or even required, by other statutory authority. (Footnote omitted.) [McVittie, 9316c, FDO, at 30.]

• The answer to question 4 – Does Goal 12 require "concurrency" for all public facilities and services, beyond the explicit concurrency requirement of RCW 36.70A.070(6)(b) for transportation" is no. Goal 12 does not require a development-prohibiting concurrency ordinance for non-transportation facilities and services. Goal 12 allows local governments to determine what facilities and services are necessary to support development and develop an enforcement mechanism for ensuring that identified necessary facilities and services for development are adequate and available. [McVittie, 9316c, FDO, at 30.]

• [In Green Valley, 8308c] the Board examined and rejected the argument that the discretion that the GMA affords to local governments to "balance the goals of the Act" somehow elevates recreational uses to an equal with agricultural uses. [Grubb, 0304, FDO, at 9.]

• [Petitioner makes no independent argument regarding compliance with the goals of the Act. The challenges to the goals are argued in the context of non-compliance with various requirements of the Act; therefore, they are addressed in the Board's analysis of the various requirements of the Act.] [McVittie IV, 0306c, at 11.]

• [DOC sought a determination of invalidity, which requires the Board to find substantial interference with the goals of the Act. There is no GMA goal that explicitly addresses EPFs. DOC argued, but the Board rejected the argument that] RCW 36.70A.020(12) implicitly encompasses the non-preclusionary requirements of RCW 36.70A.200. [To make this case, the Board would have to see evidence that the jurisdiction had identified work release and juvenile community facilities as necessary to support development and

that the jurisdiction had established minimum standards for such facilities.] However, the Board is concerned that the City ensures coordination between communities and jurisdictions, including DOC, to reconcile conflicts [RCW 36.70A.020(11).] [DOC/DSHS, 0307, FDO, at 16-17.]

• [The public participation goal RCW 36.70A.020(11)] provides an umbrella under which all the GMA public participation requirements fit. It articulates a premium on involving citizens in the entire GMA planning process; and specifically emphasizes the importance of public participation for comprehensive plans and development regulations. [McVittie V, 0316, FDO, at 16.]

• See also: Affordable Housing [LIHI I, 0317]

• [If a challenge cites goals of the Act and the specific requirements section of the Act that relate to those goals], the Board looks first to the requirements sections of the Act to determine compliance. Review is done in light of the goals of the Act, not in lieu of the goals. If the Board finds noncompliance with a requirement section of the Act, it then returns to review the goals to determine whether substantial interference has occurred and whether invalidity should be impose. [Kitsap Citizens, 0319c, FDO, at 10.]

• One of [the Board's] fundamental conclusions was the Board review of a challenge to RCW 36.70A.020(3) or (6) must be done "in light of Goal 12, not in lieu of Goal 12. [McVittie VI, 1302, FDO, at 11.]

• [In McVittie I, 9316c, FDO, 23-30.] [T]he Board reached four other basic conclusions about the cumulative effect of Goal 12 and the capital facilities requirements of the Act: (1) Goal 12 creates a duty beyond the capital facility planning that is required by RCW 36.70A.070(3) and requires substantive, as well as procedural compliance; (2) Goal 12 requires the designation of a locally established single Level of Service (LOS) standard for the facilities and services contained in the Capital Facilities Element, below which the jurisdiction will not allow service to fall; (3) Goal 12 operating through RCW 36.70A.070(3) and (6), requires an enforcement mechanism or "trigger" to compel either concurrency implementation or reevaluation of numerous options; and (4) Goal 12 does not require a development-prohibiting concurrency ordinance for non-transportation facilities and services, rather, it allows local governments to determine what facilities and services are necessary to support development and the enforcement mechanism for ensuring that identified necessary facilities and services for development are adequate and available. (Footnotes omitted). [McVittie VI, 1302, FDO, at 11-12.]

• The Board notes that while Plan provisions must be guided by and consistent with the Goals of the Act, it is conceivable that an unchallenged plan policy (now time barred from challenge) may not be guided by a goal. Consequently, in that situation, a challenge to an implementing regulation (which must also be consistent with the goals as well as implement the Plan) could be consistent with one and not the other. [Master Builders Association, 1316, FDO, at 18, footnote 16.]

• [Petitioner argued that] there appears to be a serious disconnect between transportation plans and improvements done by the County and the State. [Therefore] the spirit of Goals 3 and 12 [must apply because they] would demand a better degree of coordination and consistency between the plans and actions of State and County government. Even the County laments the timing of State improvement, to say nothing of the timing of the adoption of State LOS standards. Nevertheless, the Board must conclude that neither Goals 3 and 12, indeed none of the goals listed in RCW 36.70A.020 apply to the State because the preamble to that section unequivocally states the goals "shall be used *exclusively* for the purpose of guiding the development of comprehensive plans and development regulations." This is an unfortunate but inescapable conclusion, because to truly achieve managed growth there must be a better linkage between local efforts and state efforts. [*McVittie VIII, 1317*, FDO, at 10.]

• Petitioners cite to no authority for its ["necessary linkage" assertion that the Board must determine the constitutionality of a action to determine compliance with Goal 6.] [The Board agrees with the City] the Board does not have to 'necessarily' determine the constitutionality of a city's action when reviewing a challenge under Goal 6. Under Goal 6, the requirement to find both arbitrary and discriminatory action is not the same as finding a violation of a constitutional provision. [The Board has jurisdiction to review an action for whether it complies with Goal 6, but not for whether it is constitutional.] [HBA II, 1319, 10/18/01 Order, at 2-3.]

• The actual conflict in this instance is between Bellevue's preferred mechanism to achieve its redevelopment objective and the Act's concurrency requirements. In crafting development regulations, local governments may choose to give greater weight to one GMA goal than to another GMA goal. [Here Goal 1 and 2 versus Goal 12] However, such a local goal preference does not remove the duty to comply with a specific and unequivocal GMA requirement. Furthermore, conflicts, if any, between a general GMA goal and a specific GMA requirement must be resolved in favor of the latter. [Bennett, 1322c, FDO, at 11.]

• The Housing Goal contains three separate, but equal subparts: 1) encouraging the availability of affordable housing to all segments of the population of this state, 2) promoting a variety of residential densities and housing types, and 3) encouraging the preservation of existing neighborhoods. [LIHI II, 1223, FDO, at 8.]

• The Housing Incentive Program (HIP) defines low-income as 80% or less of the average median income (AMI). [Petitioner] is correct, the HIP does not distinguish those at or below 50% AMI (very low-income) or those at or below 30% AMI (extremely low-income) persons. As [Petitioner] demonstrates, over three-quarters of the poor people who need affordable housing in Lakewood earn less than 50% of median income. American Lake Gardens, Springbrook and Tillicum contain some of the highest concentrations of poverty in the City. While those with the greatest need fall within the City's low-income definition, the bar is high enough to dilute the potential impact of the HIP program in providing affordable housing to the poorest of Lakewood's poor that are concentrated in its poorest neighborhoods. [LIHI II, 1223, FDO, at 10-11.]

• Further, the Board agrees with [Petitioner] that the HIP is ambiguous and unclear as to whether seniors or disabled persons must also be low-income to benefit from the program and whether or not low-income units can qualify for the density bonuses. . . . [The language contained in the HIP] seems to suggest that housing units to serve non low-income seniors or non low-income disabled persons are eligible for the density bonuses of the HIP. If this is the case, it further dilutes the potential effectiveness of the HIP in providing affordable housing to low-income persons. It is also not clear whether the fee reductions are only available to low-income tenants. Base upon these ambiguities of the HIP, the Board concludes that the HIP does not encourage the provision of affordable housing to all economic segments of Lakewood's population. [LIHI II, 1223, FDO, at 10-11.]

• Simply stated, [RCW 36.70A.480] means: 1) the provisions of RCW 90.58.020 are the 14th Goal in the GMA; 2) the goals and policies contained in a shoreline master program (SMP) itself become an element of a GMA comprehensive plan (footnote and reference omitted); 3) other provisions of an SMP, including the SMP use regulations, are considered as GMA development regulations (reference omitted); and 4) adoption procedures for an SMP are governed by the SMA – i.e., requiring Ecology's approval. [Everett Shorelines Coalition, 02309c, FDO, at 15.]

• In contrast to the SMA, the GMA directs a balancing of statutory goals and a larger degree of deference to local decisions. [Everett Shorelines Coalition, 02309c, FDO, at 18.]

• In contrast to the GMA, neither the words "balancing" nor "balance" appear in the SMA, nor are local government decisions accorded as much deference as under the GMA. [Everett Shorelines Coalition, 02309c, FDO, at 20.]

• Review of the SMA use preferences indicates to the Board that the preservation of the natural character of the shorelines, protection and restoration of the resources and ecology of the shorelines, recreation and public access to the shoreline are weighted more heavily than, and take priority over, other various and sundry uses that would fit within the seventh level of preferences listed [in RCW 90.58.020]. This is the essence of the 14th GMA Goal. [Everett Shorelines Coalition, 02309c, FDO, at 21.]

• [T]he most directive of the original thirteen GMA goals do not undermine or contradict the 14th goal; rather they buttress the SMA direction to 'preserve, protect and restore" shorelines. The primary and paramount policy mandate that the Board gleans from a complete reading of RCW 90.58.020, particularly in the context of the goals and overall growth management structure of Chapter 36.70A RCW, is one of shoreline preservation, protection, enhancement and restoration. [Everett Shorelines Coalition, 02309c, FDO, at 22.]

• From a review of the interplay between the relevant provisions of the two statutes, the Board concludes that, while development will continue to be permitted within the shorelines of the state, the primary and paramount goal, objective and purpose of the

GMA/SMA total statutory scheme is to preserve, protect, enhance and restore the resources, ecology and ecosystem functions of the shorelines of the state, with special consideration paid to habitat for anadromous fish. [Everett Shorelines Coalition, 02309c, FDO, at 23.]

• The GMA clearly encourages the preservation of existing housing stock (See RCW 36.70A.020(4)) and provides for ensuring the vitality and character of established residential neighborhoods (See RCW 36.70A.070(4)). However, as the Board stated, supra, "any opportunity to perpetuate an "historic low-density residential" development pattern, [in the subarea], ended in 1994 when the County included the area within the UGA." It is clear that existing housing stock and neighborhoods may be maintained and preserved, however existing low-density patterns of development cannot be perpetuated. [MBA/Brink, 02310, FDO, at 14-15.]

• Just as the GMA provides all citizens predictability in the location and type of future growth and development that will be accommodated, those citizens that seek to carry out these GMA Plans – developers and project proponents – seek an additional degree of predictability for pursuing their development proposals. Goal 7 of the GMA addresses this need. [Olsen, 03303, FDO, at 7.]

• The "ensure[d] predictability" included in Goal 7 is directed towards, and attaches to project applicants. Predictability for a permit applicant is ensured through a permit application review process that is timely and fair. The Board notes that the addition of the extension process "diminishes" the predictability originally set forth in KCC 21A.41.100 (A) and (B). Nonetheless, it is clearly within the City of Kenmore's discretion to determine whether it desires a permit extension process or not, and to establish the criteria for granting, denying or otherwise limiting the frequency or duration of such extensions. [Olson, 03303, FDO, at 7.]

• Both the CPPs [RCW 36.70A.210(1)] and goals [RCW 36.70A.020] must be used to guide the development of locally adopted plans. Those comprehensive plans must adhere to both the CPPs and the goals of the Act. The locally established CPPs cannot contradict the goals of the statute and still fulfill their statutory obligations. (Footnote omitted.) . . .[I]f CPPs are required to establish a framework for guiding the development and amendment of comprehensive plans so as to ensure GMA compliance and consistency among jurisdictions; then the CPP guiding framework must also adhere to the goals and requirements of the Act. CPPs cannot be blind to the goals of the Act – the GMA's goals provide substantive context in the development and adoption of CPPs. This is in keeping with the interpretation of the Supreme Court which, in construing the Act, has consistently read the goals into substantive provisions. (Footnote omitted.) . . . To give effect to these GMA requirements [RCW 36.70A.020 and .210(1)] the Board holds that county-wide planning policies must be guided by, and be consistent with, the planning goals set forth in RCW 36.70A.020. Although the goals are not listed in order of priority for purposes of comprehensive plans, certain goals will have greater relevance than others at the county-wide scale. (Footnote omitted.) [CTED, 03317, FDO, at 15-16.]

• While the Act recognizes that the County may consider local circumstances in establishing rural densities in the Plan's Rural Element, the Act also requires that the County "develop a written record explaining how the rural element [here how the rural wooded land policies] harmonize the planning goals in RCW 36.70A.020 and meets the requirements of this chapter." RCW 36.70A.070(5)(a). The Board construes this "written record explanation" requirement to be a discrete document produced by the County, which may compile record evidence to explain how the goals are harmonized. [The Board found no written record addressing this requirement.] [Bremerton II, 04309c, FDO, at 24.]

• [Goals 8 and 10, by themselves] do not impose a requirement upon jurisdictions to conduct a critical areas analysis of potential impacts of the adoption, or amendment of, GMA Plans and development regulations. [Bremerton II, 04309c, FDO, at 27.]

• The physical form the GMA is driving towards in its mission to curb sprawl is "a compact urban landscape." . . . Residential development is a major component of the region's compact urban form. Therefore, as growth continues, higher residential urban densities become a corollary to compact urban development. However, urban density is not necessarily an end in itself; it is a means of achieving numerous goals in the GMA – goals which are to guide all the GMA planning jurisdictions. [Kaleas, 05307c, FDO, at 13-14.]

• Allowing higher residential densities in areas and neighborhoods where urban services and facilities already exist, or are readily available, increases service efficiencies and can lower the costs of providing urban services. The per capita costs of providing urban services tends to be lower when development is compact and at higher densities [Goals 1 and 12 and RCW 36.70A.110 and .070(3)]. [Kaleas, 05307c, FDO, at 14.]

• Increasing densities in urban areas prevents the inappropriate conversion of undeveloped land thereby curbing the perpetuation of sprawl. Compact urban development is the antithesis of sprawl. [Goal 2 and RCW 36.70A.110]. Higher urban densities at locations along major transportation corridors and allowing mixed uses at designated centers support transit and other alternative forms of transportation as well as encourage economic development. [Goals 3 and 5 and RCW 36.70A.070(6) and (7)]. [Kaleas, 05307c, FDO, at 14.]

• Higher density single family and multifamily housing (apartments, cottage housing, condominiums and townhouses, etc.) adds variety to housing alternatives within urban areas to help make housing affordable for all segments of the population. [Goal 4 and RCW 36.70A.070(4)]. [Kaleas, 05307c, FDO, at 14.]

• Likewise, increasing the intensity and density of development in urban areas is a means of preserving our natural resource industries and historical or archaeological sites, protecting open space and the environment. [Goals 8, 9, 10 and 13 and RCW 36.70A.070(8), .050, .060, .170 and .172]. [Kaleas, 05307c, FDO, at 14.]

In considering Planning Goals 1 and 2, the Board looks to the ruling in Quadrant, supra, where the Court indicated that "the primary method for meeting the goals of subsections .020(1) (urban growth) and .020(2) (reduce sprawl) is set forth in RCW 36.70A.110." Citation omitted. [Camwest II, 05341, FDO, at 23.]

• [The Board concluded that Petitioners did not carry their burden in demonstrating that the growth phasing lottery was developed in disregard of the affordable housing, economic development and property rights Goals. However, the Board concluded that Goal 7 – Permits, was not followed since a lottery based on the luck of the draw would not lead to predictability. Likewise, the inter-jurisdictional coordination aspect of Goal 11 was also ignored. [Camwest II, 05341, FDO, at 29-37.]

• [A thorough discussion as to balancing of the GMA's goals and requirements in light of several decisions of the Courts including Quadrant (2005), King County (2000), and Bellevue (2003). The Board concluded that these decisions of the Supreme Court and Court of Appeals established the rule that a jurisdiction may not assert the need to balance competing GMA goals as a reason to disregard specific GMA requirements.] [DOE/CTED, 05334, FDO, at 11-13.]

• [The Board concludes that GMA goals provide a framework for plans and regulations, and many of the goals are backed and furthered by specific and directive GMA requirements and mandates. Therefore cities and counties may not merely rely upon GMA goals, standing alone, to dilute or override GMA requirements.] [DOE/CTED, 05334, FDO, at 52-53.]

• The Growth Management Act, from its inception, was built around the concept of coordinating urban growth with availability of urban infrastructure. Determining that "uncoordinated and unplanned growth" posed a threat to the state and its citizens [RCW 36.70A.010], the legislature created a framework that requires consistency between land use planning and coordinated provision of capital facilities and urban infrastructure. See e.g., RCW 36.70A.070(3), .110(3). The "urban growth" and "public facilities" goals used to guide local comprehensive plans are cross referenced. RCW 36.70A.020(1) and (12). [Fallgatter V, 06303, FDO, at 11.]

Best Available Science - BAS

• *See also*: **Critical Areas**

• RCW 36.70A.172 does not impose a requirement that cities and counties adopt policies to protect critical areas; therefore, the Board does not have jurisdiction to hear an appeal of the City's resolution adopting such policies. Such a requirement cannot be implied by RCW 36.70A.170 or .060. [HEAL, 6312, FDO, at 15.]

• Amendments to a previously adopted critical areas ordinance, after the effective date of a legislative amendment (BAS − RCW 36.70A.172) of the GMA, are subject to the best available science requirement of RCW 36.70A.172(1). [HEAL, 6312, FDO, at 17.]

• The language of RCW 36.70A.172 that states: "shall include best available science in developing policies and development regulations" is interpreted by the Board as not mandating any substantive outcome or product, but rather requiring jurisdictions to make the best available science a part of their process of developing policies and development regulations to protect the functions and values of critical area. [HEAL, 6312, FDO, at 19.]

• The Board interprets the legislature's intent to be that counties and cities include the best available science in their process of developing critical areas regulations, so that this information can be considered before any legislative action is taken. [HEAL, 6312, FDO, at 20.]

• The GMA requires the Board to give deference to a local government's choice of scientific data. [HEAL, 6312, FDO, at 21.]

• A jurisdiction is required to include as part of the record of its development of its [critical areas regulations or amendments] the scientific information that was developed by the jurisdiction and presented to the jurisdiction by others during its development of its regulations. The City included the best available science when it developed its amendments to its critical areas regulations, and did not violate RCW 36.70A.172. [HEAL, 6312, FDO, at 21.]

• Although the Booth studies document the basin-wide 10 percent impervious surface threshold for damage to aquatic systems, the studies also identify measures to mitigate the effects of impervious surfaces. [Bremerton/Alpine, 5339c/8332c, FDO, at 31.]
 Rather than adopting a maximum limit on impervious surfaces . . . the County, utilizing best available science in a substantive way, adopted a system for critical areas protection that includes buffers, building setbacks, mitigation, and storm water drainage controls. [Bremerton/Alpine, 5339c/8332c, FDO, at 32.]

• [Even if a maximum impervious basin-wide coverage of 10 percent constitutes the best available science, petitioners have not shown that the adopted regulations allow more than 10 percent basin-wide impervious surface coverage. [Bremerton/Alpine, 5339c/8332c, FDO, at 32.]

• When any local government in the Central Puget Sound region adopts amendments to policies and regulations that purport to protect critical areas pursuant to RCW 36.70A.060(2), those enactments will be subject to meeting the best available science requirements of RCW 36.70A.172 and the potential of appeal to this Board pursuant to RCW 36.70A.280. [Tulalip II, 9313, 1/28/00 Order, at 4.]

• [The Court of Appeals Division I] found that the Board had erroneously concluded that it did not have jurisdiction to review a resolution amending the City of Seattle's critical area policies. The Court found that where a jurisdiction chooses to adopt critical area policies the Growth Boards have jurisdiction to review such policies and determine

whether the policies comply with the requirements of RCW 36.70A.172. [HEAL, 6312, 10/4/01 Remand Order, at 4.]

• Evidence of the best available science must be included in the record and must be considered substantively in the development of critical areas policies and regulations. (Citation omitted.) [HEAL, 6312, 10/4/01 Remand Order, at 4.]

• [The question before the Board was whether Seattle's policy preference for preventing harm to steep slopes by minimizing disturbance and maintaining and enhancing existing ground cover was developed and derived from a process where the evidence of best available science was in the record and was considered substantively – was it discussed, deliberated upon and balanced with other factors? The Board found BAS was included in the record and considered substantively in developing the policy preference.] [HEAL, 6312, 10/4/01 Remand Order, at 4-7.]

• The Board properly applied the State of Louisiana v. Verity to the record before it in this case. [If there are scientifically respectable conclusions disputed by rival scientific evidence of presumably equal dignity, the court will not displace the administrative choice.] The Board found that the City took evidence and included it in the record. HEAL presented evidence contrary to the evidence relied upon by the City. The Board properly concluded it could not displace the City's judgment about which science the City would rely upon as the best available science. The Board rejected the idea that the statute required any particular substantive outcome or product. The Board is correct. The legislature passed RCW 36.70A.172(1) five years after the GMA was adopted. It knew of the other factors [goals and specific requirements], but neither made best available science the sole factor, the factor above all other factors nor made it purely procedural. Instead the legislature left the cities and counties with the authority and obligation to take scientific evidence and to balance that evidence among the many goals and factors to fashion locally appropriate regulations based on the evidence not on speculation and surmise. (Citations omitted.) [HEAL, 6312, 10/4/01 Remand Order, at 6-7.]
 [The record contained scientific evidence based on "natural systems sciences" and "engineering sciences," the City discussed both sciences, discussed and deliberated on the capital and operational costs of each, then chose and used the "natural systems sciences" in developing its steep slope regulations.] The same evidence of best available science was included and substantively considered by the City when it simultaneously adopted amendments to the steep slope portion of its critical areas regulations and the amendment to its steep slope policy. Consequently, the Board concludes that the City's adoption of the steep slope (critical area) policy amendment, complies with [the BAS requirement of .172(1). [HEAL, 6312, 10/4/01 Remand Order, at 7.]

• [Respondent asserted that RCW 36.70A.172 only applies to critical area regulations and argued] "A Comprehensive Plan is a policy statement, and therefore any critical area policies are not subject to Board review." [Citing the Court of Appeals in the HEAL case, the Board concluded] Respondent is wrong on the law. [Lewis, 1320, FDO, at 14.]

• [Petitioner cited to science in the record from the City's Surface Water Management Plan, recommending regulation based upon the 500-year flood plain. Yet the City designated the 100-year flood plain as its frequently flooded area.] Although there may well be a scientific basis to support this designation, Edgewood fails to cite to a scientific basis for this 100-year flood plain designation. Consequently, the Board concludes that Edgewood's Plan declaration and designation of the 100-year flood plain, as its frequently flooded area – critical area, does not comply with the requirements of RCW 36.70A.172. [Lewis, 1320, FDO, at 15.]

• The protection and regulation of "shorelines of state-wide significance [a critical area and ecosystem] is to be based on the scientific method derived from the supportive and harmonious provisions of RCW 90.58.100 and RCW 36.70A.172. [Everett Shorelines Coalition, 02309c, FDO, at 26.]

• [A]ll "shorelines of state-wide significance" designated under Chapter 90.58 RCW are "critical areas" pursuant to RCW 36.70A.030(5). Therefore, the shoreline master program element of comprehensive plans, and all designations and development regulations that purport to control the use of land in such areas, are subject to the requirements of RCW 36.70A.060 and .172. Consequently, all shoreline master program element plan provisions and development regulations designed to govern shorelines of state-wide significance must: 1) be guided substantively by the protect, preserve, enhance and restore goals of RCW 36.70A.020(8), (10) and (14); and 2) utilize the scientific method derived from RCW 90.58.100 and RCW 36.70A.172. [Everett Shorelines Coalition, 02309c, FDO, at 26; See also Everett Shorelines Coalition, 02309c, 2/10/03 Order.]

• Regarding the critical areas regulations that are incorporated into the SMP as shoreline management implementing regulations, and the separate shoreline regulations within the SMP, the Board concludes that it cannot allow these regulations that have not been reviewed and evaluated for consistency with the GMA's [best available science] requirement to stand as significant implementing tools for the SMP. [Everett Shorelines Coalition, 02309c, FDO, at 42.]

• But for the critical areas/BAS error discussed supra, the Board would find the following regarding the City's core scientific documents: 1) that the [Snohomish Estuary Wetland Integration Program – SEWIP] complies with RCW 90.58.100(1) and constitutes BAS [RCW 36.70A.172] in support of certain use designations established by the City's SMP; 2) that concerning the compensatory mitigation measures in the [Salmon Overlay to the SEWIP – SOSEWIP], the Board does not have the same degree of confidence in concluding the SOSEWIP constitutes BAS; and 3) regarding the actual regulatory measures to be applied within the various shoreline use designations, the Board again is not confident that it can conclude that the [Use of Best Available Science in City of Everett's Buffer Regulations – Pentec Report] constitutes BAS. [Everett Shorelines Coalition, 02309c, FDO, at 42.]

• The City never contended it amended its critical areas regulations as part of the SMP update. As discussed previously, this is a fatal flaw in the City's action. Consequently, it

is undisputed that the City's shorelines implementing development regulations, including critical areas regulations and shorelines regulations in the SMP (reference omitted), were not adopted as critical areas regulations pursuant to RCW 36.70A.060, nor were they supported by best available science pursuant to RCW 36.70A.172. Moreover, the Board concludes that critical area regulations must assure no net loss of the functions and values of shorelines of state-wide significance. [Everett Shorelines Coalition, 02309c, FDO, at 45.]

• Neither the PFR nor the Petitioner's arguments and exhibits properly puts in issue the scientific basis for the County's critical areas regulations concerning wetland and stream buffer widths and vegetation management. [Petitioner did not raise BAS issues, instead challenged whether the CAO was arbitrary or inconsistent with Plan goals and policies supporting agricultural and rural lifestyles. The Board found that Petitioner did not sustain the burden of proof.] [Keesing CAO, 05301, FDO, at 36.]

• The Board recognizes that difficult questions may arise in establishing the evidentiary record in a "best available science" challenge which must be decided primarily on the basis of the record before the challenged city or county. The Board notes that the County's record here [and in other "best available science" challenges] is replete with studies that contain bibliographical references to other works by the same authors or related topics, which County staff may or may not have reviewed. The Board also notes that much science in the County's record consists of print-outs from web sites of other governmental agencies, and that these websites are updated from time to time. Pierce County states that it also received CDs from citizens and participants in its public process which purport to present relevant science. The Board is likely to be presented some difficult questions of proof as to whether city or county officials are aware of, or are required by RCW 36.70A.172(1) to be aware of, updated scientific findings. In the present challenges, however, the Board determined it was able to make its decision without considering the proffered extra-record studies. [Tahoma/Puget Sound, 05304c, FDO, at 7-8.]

• The Board finds that "best available science' was included in the designation of Lahar Inundation Zones and Lahar Travel Time Zones. To the extent the new regulations were built around that mapping exercise, they reflect best available science as required by RCW 36.70A.172(1). . . . The more troubling question is what land use regulations are required, once a hazard is acknowledged. . . . The County reasons that the only remaining question – reasonable occupancy limits [for a covered assembly in the lahar zone] – is a policy choice based on weighing risks. In the County's calculus, the low frequency of lahar events, the likelihood of early warning, and the opportunity for evacuation must be weighed against the economic opportunity presented by new tourist facilities. . . . The Board agrees with Pierce County that land use policy and responsibility with respect to Mount Rainier Case II lahars – "low probability, high consequence" events – is within the discretion of the elected officials; they bear the burden of deciding "How many people is it okay to sacrifice." [Tahoma/Puget Sound, 05304c, FDO, at 23-25.]

• The Board reads the cautionary approach recommended in the CTED guidelines [WAC 365-195-920] to refer to situations where incomplete science may result in inadequate protection for the "functions and values" of critical areas. In this case, we are not concerned with protecting the "function and values" of volcanic debris flows. Here, the science of lahar inundation hazards on Mount Rainier is sufficiently detailed; the question dealt with in the County occupancy regulations is the feasibility of rapid evacuation from sites very close to the mountain – identified by the URS report as an engineering and life-safety question rather than an issue of vulcanology.. [Tahoma/Puget Sound, 05304c, FDO, at 28.]

• [Pursuant to RCW 36.70A.480] the Board agrees with Pierce County that marine shorelines are not per se fish and wildlife habitat conservation areas [critical areas]. The Board then asks (1) whether Pierce County used best available science to protect critical fish and wildlife habitat conservation areas on its marine shorelines; (2) whether Pierce County's regulations gave priority to anadromous fish; (3) whether Pierce County's regulations protect the functions and values of marine shorelines as salmon habitat, and (4) whether a vegetative buffer is required. [The County's CAO] identifies a number of critical fish and wildlife conservation areas on its marine shorelines. These include eelgrass beds, shellfish beds, surf smelt spawning areas and the like. However, [the CAO] was drafted to designate and protect all Pierce County marine shorelines. When the County Council voted to remove the marine shorelines from critical areas, it did so (a) without ascertaining whether the remaining protected salt-water areas included all the areas important for protection and enhancement of anadromous fisheries and (b) without assessing whether the overlay of elements remaining in the CAO [i.e. steep slopes, erosion areas, eelgrass beds, etc.] would protect the "values and functions" necessary for salmon habitat. [A discussion of WEAN v. WWGMHB, 122 Wn. App. 173, (2004) follows.] [Tahoma/Puget Sound, 05304c, FDO, at 37.]

• [The Board reviewed the detailed scientific evidence in the record regarding salmon habitat along marine shorelines to determine whether the County gave "special consideration to anadromous fish."] Despite the detailed information about the function and values of salmonids habitat specific to each shoreline reach, Pierce County eliminated "marine shorelines" from the fish and wildlife habitat conservation areas listed in its critical areas ordinance without determining whether the remaining designated critical areas adequately met the needs of salmon. Undoubtedly some of Pierce County's remaining designated and mapped salt-water critical areas, such as eelgrass beds, surf smelt beaches, salt marshes and steep bluffs, overlap with habitats critical to the survival of anadromous fish. But there is nothing in the record to indicate that the high-value shoreline reaches identified by the Pentec Report for salmonids habitat [much less the restorable habitat stretches] are designated and protected in the Pierce County critical areas regulations. [Tahoma/Puget Sound, 05304c, FDO, at 38-40.]

• Deferring salmon habitat protection to a site-by-site analysis based on disaggregated factors is inconsistent with Pierce County's best available science. Nothing in the science amassed by the County supports disaggregating the values and functions of marine

shorelines. [Various studies are reviewed pertaining to the integrated function and value of salmon habitat [Tahoma/Puget Sound, 05304c, FDO, at 40.]

• The Board finds that Pierce County's site-by-site assessment of marine shorelines during the permit application process, as established in (the CAO), does not meet the requirement of using best available science to devise regulations protective of the integrated functions and values of marine shorelines as critical salmon habitat. [Tahoma/Puget Sound, 05304c, FDO, at 40-41.]

• While the 2003 GMA amendments [ESHB 1933, amending RCW 36.70A.480] prohibit blanket designation of all marine shorelines (or indeed, all freshwater shorelines) as critical fish and wildlife habitat areas, the GMA requires the application of best available science to designate critical areas, explicitly recognizing that some of these will be shorelines. The legislature sought to ensure that this correction did not create loopholes. "Critical areas within shorelines" must be protected, with buffers as appropriate, if they meet the definition of critical areas under RCW 36.70A.030(5). RCW 36.70A.480(5) and (6). [The BAS in the County's record supported the conclusion that near-shore areas meet this definition, and the BAS] may provide the basis for designating less than all of Pierce County's marine shorelines as critical habitat for salmon. ESHB 1933 does not justify Pierce County's blanket deletion of marine shorelines and marine shoreline vegetative buffer requirements from its [CAO]. [Tahoma/Puget Sound, 05304c, FDO, at 49.]

• Although Mukilteo argues that the best available science was "included" in providing the basis for the 40% buffer reduction provision from DOE Buffer Alternative 3 methodology, nothing in the record shows that best available science was even considered in making the decision. The 50% reduction that appeared very early in the City's revision process was not informed by best available science, as discussed supra, and nothing in the record indicates a reduction of more than 25% is an appropriate deviation from DOE Buffer Alternative 3 methodology. The City's argument that changes can be made from best available science recommendations without any justification for the changes would eliminate the stated purpose of the best available science requirement – protection of the function and values of critical areas. A jurisdiction must provide some rationale for departing from science based regulations. (Citation and quote from Court of Appeals Division I decision in WEAN v. Island County). [Pilchuck V, 05329, FDO, at 10-11.]

• In remanding the noncompliant regulations to [the County], the Board pointed out that . . . the record already contained abundant science concerning the matters at issue. Nevertheless, [the County] undertook additional public process and re-analysis in developing the proposal for [the remand Ordinance]. Base on the prior well-developed record, as refined in the compliance process, [the County] has now enacted both designation of critical salmon habitat in [the County] marine shorelines and measures to protect the functions and values of that habitat. While there are various ways that the science in the record might have been applied by [the County] to comply . . . the Board is persuaded that Ordinance No. 2005-80s meets the GMA standard. [Tahoma/Puget Sound, 05304c, 1/12/06 Order, at 6.]

• [A thorough discussion as to balancing of the GMA's goals and requirements in light of several decisions of the Courts including Quadrant (2005), King County (2000), and Bellevue (2003). The Board concluded that these decisions of the Supreme Court and Court of Appeals established the rule that a jurisdiction may not assert the need to balance competing GMA goals as a reason to disregard specific GMA requirements.] [DOE/CTED, 05334, FDO, at 11-13.]

• [The Board concludes that GMA goals provide a framework for plans and regulations, and many of the goals are backed and furthered by specific and directive GMA requirements and mandates. Therefore cities and counties may not merely rely in the City's record any current science supporting the truncated wetland rating system or indicating how wetland functions will be identified and protected with this system. [DOE/CTED, 05334, FDO, at 33.]

• In reenacting its three-tier wetlands ranking system, Kent failed to account for the full range of wetland functions and therefore failed in its GMA obligation to protect critical area functions and values. [As clarified in the following section, protection of functions could possibly have been provided, even under a three-tier system, with wider required buffers and other adjustments.] Retaining this outdated system ignores the advances of science and understanding of wetland functions and values that have occurred over the last decade. Retention of an obsolete, albeit "comfortable" system makes a mockery of, and totally ignores, the requirement of RCW 36.70A.130(1) that local cities and counties must update CAOs based upon BAS, which is continually being refined. [DOE/CTED, 05334, FDO, at 34.]

• The Board reviews this case under the framework laid down by the Supreme Court last year in Ferry County and adds a fourth consideration based on WEAN and on the CTED guidelines at WAC 395-195-915(c): (1) The scientific evidence contained in the record; (2) Whether the analysis by the local decision-maker of the scientific evidence and other factors involved a reasoned process; (3) Whether the decision made by the local government was within the parameters of the Act as directed by the provisions of RCW 36.70A.172(1); AND (4) Whether there is justification for departure from BAS. [DOE/CTED, 05334, FDO, at 42.]

• [W]here science deals with complex, multi-faceted phenomena, scientific analysis and findings are likely to be complex. And where private economic interests or deeply-held beliefs are impacted, scientific conclusions are sure to be contentious. [DOE/CTED, 05334, FDO, at 38.]

• [T]he complexity of wetlands protection is a function of the interplay between land uses, the specific wetland functions at risk, the degree of effectiveness, and other factors that might be more accurately assessed on a case-by-case basis. Where prescriptive regulation is enacted, a first step is designing a ranking system that reflects the full range of wetland functions and so addresses the protection of all functions. [DOE/CTED, 05334, FDO, at 39.]

• The Legislature determined that scientific understanding of the necessary critical area protections would improve over time; thus, cities do not have to answer all the scientific questions they can think of but only need to apply the best science available at a particular time and place. [DOE/CTED, 05334, FDO, at 39.]

• Mere recitals on the part of the local government that it "considered" BAS and chose to depart from it in the service of other GMA goals are inadequate. The justifications for departure must be supported by evidence in the record. [DOE/CTED, 05334, FDO, at 53.]

• [An analysis is required to demonstrate how the various regulations, projects, and programs, together or separately, protect the specific hydrologic, water quality and habitat functions and values of a City's wetlands allow for, under WEAN, a departure from protections that are within the range of best available science.] [DOE/CTED, 05334, FDO, at 48-49.]

• [BAS is required in developing measures to protect the function and value of critical areas. BAS is not a prerequisite for a rezone.] If Petitioners believed that the City's identification, designation and protection of geologically hazardous areas along the western edge of the City was clearly erroneous, Petitioner's could have challenged the City's adoption of its critical areas regulations, the City's identification and designation of geologically hazardous areas, or the Comprehensive Plan's land use designations for the area. Petitioner did none of the above, and it is untimely to challenge any of those actions at this time. To now challenge the zoning designations that implement the unchallenged Plan designations, which are admittedly based upon BAS, is without merit. Both parties have demonstrated that BAS, as reflected in adopted documents, was part of the record in this rezoning action. [Abbey Road, 05348, FDO, at 11.]

• [The County exempted from regulation very small, truly isolated and poorly functioning wetlands. The County was advised by state agencies that such exemptions were not supported by BAS. The Board reviewed the case of Clallam County v. Western Washington Growth Management Hearings Board, 130 Wash. App. 127, 140, 121 P.3d 764 (2005), pertaining to the limitations on exemptions from critical areas regulations.] The Board reads the Court's opinion to require CAO exemptions to be supported by some analysis of cumulative impacts and corresponding mitigation or adaptive management. Here, Kitsap County has not expanded its small wetlands exemption; in fact the exemption has been somewhat narrowed. But there is no evidence in the record of the likely number of exempt wetlands, no cumulative impacts assessment or adaptive management, and no monitoring program to assure no net loss. In light of the Court's guidance in Clallam County, which the Board finds controlling, the Board is persuaded that a mistake has been made; Kitsap's wetland exemption is clearly erroneous. [Hood Canal, 06312c, FDO, at 19-20.]

• Petitioner KAPO contends that the County may not rely on federal habitat designations undertaken for another purpose but must conduct its own shoreline inventory or "independent analysis" and show in the record its owned "reasoned process." The Board

however, reasons that the "best available science" requirement includes the word "available" as an indicator that a jurisdiction is not required to sponsor independent research but may rely on competent science that is provided from other sources. . . .The Board concludes that the County appropriately relied on available science. [Hood Canal, 06312c, FDO, at 30.]

• HEAL reminds us that the choice of a city or a county, when faced with competing options for protecting critical areas – each based on competent and current science – is entitled to deference. Kitsap County chose the prescriptive buffer approach, with flexible alternatives, because it found the BAS supporting that approach more persuasive and because it was administratively feasible. The Board is not persuaded that the County's choice was erroneous. [Hood Canal, 06312c, FDO, at 35-36.]

• Kitsap County's marine buffers buffer widths are assigned based on SMA land use classifications, not based on the functions and values of the critical areas designation – here, fish and wildlife habitat conservation areas. . . .The County has not differentiated among the functions and values that may need to be protected on shorelines that serve, for example, as herring and smelt spawning areas, juvenile upon GMA goals, standing alone, to dilute or override GMA requirements.] [DOE/CTED, 05334, FDO, at 52-53.]

• [The Board acknowledges the language used by the Court of Appeals in both the HEAL case and subsequently in WEAN that apparently allows "balancing" in the context of critical areas regulation. In the CAO context, such "balancing" is clearly appropriate if GMA requirements are in conflict, but there is no hard evidence here to support such a divergence from wetland ranking and buffers based on best available science.] [DOE/CTED, 05334, FDO, at 53.]

• [A thorough discussion of the GMA's Best Available Science (BAS) requirement in the context of HEAL (1999) and Ferry County (2005). The Board reiterated the Supreme Court's holding in Ferry County, finding that the Court's 3-factor analysis - (1) The scientific evidence contained in the record; (2) Whether the analysis by the local decision-maker of the scientific evidence and other factors involved a reasoned process; and (3) Whether the decision made by the local government was within the parameters of the Act as directed by the provisions of RCW 36.70A.172(1) - is a case-by-case, rather than a bright-line, review.] [DOE/CTED, 05334, FDO, at 13-15.]

• The GMA mandate at issue in the present case, as in WEAN, is the requirement that local jurisdictions include best available science in designating critical areas and protecting their functions and values. Once a challenger has demonstrated that there is no science or outdated science in the City's record in support of its ordinance, or that the City's action is contrary to what BAS supports, it does not impermissibly shift the burden of proof for the Board to review the City's record to determine what science, if any, it relied upon. This is precisely the process undertaken in the Ferry County case. See generally, Ferry County, supra. It is Petitioners' burden to prove by clear and convincing evidence that the City's ordinance does not comply with the GMA because it does not include BAS for wetlands protection. [DOE/CTED, 05334, FDO, at 17.]

• The GMA imposes a requirement to protect critical area functions and values based on best available science. Wetland classification schemes are not necessary, but if used, they must be based on BAS in order to ensure that the related buffer requirements provide the needed protections. [DOE/CTED, 05334, FDO, at 31]

• [T]he Petitioners have met their burden of proof by demonstrating that the City's record lacks a current scientific basis for its wetlands rating system and that the three-tier system is designed "with specific and narrow functions in mind," rather than protecting "the entirety of functions" of the City's wetlands. The Board does not find
chum rearing areas, Chinook migratory passages, shellfish beds or have other values. Rather they have chosen an undifferentiated buffer width that is at or below the bottom of the effective range for pollutant and sediment removal cited in [BAS]. And they have applied that buffer to SMP land use classifications, not to the location of specific fish and wildlife habitat. . . .The flaw [in this approach] is illustrated by the fact that eelgrass, kelp, and shellfish beds are protected by larger buffers if they happen to be off shores designated Natural or Conservancy [in the SMP], while the same critical resources – eelgrass, kelp, shellfish – have just 35 feet of buffer off the Urban, Semi-rural or Rural shore. Protection for critical areas functions and values should be based first on the needs of the resource as determined by BAS. . . .Here Kitsap County has opted to designate its whole shoreline as critical area but then has not followed through with the protection of all the applicable functions and values. [Hood Canal, 06312c, FDO, at 39-41.] • [Discussion of "immature science" dilemma. It is always evolving, with more questions being raised, requiring more data and analysis.] [Hood Canal, 06312c, FDO, at 41-42.]

• [T]he GMA requires that critical areas regulations be updated periodically, RCW 36.70A.130(3), and that cities "shall include" best available science in designating critical areas, RCW 36.70A.172(1). Here, the City of Seattle is aware of a great deal of new science concerning the existence and location of surficial faults and concerning the past occurrence and future risks of tsunamis and lahars. But the City has not included this new science, even provisionally, in its designations of geological hazard areas. [Seattle Audubon, 06324, FDO, at 19.]

Critical Areas - CAs

• The GMA's definition of "critical areas" at RCW 36.70A.030(5) is not exclusive and prescriptive: local governments must consider, but are not bound by, that definition and the definitions used in the minimum guidelines developed by CTED. Local governments also have the authority to modify existing definitions or adopt their own to meet local requirements as long as those definitions comply with the GMA. [Tracy, 2301, FDO, at 23.]

• While cities have broad discretion as to the content of their comprehensive plans, this discretion is not limitless. It is subject to several practical and legal limitations.
1. As a practical matter, the localized rate of growth within a UGA or within a city is strongly dependent upon the dynamics of the market.

2. The Act's requirement of internal consistency between the elements of the plan, and with the future land use map, will require the local choices to reflect the capabilities of the existing capital facilities and/or the ability to create sufficient future capabilities.
3. The broad discretion enjoyed by a city regarding the location and configuration of growth within its boundaries is tempered by the GMA's requirement that the legislative body must substantively comply with the planning goals of RCW 36.70A.020 when adopting comprehensive plans.
4. Critical area and natural resource land designations and development regulations must be adopted pursuant to RCW 36.70A.060 and .170 separate from and prior to adoption of the comprehensive plan.
5. There are certain specific provisions of the Act that permit state or regional policy decisions to limit the range of local discretion in a comprehensive plan. [Aagaard, 4311c, FDO, at 9.]

• Any smaller rural lots will be subject to increased scrutiny by the Board to assure that the pattern of such lot sizes (their number, location and configuration) does not constitute urban growth; does not represent an undue threat to large scale natural resource lands, such as forest lands, and large scale critical areas, such as aquifers; will not thwart the long term flexibility to expand the UGA; and will not otherwise be inconsistent with the goals and requirements of the Act. [Vashon-Maury, 5308c, FDO, at 79.]

• Whether a county or city elects to include critical areas maps that it has prepared in other documents within its comprehensive plan is left to the jurisdiction's discretion. Counties are not precluded from including designated critical areas within UGAs, so long as they protect them as required by RCW 36.70A.060. [Gig Harbor, 5316c, FDO, at 28.]

• Two of the Act's most powerful organizing concepts to combat sprawl are the identification and conservation of resource lands and the protection of critical areas (see RCW 36.70A.060 and .170) and the subsequent setting of urban growth areas (UGAs) to accommodate urban growth (see RCW 36.70A.110). It is significant that the Act required cities and counties to identify and conserve resource lands and to identify and protect critical areas before the date that IUGAs had to be adopted. This sequence illustrates a fundamental axiom of growth management: "the land speaks first." [Bremerton, 5339c, FDO, at 31.]

• The Act requires local governments to designate all lands within their jurisdiction which meet the definition of critical areas. Any exemptions, exclusions, limitations on applicability or other regulatory provisions which result in not designating all critical areas, are prohibited. The requirement to designate may be met by designating or mapping known critical areas now or by adopting a process to designate or map them as information becomes available. [Pilchuck II, 5347c, FDO, at 19.]

• All lands that are designated critical areas pursuant to RCW 36.70A.170 must be protected by critical area development regulations adopted pursuant to RCW 36.70A.060, and such lands may not be exempted or excluded from protection. However, not all

critical areas must be protected in the same manner or to the same degree. [Pilchuck II, 5347c, FDO, at 19.]

• The Act's directive that local governments are to "protect" critical areas means that they are to preserve the structure, value and functions of wetlands, aquifer recharge areas used for potable water, fish and wildlife habitat conservation areas, frequently flooded areas and geologically hazardous areas. [derived from WAC 365-195-825(2)(b)] [Pilchuck II, 5347c, FDO, at 20.]

• It is the structure, value and functions of critical areas that are inviolate, not the critical areas themselves. The "protect critical areas" mandate does not equate to "do not alter or negatively impact critical areas in any way." While the preservation of the structure, value and functions of wetlands, for example, is of paramount importance, the Act does not flatly prohibit any alteration of or negative impacts to such critical areas. [Pilchuck II, 5347c, FDO, at 20.]

• The Act's requirement to protect critical areas means that the structure, value and functions of such natural systems are inviolate. While local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in a net loss of the structure, value and functions of such natural systems within a watershed or other functional catchment area. [Pilchuck II, 5347c, FDO, at 21.]

• The GMA requires designation and protection of critical areas and makes no qualifying statement that, for example, urban wetlands are any less important or deserving of protection than rural ones. As a practical matter, past development practices may have eliminated and degraded wetlands in urban areas to a greater degree than rural areas, but the Board rejects the reasoning that this provides a GMA rationale for not protecting what is left. [Pilchuck II, 5347c, FDO, at 23.]

• The requirement that critical areas are to be protected in the urban area is not inconsistent with the Act's predilection for compact urban development. [Pilchuck II, 5347c, FDO, at 24.]

• The legislature required cities and counties to designate fish and wildlife habitat conservation areas only; the legislature did not mandate that cities and counties designate every parcel of land that constitutes fish and wildlife habitat. [Pilchuck II, 5347c, FDO, at 31.]
• RCW 36.70A.170 and .060 require cities and counties to designate fish and wildlife habitat conservation areas and adopt development regulations to protect them for all species of fish and wildlife found within them. [Pilchuck II, 5347c, FDO, at 32.]

• The Act's mandate for protection requires either a buffer, or a functionally equivalent protection for all wetlands, including category 4 wetlands. It may well be that some or

even most category 4 wetlands can be protected by means other than a buffer. However, . . . some mechanism is needed to protect these areas. [Pilchuck II, 5347c, FDO, at 35.]

• The use of performance standards is recommended in the Minimum Guidelines for "circumstances where critical areas (e.g., aquifer recharge areas, wetlands, significant wildlife habitat, etc.) cannot be specifically identified." WAC 365-190-040(1). However, where critical areas are known, cities and counties cannot rely solely upon performance standards to designate these areas. [Pilchuck II, 5347c, FDO, at 41-42.]

• The fact that a portion of a parcel of land contains critical areas does not preclude any development whatsoever on the parcel. Instead, the Act requires that critical areas be protected. As long as that mandate is met, other, non-critical portions of land can be developed as appropriate under the applicable land use designation and zoning requirements. Furthermore, development of critical areas is not absolutely prohibited as long as those areas are adequately protected. [Anderson Creek, 5353c, FDO, at 19.]

• The presence of special environmental constraints, natural hazards and environmentally sensitive areas may provide adequate justification for residential densities under 4 du/acre within a UGA. [Benaroya I, 5372c, 3/13/97, Order, at 13.]

• Neither goal (1) and (2) nor Anderson Creek establish a GMA duty that precludes a jurisdiction from limiting the scope and magnitude of development in critical areas or environmentally sensitive areas. [Litowitz, 6305, FDO, at 9.]

• When environmentally sensitive systems are large in scope (e.g., a watershed or drainage sub-basin), their structure and functions are complex and their rank order value is high, a local government may also choose to afford a higher level of protection by means of land use plan designations lower than 4 du/acre. Such designation must be supported by adequate justification. [Litowitz, 6305, FDO, at 12.]

• RCW 36.70A.172 does not impose a requirement that cities and counties adopt policies to protect critical areas; therefore, the Board does not have jurisdiction to hear an appeal of the City's resolution adopting such policies. Such a requirement cannot be implied by RCW 36.70A.170 or .060. [HEAL, 6312, FDO, at 15.]

• Amendments to a previously adopted critical areas ordinance, after the effective date of a legislative amendment (BAS − RCW 36.70A.172) of the GMA, are subject to the best available science requirement of RCW 36.70A.172(1). [HEAL, 6312, FDO, at 17.]

• The Act's requirement to protect critical areas, particularly wetlands and fish and wildlife habitat conservation areas, means that the structure, values and functions of such natural ecosystems are inviolate must be maintained. While local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in the net loss of the structure, value and functions of such natural ecosystems within a watershed or other catchment area.

[Tulalip, 6329, FDO, at 11, amending a holding in Pilchuck II, FDO 5347, pursuant to a Superior Court remand]

• Local governments have the flexibility to adopt critical area development regulations that would permit the reduction of the geographic extent of, for example, a wetland. This could result in the loss of all or a portion of an individual site-specific critical area, so long as the values and functions of the ecosystem in which the critical area is located is not diminished. [Tulalip, 6329, FDO, at 11.]

• Certain critical areas, such as wetlands and fish and wildlife habitat areas, constitute ecosystems that transcend the boundaries of individual properties and jurisdictions, and that it is therefore necessary to address certain critical area issues on a watershed level. [Tulalip, 6329, FDO, at 11-12.]

• The GMA requires jurisdictions to adopt development regulations that protect critical areas; jurisdictions have the authority to supplement the GMA's mandated regulatory protection of critical areas with non-regulatory programs. [Tulalip, 6329, FDO, at 12.]

• RCW 36.70A.050, .170, and .172 provide the required analytical rigor and scientific scrutiny for identifying, designating and protecting critical areas. While local governments have some discretion in identifying, designating and protecting critical areas they may not [use alternative means or] ignore the critical areas requirements (RCW 36.70A.050, .060, .170 and .172) of the GMA. [LMI/Chevron, 8312, FDO, at 17.]

• Application of the GMA's scientific and analytic critical areas process may, in certain limited instances, provide information to justify supplementary use of land use designations on the Plan's future land use map as an additional layer of critical areas protection. [LMI/Chevron, 8312, FDO, at 17.]

• When critical areas are large in scope, with a high rank order value and are complex in structure and function, a city may use its future land use map designations to afford a higher level of critical areas protection than is available through its regulations to protect critical areas. In these limited circumstances, the resulting residential density will be deemed an appropriate urban density. [LMI/Chevron, 8312, FDO, at 25.]

• [Absent the requisite environmental attributes of a critical area that is large in scope, of high rank order value and is complex in structure and function, [a city's] future land use map density designations must permit appropriate urban densities. [LMI/Chevron, 8312, FDO, at 26.]

• Although the Booth studies document the basin-wide 10 percent impervious surface threshold for damage to aquatic systems, the studies also identify measures to mitigate the effects of impervious surfaces. [Bremerton/Alpine, 5339c/8332c, FDO, at 31.]

• Rather than adopting a maximum limit on impervious surfaces . . . the County, utilizing best available science in a substantive way, adopted a system for critical areas protection

that includes buffers, building setbacks, mitigation, and storm water drainage controls. [Bremerton/Alpine, 5339c/8332c, FDO, at 32.]

• [Even if a maximum impervious basin-wide coverage of 10 percent constitutes the best available science, petitioners have not shown that the adopted regulations allow more than 10 percent basin-wide impervious surface coverage. [Bremerton/Alpine, 5339c/8332c, FDO, at 32.]

• Under the sequencing scheme of the GMA, the land does speak first; but, on the rare occasion, as is the case here, where the land may speak late − it will be heard. [Bremerton/Alpine, 5339c/8332c, FDO, at 35.]

• [The Tribe] has raised important and provocative questions about the responsibility of a city to protect fish habitat in view of the recent federal listings of Chinook salmon, bull trout, and other species. The GMA contains specific requirements for local governments to designate and protect critical areas, including fish and wildlife habitat. . . . Significantly, the Tribes insist that they are not challenging the City's critical areas regulations adopted pursuant to [the GMA]. They instead assert that the City' [adoption of a Subarea Plan] violates the GMA because the Subarea Plan and critical areas regulations are inextricably intertwined. [Tulalip II, 9313, 1/28/00 Order, at 4.]

• When any local government in the Central Puget Sound region adopts amendments to policies and regulations that purport to protect critical areas pursuant to RCW 36.70A.060(2), those enactments will be subject to meeting the best available science requirements of RCW 36.70A.172 and the potential of appeal to this Board pursuant to RCW 36.70A.280. [Tulalip II, 9313, 1/28/00 Order, at 4.]

• The critical area scheme set out by the GMA for [jurisdictions] is: (1) designate critical areas by September 1, 1991; (2) adopt development regulations to protect these designated critical areas by September 1, 1991; and (3) when adopting a comprehensive plan by the July 1, 1994 deadline, review the critical area designations and protective development regulations. In other words, the requirement of RCW 36.70A.060(3) applies to the adoption of the initial comprehensive plan required by RCW 36.70A.040; nothing in RCW 36.70A.060(3) creates a duty for the [jurisdiction] to review its critical area designations and development regulations upon adoption of a subsequent subarea plan. [Tulalip II, 9313, 1/28/00 Order, at 10.]

• [Respondent asserted that RCW 36.70A.172 only applies to critical area regulations and argued] "A Comprehensive Plan is a policy statement, and therefore any critical area policies are not subject to Board review." [Citing the Court of Appeals in the HEAL case, the Board concluded] Respondent is wrong on the law. [Lewis, 1320, FDO, at 14.]

• [Petitioner cited to science in the record from the City's Surface Water Management Plan, recommending regulation based upon the 500-year flood plain. Yet the City designated the 100-year flood plain as its frequently flooded area.] Although there may well be a scientific basis to support this designation, Edgewood fails to cite to a scientific

basis for this 100-year flood plain designation. Consequently, the Board concludes that Edgewood's Plan declaration and designation of the 100-year flood plain, as its frequently flooded area – critical area, does not comply with the requirements of RCW 36.70A.172. [Lewis, 1320, FDO, at 15.]

• GMA critical areas and SMA shorelines are found in all three fundamental land use types (urban, rural and resource lands). When this occurs, the inherent natural attributes of the critical areas and shorelines will affect, and may limit, or prohibit, development of certain lands within such areas. . . .These inherent natural attributes place constraints on the development of land that are typically eliminated, minimized or mitigated as development proceeds. Nonetheless, the inherent natural attributes of the land must be given substantial weight in differentiating the fundamental land use types and the compatibility of various land uses, improvements and activities. [Everett Shorelines Coalition, 02309c, FDO, at 16-17.]

• From a review of the interplay between the relevant provisions of the two statutes, the Board concludes that, while development will continue to be permitted within the shorelines of the state, the primary and paramount goal, objective and purpose of the GMA/SMA total statutory scheme is to preserve, protect, enhance and restore the resources, ecology and ecosystem functions of the shorelines of the state, with special consideration paid to habitat for anadromous fish. [Everett Shorelines Coalition, 02309c, FDO, at 23.]

• In addition to wetlands, such "ecosystems" include "areas with a critical recharging effect on aquifers used for potable water," "fish and wildlife habitat conservation areas," and "frequently flooded areas." These features collectively constitute the component parts of the hydrologic ecosystems that are "shorelines of state-wide significance." [Everett Shorelines Coalition, 02309c, FDO, at 24.]

• It is difficult to imagine a shoreline ecology, that is the subject of the SMA planning regime, that does not consist of "ecosystem" values and functions defined by wetlands, critical aquifer recharge areas, fish and wildlife habitat conservation areas and frequently flooded areas. The two regulatory schemes plainly address the same natural landscape, the same natural attributes, and the same natural processes. It is an inescapable conclusion that SMA "shorelines of statewide significance," are critical areas that are "large in scope, complex in structure and functions, and of a high rank order value." (Citation omitted) The Board concludes that shorelines of state-wide significance are critical areas subject to both the GMA and the SMA. [Everett Shorelines Coalition, 02309c, FDO, at 24; See also Everett Shorelines Coalition, 02309c, 2/10/03 Order.]

• The protection and regulation of "shorelines of state-wide significance [a critical area and ecosystem] is to be based on the scientific method derived from the supportive and harmonious provisions of RCW 90.58.100 and RCW 36.70A.172. [Everett Shorelines Coalition, 02309c, FDO, at 26.]

• [A]ll "shorelines of state-wide significance" designated under Chapter 90.58 RCW are "critical areas" pursuant to RCW 36.70A.030(5). Therefore, the shoreline master program element of comprehensive plans, and all designations and development regulations that purport to control the use of land in such areas, are subject to the requirements of RCW 36.70A.060 and .172. Consequently, all shoreline master program element plan provisions and development regulations designed to govern shorelines of state-wide significance must: 1) be guided substantively by the protect, preserve, enhance and restore goals of RCW 36.70A.020(8), (10) and (14); and 2) utilize the scientific method derived from RCW 90.58.100 and RCW 36.70A.172. [Everett Shorelines Coalition, 02309c, FDO, at 26; See also Everett Shorelines Coalition, 02309c, 2/10/03 Order.]

• Regarding the critical areas regulations that are incorporated into the SMP as shoreline management implementing regulations, and the separate shoreline regulations within the SMP, the Board concludes that it cannot allow these regulations that have not been reviewed and evaluated for consistency with the GMA's [best available science] requirement to stand as significant implementing tools for the SMP. [Everett Shorelines Coalition, 02309c, FDO, at 42.]

• But for the critical areas/BAS error discussed supra, the Board would find the following regarding the City's core scientific documents: 1) that the [Snohomish Estuary Wetland Integration Program – SEWIP] complies with RCW 90.58.100(1) and constitutes BAS [RCW 36.70A.172] in support of certain use designations established by the City's SMP; 2) that concerning the compensatory mitigation measures in the [Salmon Overlay to the SEWIP – SOSEWIP], the Board does not have the same degree of confidence in concluding the SOSEWIP constitutes BAS; and 3) regarding the actual regulatory measures to be applied within the various shoreline use designations, the Board again is not confident that it can conclude that the [Use of Best Available Science in City of Everett's Buffer Regulations - Pentec Report] constitutes BAS. [Everett Shorelines Coalition, 02309c, FDO, at 42.]

• The City never contended it amended its critical areas regulations as part of the SMP update. As discussed previously, this is a fatal flaw in the City's action. Consequently, it is undisputed that the City's shorelines implementing development regulations, including critical areas regulations and shorelines regulations in the SMP (reference omitted), were not adopted as critical areas regulations pursuant to RCW 36.70A.060, nor were they supported by best available science pursuant to RCW 36.70A.172. Moreover, the Board concludes that critical area regulations must assure no net loss of the functions and values of shorelines of state-wide significance. [Everett Shorelines Coalition, 02309c, FDO, at 45.]

• The natural systems that are purported to be regulated by the City's SMP for shorelines of state-wide significance reveals that these areas constitute critical areas and are subsumed within the hydrological ecosystems discussed at RCW 36.70A.030(5) and discussed in the FDO, at 23-26. [Everett Shorelines Coalition, 02309c, 2/10/03 Order, at 5.]

• The Board's conclusion that these SMA shorelines of state-wide significance are GMA critical areas does not limit or skew the range of preferred or permitted land use designations adopted pursuant to the SMA nor does it preclude development within 200 feet of the ordinary high water mark. It is understandable that this may be a new and different concept, given that traditional critical areas regulations have frequently focused on such inland aquatic features as wetlands, streams, lakes and rivers, rather than estuaries and salt-water environments. Moreover, such traditional critical areas regulations have largely been concerned with matters such as buffers and setbacks. However, while development standards will continue to be an issue even in shorelines with an intensive, committed pattern of land use, the primary consequence of the critical area status for such lands will be a duty to evaluate and take necessary actions to assure protection of these ecosystems. [Everett Shorelines Coalition, 02309c, 2/10/03 Order, at 7.]

• Once critical areas have been identified and designated, they must also be protected. (Citation omitted.) There are at least two levels of protection: first, the designation level, which prescribes the permitted uses allowed within the designated area(s); and second, the development standards level, which articulates the specific requirements and standards that governs the actual development of the permitted uses within the designation. In this case the Board reviewed the designation level – the designations adopted by Everett, and approved by Ecology, to five different area designations in the Shoreline Master Program. Through the use of the information portrayed and contained in the SEWIP (a BAS document), the Board concluded that either specific designations did, or did not, comply with the first level protections required by the GMA/SMA statutory scheme. However, since the City conceded it had relied, in part, upon existing sensitive area regulations (which contain the development standards), which had not been revised or updated as required by RCW 36.70A.172, the Board found that this level of protection did not comply with the requirements of the integrated GMA/SMA statutory scheme. [Everett Shorelines Coalition, 02309c, 2/10/03 Order, at 7.]

• It is generally accepted, and not disputed here, that 4 dwelling units per acre is an appropriate urban density. However, the Board has stated that, in certain circumstances, urban densities of less than 4 dwelling units per acre can be an appropriate urban density, and therefore comply with Goals 1 and 2. "Whenever environmentally sensitive systems are large in scope (e.g., watershed or drainage sub-basin), their structure and functions are complex and their rank order value is high, a local government may choose to afford a higher level of protection by means of land use plan designations lower than 4 du/acre." Litowitz v. City of Federal Way, CPSGMHB Case No. 96-3-0005, Final Decision and Order, (Jul. 22, 1997), at 12. The Litowitz test, although originally used to assess a land use plan designation, is also the appropriate test to apply here in relation to the challenged zoning designations. [MBA/Brink, 02310, FDO, at 15.]

• The County makes no pretense or effort to explain the [2-4 du/acre zone designation] by suggesting it is necessary to preserve large scale, complex and high value critical areas, as it did for the [1-3 du/acre zone designation]. Therefore the foundation for any lower

density designations [below 4 du/acre], is absolutely absent. [Therefore, the designation does not comply with Goals 1 and 2.] [MBA/Brink, 02310, FDO, at 20.]

• The County's approach, to rely on identification of [aquifer recharge areas] on a site-by-site basis, is within the range of choices available to local governments to satisfy the designate and protect mandates for critical areas. [Sakura, 02321, 2/12/03 Order, at 4.]

• The large scale environmentally sensitive hydrologic system that provided the context for the Board's analysis in the FDO is the Clover Creek drainage. As noted in the MBA's quote from the Board's FDO, the 729 acres zoned RR in Area 1 contains "isolated, sporadic and scattered occurrences of flooding, wetlands or priority habitat that can be appropriately addressed through existing critical areas regulation." In essence, the Board concluded that Area 1 was not an integral and significant part of the large scale environmentally sensitive system at issue – Clover Creek. Nothing has changed. [MBA/Brink, 02310, 9/4/03 Order, at 7.]

• [In its FDO, the Board did not address an issue related to compliance with the GMA's critical areas provisions. Petitioners asked that this issue be addressed during the compliance phase; Respondent argued the Board no longer had jurisdiction to resolve this issue. A majority of the Board agreed.] While both sides present cogent arguments [regarding continuing jurisdiction over the issue], the most compelling is the argument that the Petitioners did not avail themselves of the opportunity to file a post-FDO motion specifically requesting that the Board also address Legal Issue No. 5 [the CA issue]. Had Petitioners done so, the Board clearly would have had jurisdiction to answer [it] in the context of clarifying or reconsidering the FDO. The Board concludes that it lacks authority to answer [the issue] during the compliance phase of this proceeding. [1000 Friends I, 03319c, 6/24/04 Order, at 8.]

• [In addition to the indicators of long-term commercial significance articulated at WAC 365-190-050(a through j), land-owner intent, current use, and "commercial viability" may be considered, but none of these individual factors can be conclusive in determining long-term commercial significance. Likewise, the presence or absence of critical areas may affect decisions regarding long-term commercial significance.] [Orton Farms, 04307c, FDO, at 26-28.]

• [Goals 8 and 10, by themselves] do not impose a requirement upon jurisdictions to conduct a critical areas analysis of potential impacts of the adoption, or amendment of, GMA Plans and development regulations. [Bremerton II, 04309c, FDO, at 27.]

• [The Board found that in updating the CAO the County considered the CTED guidelines in protecting critical aquifer recharge areas. The classification based on vulnerability to contamination was based upon best available science. The County is not restricted to reliance upon sole source aquifers and wellhead protection zones.] [Keesing CAO, 05301, FDO, at 11-12.]

• The GMA "requires all local governments to designate all lands within their jurisdictions which meet the definition of critical areas." (Citation omitted.) Agricultural lands cannot be excluded. [The County's designation of critical areas within an agricultural production district] recognizes the dual obligation under GMA to protect agricultural resource lands and to protect long-term water quality for people and for fish and wildlife. The Board will defer to King County in the balance it has struck. [Keesing CAO, 05301, FDO, at 11-12.]

• [Petitioner's appeal of certain drainage and grading regulations is based on misreading the challenged provisions.] While the Board agrees with the County [in its explanation of challenged regulations], it is not unsympathetic to Petitioner in her effort to understand the County's complex regulatory regime. It would have served the County well to simplify its regulations in the first place and not have to rely upon "clarifying" and "supporting" documents to glean an understanding of the County's regulations. [Keesling CAO, 05301, FDO, at 22.]

• The GMA defines geologically hazardous areas as areas that are not suited to siting of . . . development consistent with public health or safety concerns," [RCW 36.70A.030(9)], but there is no affirmative mandate associated with this definition except to "protect the functions and values." Petitioners have not persuaded the Board that the requirement to protect the functions and values of critical areas has any meaning with respect to volcanic hazard areas or that the GMA contains any independent life-safety mandate. [Tahoma/Puget Sound, 05304c, FDO, at 25.]

• The Board finds that "best available science' was included in the designation of Lahar Inundation Zones and Lahar Travel Time Zones. To the extent the new regulations were built around that mapping exercise, they reflect best available science as required by RCW 36.70A.172(1). . . . The more troubling question is what land use regulations are required, once a hazard is acknowledged. . . . The County reasons that the only remaining question – reasonable occupancy limits [for a covered assembly in the lahar zone] – is a policy choice based on weighing risks. In the County's calculus, the low frequency of lahar events, the likelihood of early warning, and the opportunity for evacuation must be weighed against the economic opportunity presented by new tourist facilities. . . . The Board agrees with Pierce County that land use policy and responsibility with respect to Mount Rainier Case II lahars – "low probability, high consequence" events – is within the discretion of the elected officials; they bear the burden of deciding "How many people is it okay to sacrifice." [Tahoma/Puget Sound, 05304c, FDO, at 23-25.]
The County has prohibited density bonuses in lahar hazard zones, provided maps of flow zones which are available on line, launched significant public and landowner information and outreach, created and installed warning systems where feasible, prohibited critical facilities, and limited special occupancies and covered assemblies. The Board finds that [Plan Policies] that might apply to the occupancies at issue here are equivocal and do not provide a basis for overturning the covered assembly occupancies in Case II, Travel Time Zone A, Lahar Inundation Zones. [Tahoma/Puget Sound, 05304c, FDO, at 31.]

• [Pursuant to RCW 36.70A.480] the Board agrees with Pierce County that marine shorelines are not per se fish and wildlife habitat conservation areas [critical areas]. The Board then asks (1) whether Pierce County used best available science to protect critical fish and wildlife habitat conservation areas on its marine shorelines; (2) whether Pierce County's regulations gave priority to anadromous fish; (3) whether Pierce County's regulations protect the functions and values of marine shorelines as salmon habitat, and (4) whether a vegetative buffer is required. [The County's CAO] identifies a number of critical fish and wildlife conservation areas on its marine shorelines. These include eelgrass beds, shellfish beds, surf smelt spawning areas and the like. However, [the CAO] was drafted to designate and protect all Pierce County marine shorelines. When the County Council voted to remove the marine shorelines from critical areas, it did so (a) without ascertaining whether the remaining protected salt-water areas included all the areas important for protection and enhancement of anadromous fisheries and (b) without assessing whether the overlay of elements remaining in the CAO [i.e. steep slopes, erosion areas, eelgrass beds, etc.] would protect the "values and functions" necessary for salmon habitat. [A discussion of WEAN v. WWGMHB, 122 Wn. App. 173, (2004) follows.] [Tahoma/Puget Sound, 05304c, FDO, at 37.]

• [The Board reviewed the detailed scientific evidence in the record regarding salmon habitat along marine shorelines to determine whether the County gave "special consideration to anadromous fish."] Despite the detailed information about the function and values of salmonids habitat specific to each shoreline reach, Pierce County eliminated "marine shorelines" from the fish and wildlife habitat conservation areas listed in its critical areas ordinance without determining whether the remaining designated critical areas adequately met the needs of salmon. Undoubtedly some of Pierce County's remaining designated and mapped salt-water critical areas, such as eelgrass beds, surf smelt beaches, salt marshes and steep bluffs, overlap with habitats critical to the survival of anadromous fish. But there is nothing in the record to indicate that the high-value shoreline reaches identified by the Pentec Report for salmonids habitat [much less the restorable habitat stretches] are designated and protected in the Pierce County critical areas regulations. [Tahoma/Puget Sound, 05304c, FDO, at 38-40.]
• Deferring salmon habitat protection to a site-by-site analysis based on disaggregated factors is inconsistent with Pierce County's best available science. Nothing in the science amassed by the County supports disaggregating the values and functions of marine shorelines. [Various studies are reviewed pertaining to the integrated function and value of salmon habitat [Tahoma/Puget Sound, 05304c, FDO, at 40.]

• The Board finds that Pierce County's site-by-site assessment of marine shorelines during the permit application process, as established in (the CAO), does not meet the requirement of using best available science to devise regulations protective of the integrated functions and values of marine shorelines as critical salmon habitat. [Tahoma/Puget Sound, 05304c, FDO, at 40-41.]

• A final issue is whether vegetative buffers are required. Pierce County declined to establish a regulatory requirement for vegetative buffers on marine shorelines, except to the extent they might be required in connection with a narrower protective regime

(eelgrass beds, for example, or bald eagle nesting sites), and has substituted a 50-foot setback from ordinary high water mark. There is a wealth of scientific opinion in the County's record supporting vegetative buffers to protect multiple functions and values of marine shoreline salmon habitat. [The Board reviewed the record documents provided to the County; and concludes that the County rejected the recommendations of experts and agencies with expertise without any sound reasoned process.] [Tahoma/Puget Sound, 05304c, FDO, at 41-44.]

• While the 2003 GMA amendments [ESHB 1933, amending RCW 36.70A.480] prohibit blanket designation of all marine shorelines (or indeed, all freshwater shorelines) as critical fish and wildlife habitat areas, the GMA requires the application of best available science to designate critical areas, explicitly recognizing that some of these will be shorelines. The legislature sought to ensure that this correction did not create loopholes. "Critical areas within shorelines" must be protected, with buffers as appropriate, if they meet the definition of critical areas under RCW 36.70A.030(5). RCW 36.70A.480(5) and (6). [The BAS in the County's record supported the conclusion that near-shore areas meet this definition, and the BAS] may provide the basis for designating less than all of Pierce County's marine shorelines as critical habitat for salmon. ESHB 1933 does not justify Pierce County's blanket deletion of marine shorelines and marine shoreline vegetative buffer requirements from its [CAO]. [Tahoma/Puget Sound, 05304c, FDO, at 49.]

• [The City's Conservancy Residential District (47 acres @ 1 du/5 acres) and the Single Family Estates District (393 acres @ 1.24 du/acre) account for approximately 6% of the City's total land. About 10% of the vacant land in the City is within these designations. Approximately 81% of the land designated by the City for single family residential use, permits densities ranging from 4.5 to 7.26 du/acre. Multi-family, mixed uses and urban village designations, which all allow residential development, account for almost 20% of the land in the City. The City made a policy determination, in the text describing the challenged designations, that its critical areas regulations do not adequately protect identified critical areas within some areas of the Conservancy Residential District and the Single Family Estates District and relied upon low density designations to provide added protections. With the exception of one of the areas with the challenged designations, the Board found the designations to be appropriate urban densities, due to critical areas constraints. For one area the Board found noncompliance.] [1000 Friends VII, 05306, FDO, at 25-29.]

• While the Board concludes that the Plan's R-9,600 minimum lot size is intended to yield an appropriate urban density of 4 du/acre; the Board is also mindful that de minimus variations may occur. However, such variations should be minimized through techniques such as lot-size averaging, density bonuses or credits, cluster development, perhaps maximum lot sizes and other innovative techniques. [Fuhriman II, 05325c, FDO, at 32.]

• [The City designated a 357 acre area with an R-40,000 minimum lot size – Fitzgerald Subarea. The basis for the designation to protect large-scale, complex, high rank value critical areas that could not be adequately protected by existing critical areas regulations.]

It seems apparent to the Board that, at least for the 357-acres disputed here, the City's present critical areas regulations were believed to be inadequate in protecting the critical areas at issue. This is evidenced by the Litowitz Test Report [which identified the area as having large-scale, complex and high rank value critical areas] and the fact that even the Planning Commission [which did not support the designation] recommended a "special overlay designation" and "special protections and regulations" to be developed to adequately protect the critical areas in question. The Commission's recommendation by itself evidences perceived inadequacies in the City's existing critical areas regulations that can support the added protection of the R-40,000 designation. Further, the overall size and interconnectedness of the affected hydrologic system is well documented; it is not inappropriate to look at a sub-basin or related hydrologic feature to assess critical areas in a specific area. [The Board upheld the R-40,000 designation for the affected area.] [Fuhriman II, 05325c, FDO, at 34-36.]

• [The City designated a portion of the Norway Hill area with an R-40,000 minimum lot size. Steep slopes, erosive soils, difficulty in providing urban services and connection to an aquifer and salmon stream were the basis for the designation. The Board noted that only a portion of the area designated was within the city limits, the remainder being within the unincorporated county, but within the UGA and planned annexation area of the City.] There is no question that the area designated R-40,000 within the Norway Hill Subarea is not a large scale, complex, high rank order value critical area as analyzed in the Board's Litowitz case. The City's Litowitz Test Report confirms this conclusion. However, in a recent Board decision [Kaleas, 05307c, FDO.], the Board acknowledged that the critical areas discussed in the Litowitz case, and several cases thereafter, were linked to the hydrologic ecosystem, and that the Board could conceive of unique geologic or topographical features that would also require the additional level of protection of lower densities in those limited geologically hazardous landscapes. [To qualify, geologically hazardous critical areas would have to be mapped, and use best available science, to identify their function and values. The Board concluded that the geologically hazardous areas on Norway Hill were mapped, and the area contained aquifers connected to salmon bearing streams. The Board upheld the R-40,000 designation for the affected area.] [Fuhriman II, 05325c, FDO, at 37-39.]

• In remanding the noncompliant regulations to [the County], the Board pointed out that . . . the record already contained abundant science concerning the matters at issue. Nevertheless, [the County] undertook additional public process and re-analysis in developing the proposal for [the remand Ordinance]. Base on the prior well-developed record, as refined in the compliance process, [the County] has now enacted both designation of critical salmon habitat in [the County] marine shorelines and measures to protect the functions and values of that habitat. While there are various ways that the science in the record might have been applied by [the County] to comply . . the Board is persuaded that Ordinance No. 2005-80s meets the GMA standard. [Tahoma/Puget Sound, 05304c, 1/12/06 Order, at 6.]

• In designating critical areas, cities and counties "shall consider" the minimum guidelines promulgated by CTED in consultation with DOE pursuant to RCW

36.70A.050(1) and (3); .170(2). In particular, wetlands "shall be delineated" pursuant to the DOE manual. RCW 36.70A.175. [DOE/CTED, 05334, FDO, at 10.]

• [The Board acknowledges the language used by the Court of Appeals in both the HEAL case and subsequently in WEAN that apparently allows "balancing" in the context of critical areas regulation. In the CAO context, such "balancing" is clearly appropriate if GMA requirements are in conflict, but there is no hard evidence here to support such a divergence from wetland ranking and buffers based on best available science.] [DOE/CTED, 05334, FDO, at 53.]

• [A thorough discussion of the GMA's Best Available Science (BAS) requirement in the context of HEAL (1999) and Ferry County (2005). The Board reiterated the Supreme Court's holding in Ferry County, finding that the Court's 3-factor analysis - (1) The scientific evidence contained in the record; (2) Whether the analysis by the local decision-maker of the scientific evidence and other factors involved a reasoned process; and (3) Whether the decision made by the local government was within the parameters of the Act as directed by the provisions of RCW 36.70A.172(1) - is a case-by-case, rather than a bright-line, review.] [DOE/CTED, 05334, FDO, at 13-15.]

• The GMA mandate at issue in the present case, as in WEAN, is the requirement that local jurisdictions include best available science in designating critical areas and protecting their functions and values. Once a challenger has demonstrated that there is no science or outdated science in the City's record in support of its ordinance, or that the City's action is contrary to what BAS supports, it does not impermissibly shift the burden of proof for the Board to review the City's record to determine what science, if any, it relied upon. This is precisely the process undertaken in the Ferry County case. See generally, Ferry County, supra. It is Petitioners' burden to prove by clear and convincing evidence that the City's ordinance does not comply with the GMA because it does not include BAS for wetlands protection. [DOE/CTED, 05334, FDO, at 17.]
• [Regulations affecting nuisance odors from a wastewater treatment facility such as hydrogen sulfide or ammonia are not regulations protecting critical areas, and BAS is not applicable.] Odor does not fit within the GMA's definition of critical areas (See RCW 36.70A.030(5), nor has the County defined it as such. [Sno-King, 06305, 5/25/06 Order, at 12-13.]

• Since the enactment of ESHB 1933 in 2003, the Board has been presented with a number of challenges to local CAO enactments involving critical areas, as defined by the GMA, that are within shorelines, as defined by the SMA. Since ESHB 1933, at least six CAO updates have been challenged before this Board – three counties and three cities. First, no jurisdiction whose CAO has been appealed to this Board has omitted CAO regulations for wetlands, freshwater shorelines, or floodplains on the basis of ESHB 1933. Similarly, no jurisdiction, to our knowledge, has submitted its CAO update to DOE for approval under the SMA. Central Puget Sound counties and cities appear to agree that – for wetlands, freshwater shorelines, and floodplains – the current round of CAO updates is a GMA process that must be based on the GMA best

available science provisions notwithstanding the interaction with SMA land use designations. [Hood Canal, 06312c, FDO, at 26.]

• [The Board discussed various approaches used by different Puget Sound jurisdictions to protect marine shorelines.] The Board finds that there is no single interpretation of the ambiguity inherent in ESHB 1933 – specifically RCW 36.70A.480(5) – but a range of reasonable responses by local cities and counties in the Central Puget Sound region. The Board will defer to the County's decision, [the County designated all saltwater shorelines, stream segments with flow greater than 20 cubic feet per second, and lakes greater than 20 acres as critical areas under the category of "fish and wildlife habitat conservation areas."] based on local circumstances, unless persuaded by Petitioners that the County's approach was clearly erroneous. [The County had in its record ample BAS to support its designation of marine shorelines and Petitioners failed in this effort.] [Hood Canal, 06312c, FDO, at 26-29.]

• Petitioner KAPO contends that the County may not rely on federal habitat designations undertaken for another purpose but must conduct its own shoreline inventory or "independent analysis" and show in the record its owned "reasoned process." The Board however, reasons that the "best available science" requirement includes the word "available" as an indicator that a jurisdiction is not required to sponsor independent research but may rely on competent science that is provided from other sources. . . .The Board concludes that the County appropriately relied on available science. [Hood Canal, 06312c, FDO, at 30.]

• Kitsap County has developed and adopted regulations relying on prescriptive buffer widths to protect the functions and values of wetlands, streams, lake and marine shorelines. The County relies on science concerning the functions generally performed by vegetative buffers – sediment and pollutant capture, wildlife habitat and the like. Contrary to KAPO's assertions, there is site-specific flexibility, through buffer averaging, habitat conservation plans, off-site mitigation options, variances and reasonable use provisions. [Hood Canal, 06312c, FDO, at 35.]

• Kitsap County's marine buffers buffer widths are assigned based on SMA land use classifications, not based on the functions and values of the critical areas designation – here, fish and wildlife habitat conservation areas. . . .The County has not differentiated among the functions and values that may need to be protected on shorelines that serve, for example, as herring and smelt spawning areas, juvenile chum rearing areas, Chinook migratory passages, shellfish beds or have other values. Rather they have chosen an undifferentiated buffer width that is at or below the bottom of the effective range for pollutant and sediment removal cited in [BAS]. And they have applied that buffer to SMP land use classifications, not to the location of specific fish and wildlife habitat. . . .The flaw [in this approach] is illustrated by the fact that eelgrass, kelp, and shellfish beds are protected by larger buffers if they happen to be off shores designated Natural or Conservancy [in the SMP], while the same critical resources – eelgrass, kelp, shellfish – have just 35 feet of buffer off the Urban, Semi-rural or Rural shore. Protection for critical areas functions and values should be based first on the needs of the resource as

determined by BAS. . . .Here Kitsap County has opted to designate its whole shoreline as critical area but then has not followed through with the protection of all the applicable functions and values. [Hood Canal, 06312c, FDO, at 39-41.] 236

• Whether FEMA changes its density fringe designation along the Snohomish River floodway, or whether the FAA approves expansion of Harvey Airfield are interesting wrinkles that the County will have to iron out when those federal decisions are ultimately made. However, the issue before the Board is whether the County's retention of some 50 acres within the City of Snohomish's UGA is clearly erroneous. The Board concludes that it is not. The focus of Petitioners' argument is that the area within the UGA is a critical area and its inclusion in the UGA indicates it is not, will not, or cannot be protected. Pilchuck has not made its case on this point, nor could it in the context of the present ordinance. Further, the Board finds that Petitioners' theory is unsupported by the GMA. The GMA acknowledges that critical areas occur throughout the landscape, within urban, rural and resource land designations. The GMA does not discriminate; it simply requires that their functions and values be protected wherever they are found. [Pilchuck VI, 06315c, FDO, at 68.]

• In Category IV wetlands (the most degraded) of less than 1000 square feet, the City allows development impacts if they are mitigated by on-site replacement, bioswales, revegetation, or roof gardens. SMC 25.09.160.C.3. However, no buffers are required. In Hood Canal, the Board acknowledged the potential disproportionality of requiring buffers as the means of protecting functions of the smallest, most degraded wetlands. Hood Canal, at 19, fn. 23. The Board noted that other mitigating strategies, such as best management practices or compensatory on-site or off-site mitigation might be scientifically supported. Id. Here, Seattle has opted for alternative protection mechanisms for these limited cases of small, isolated, low-functioning wetlands. The Petitioners have not carried their burden of proving that the City's regulations for small Category IV wetlands are clearly erroneous. [Seattle Audubon, 06324, FDO, at 24.]

• [Seattle's CAO exempts hydrologically isolated wetlands of less than 100 square feet relying on science that states that wetlands down to 200 square feet may provide habitat for amphibians but that BAS cannot yet assess ecological functions os very small wetlands.] Nevertheless, Seattle has undertaken a study to map wetlands in Seattle, in collaboration with the U.S. Fish and Wildlife Service. Doc. 3h, at 7. Preliminary findings of the survey identified 733 possible wetlands in the City, of which 197 were estimated to be smaller than 1,000 square feet. Id. at 9. Wetlands smaller than 100 square feet – and hydrologically isolated - would necessarily be a smaller subset of the 197. To require the City to address specific harm from possible loss of this subset of very small isolated wetlands, when best available science cannot assess their ecological functions, would stretch the Board's authority. A fee-in-lieu compensatory mitigation program would of course be preferable, as it would enable the City to mitigate any cumulative impacts that future scientific understandings might bring to light. However, in the context of a narrowly-tailored exemption based on science, the Board is not persuaded that the GMA requires more. [Seattle Audubon, 06324, FDO, at 26.]

• The GMA mandates that local governments must protect the function and values of critical areas, and buffers around certain critical areas are scientifically supported as a preferred protection strategy. The GMA does not mandate that critical area buffers must be "no-build" or "no touch" areas. The Board reviews the BAS in the City's record to determine whether the particular buffer regulation adopted – whether "no build" or fully mitigated – provide protections for functions and values within the scope of the science. [Seattle Audubon, 06324, FDO, at 35.]

• The question of reliance on stormwater regulations for protection of critical areas functions and values has come before the Board in several recent decisions. The Court of Appeals set the standard in WEAN v. Island County, 122 Wn.App. 156, 180, 93 P.3d 885 (2004), stating that if a local government is relying substantially on pre-existing regulations to satisfy its obligations under RCW 36.70A.172, then "those regulations must be subject to the applicable critical areas analysis to ensure compliance with the GMA." [Seattle Audubon, 06324, FDO, at 37.]

Agricultural Lands

• See also: Natural Resource Lands

• The Board declines the invitation to establish a minimum lot size for agricultural parcel sizes. [Gig Harbor, 5316c, FDO, at 31.]

• The County's intention to conserve agricultural lands does not prohibit the County from establishing policies for the conversion of some agricultural lands to other uses, when the CPPs mandate such conversion policies. [Gig Harbor, 5316c, FDO, at 33.]

• RCW 36.70A.170(1)(a) requires counties and cities to designate all lands that meet the definition of agricultural lands, unless the lands fall within a UGA lacking a program for purchase or transfer of development rights, and that RCW 36.70A.060(1) requires that counties and cities adopt development regulations to assure the conservation of all designated agricultural lands. [Sky Valley, 5368c, FDO, at 113.]

• Lands not receiving interim designation as agricultural lands may receive such a designation during the review required by RCW 36.70A.060(3). However, such a designation is predicated on the parcels in question meeting the definition of "agricultural lands." [Sky Valley, 5368c, FDO, at 114.]

• A county or city does not per se violate the Act simply because its final agricultural land designations approved at the time of comprehensive plan adoption include lesser acreage than the preliminary, interim agricultural land designations. [Sky Valley, 5368c, FDO, at 114.]

• A city is without authority to make any agricultural designations within a UGA prior to the enactment of a program authorizing a transfer or purchase of development rights pursuant to RCW 36.70A.060(4). Unless and until it adopts such a program, it is obliged

to designate such properties for non-agricultural urban uses. [Benaroya I, 5372c, FDO, at. 11-12.]

• Open space is an inevitable byproduct of land being put to an agricultural use. However, this fact alone is insufficient grounds for a claim that agricultural designation by a local government requires development rights acquisition pursuant to RCW 36.70A.160. Only if a government restricts the use of designated agricultural lands solely to maintain or enhance the value of such lands as open space, must the City or County acquire a sufficient interest in the property. [Benaroya I, 5372c, FDO, at 13.]

• The Board reaffirmed its holding in the FDO that the City could not designate lands agriculture unless and until it adopted a program authorizing the transfer of development rights. [Benaroya I, 5372c, 12/31/98 Order, Court Remand, at 3.]

• The Board reversed its holding in the FDO to the extent that it was based upon the determination that the Benaroya and Cosmos properties were not agricultural land within the meaning of that term in RCW 36.70A.030(2). [Benaroya I, 5372c, 12/31/98 Order, Court Remand, at 4.]

• The remainder of the Board's FDO and the Board's Finding of Compliance remain unaffected by the Washington Supreme Court Opinion. [Benaroya I, 5372c, 12/31/98 Order, Court Remand, at 4.]

(Inserted from another source.)The Washington State Supreme Court held in 2006 that there is a three-part test for agricultural land of long-term commercial significance:

> In sum, based on the plain language of the GMA and its interpretation in Benaroya I, we hold that agricultural land is land: (a) not already characterized by urban growth (b) that is primarily devoted to the commercial production of agricultural products enumerated in RCW 36.70A.030(2), including land in areas used or capable of being used for production based on land characteristics, and (c) that has long-term commercial significance for agricultural production, as indicated by soil, growing capacity, productivity, and whether it is near population areas or vulnerable to more intense uses.

Lewis County v. Western Washington Growth Management Hearings Bd., 157 Wn.2d 488, 502 (2006). See RCW 36.70A.030(2) (defining "agricultural land").

• RCW 36.70A.020(8), .060, and .170, when read together, create an agricultural conservation imperative that imposes an affirmative duty on local governments to designate and conserve agricultural lands to assure the maintenance and enhancement of the agricultural resource industry. [Green Valley, 8308c, FDO, at 16.]
• The location-specific and directive duty of RCW 36.70A.020(8), .060 and .170 to designate and conserve agricultural lands clearly trumps the non-directive, non-site specific guidance and inventory requirements for open space and recreation of .020(9), .150 and .160. [Green Valley, 8308c, FDO, at 17.]

• General discussion and interpretation of RCW 36.70A.177 by majority and dissent. [Green Valley, 8308c, FDO, at 17-18 and 24-25.]

• RCW 36.70A.177 does create an opportunity for land use and development techniques that are new and innovative, [but] the Board cannot read these provisions to be interpreted to allow the effective evisceration of agricultural lands conservation on a piecemeal basis. [Green Valley, 8308c, FDO, at 18.]

• Both experience and common sense indicate that conversion of agricultural resource lands to nonagricultural uses is a one-way ratchet. To suggest that designated agricultural resource lands, once given over to intensive uses demanded by an ever-increasing urban population, could ever be "retrieved" is simply not credible. [Green Valley, 8308c, FDO, at 18.]

• [RCW 36.70A.177] allows flexibility on a site or parcel basis to enable a portion of a parcel not suitable for agricultural purposes to have a non-agricultural use; however, the County's amendments allow entire parcels to be given over to nonfarm and nonagricultural uses [thereby violating .177]. [Green Valley, 8308c, FDO, pp. 18-19]

• The Act requires conservation not just of the soil attributes that make agricultural lands productive and potentially subject to designation, but also of the agricultural use of that land, to the end that the resource-based industry is maintained and enhanced. [Green Valley, 8308c, FDO, at 19.]

• Land use plans and development regulations which allow parcels designated agricultural resource lands to be used for active recreation uses and supporting facilities does not assure the conservation of those lands for the maintenance and enhancement of the agricultural industry. [Green Valley, 8308c, FDO, at 19.]

• The Washington Supreme Court has determined that land is devoted to agricultural use under the GMA "if it is an area where the land is actually used or capable of being used for agricultural production. City of Redmond v. Central Puget Sound Growth Management Hearings Bd. 136 Wn.2d 38, 56 (1998). It is irrelevant that a parcel has not been farmed for 25 years. The question is whether the land is actually used or capable of being used for agriculture. [Sky Valley, 5368c, 4/22/99 Order, at 8-9.]

• It is absurd to argue that the presence of roads, even an interstate highway, automatically prohibits designation of land as agriculture. [Sky Valley, 5368c, 4/22/99 Order, at 11.]

• It is hard to imagine a situation where agricultural use of land near an urban area is the most economically valuable use of that land. [Relying on such facts alone cannot dictate the designation of land.] [Sky Valley, 5368c, 4/22/99 Order, at 11.]
• [T]he County initiated the review and evaluation of the [subarea, not a property owner seeking to "correct" an alleged prior "error."] The purpose of the County's undertaking

the planning process for the [subarea] was to reconcile differences between the Tribe's Plan and the County's Plan for the area, not to revisit and reevaluate all designations within the subarea. The [agricultural] designation within the subarea was not among the items needing to be reconciled. In the end, the County's adoption of the subarea plan did not alter the land use designation of Petitioner's property. [MacAngus, 9317, FDO, at 7-8.]

• [This case] is the first GMA challenge arising form the action of a local government to remove the agricultural resource land designation that it had previously adopted. The permanence of agricultural resource lands designations have been discussed only peripherally in prior Board decisions, and never settled as a matter of law. [The threshold question in this case is] can lands that have been designated [agricultural lands] pursuant to RCW 36.70A.170(1)(a) and regulated pursuant to RCW 36.70Al060(1) be "de-designated" and, and if so, under what conditions? [Grubb, 0304, FDO, at 8.]
• General discussion of agricultural lands designation and the agricultural conservation imperative. [Grubb, 0304, FDO, at 8-12.]

• The GMA's provisions for the conservation of natural resource lands, including agricultural lands, constitutes on of the Act's most important and directive mandates. [Grubb, 0304, FDO, at 8.]

• [In Green Valley, 8308c] the Board examined and rejected the argument that the discretion that the GMA affords to local governments to "balance the goals of the Act" somehow elevates recreational uses to an equal with agricultural uses. [Grubb, 0304, FDO, at 9.]

• The Board has interpreted the Act to acknowledge the paramount importance of the designation, conservation and protection of agricultural lands. It is a duty local government should not take lightly. [Grubb, 0304, FDO, at 9.]

• Although both RCW 36.70A.130 and .215 require counties and cities to systematically review their comprehensive plans, and to take action to amend them when appropriate, neither provision requires that amendment actually occur. Significantly, neither .130 nor .215 make explicit mention of reviewing or amending agricultural resource lands designations. More significantly, neither .170 nor .060 describe a process or criteria to amend or "de-designate" agricultural lands. Does the lack of an explicit GMA mention, much less mandate, to review and amend prior agricultural lands designations mean that ag lands may never be "de-designated"? [The Board answers this question in the negative.] [Grubb, 0304, FDO, at 10-11.]

• Once lands are designated as agricultural lands they are not necessarily destined to be agricultural lands forever. This is not license for local governments to "de-designated" agricultural lands where it may simply be locally popular or politically convenient. "De-designation" of agricultural lands is a serious matter with potentially very long-term consequences. Such de-designation may only occur if the record shows demonstrable and conclusive evidence that the Act's definitions and criteria for

designation are no longer met. The documentation of changed conditions that prohibit the continued designation, conservation and protection of agricultural lands would need to be specific and rigorous. If such de-designation action were challenged, it would be subject to heightened scrutiny by the Board. [Grubb, 0304, FDO, at 11.]

• There are two criteria for local governments to [use when designating] agricultural resource lands. The first is the requirement that the land be "devoted to" agricultural usage. The second is that the land must have "long-term commercial significance" for agriculture. [Grubb, 0304, FDO, at 11.]

• [The Washington Supreme Court has held that] land is "devoted to" agricultural use under RCW 36.70A.030 if it is in an area where the land is actually used or capable of being used for agricultural production. (Citation omitted). [Grubb, 0304, FDO, at 11.]

• [There are two components to "lands of long-term commercial significance."] The first addresses the viability of the lands as a function of intrinsic attributes, i.e., "growing capacity" and "productivity" which in turn are largely a function of the suitability of the soils for growing agricultural products. The second involves consideration of the off-site factors and some degree of judgment about how those factors affect the long-term viability of agriculture. [Grubb, 0304, FDO, at 9.]

• When both the statutory definition [RCW 36.70A.030(10)] and the factors set forth in the Department's regulations [the Department of Community, Trade and Economic Developments – WAC 365-190-050(1)] are considered, it is apparent that [generally,] the Northern Sammamish Valley no longer has long-term commercial significance for agricultural production. [Grubb, 0304, FDO, at 7.]

• [Judged against these criteria and factors, the record shows that] Redmond's conclusion that [most of the] properties [in the Northern Sammamish Valley] no longer have long-term commercial significance is reasonable and supportable. Even if lands have prime soils, and have been historically farmed, it does not follow that they must remain designated as agricultural resource lands if a significant physical change has occurred to destroy the long-term viability of those parcels as agricultural land. Likewise, the fact that [certain parcels] are surrounded by incompatible residential uses and [are] severed from connection with a larger pattern of agricultural land makes them also untenable long-term as commercial agriculture. [These parcels no longer meet the definition of "long-term commercial significance."] [Grubb, 0304, FDO, at 13.]

• The properties in the "Northern Sammamish Valley" are, in fact, the southerly portion of the much larger lands of the Sammamish River Valley. Thus, when Redmond argues that 80% of the "Northern Sammamish Valley" [within the city-limits] is irrevocably committed to non-agricultural uses, it is actually talking only about the relatively small piece of a much bigger picture – a picture that is overwhelmingly agricultural. [Grubb, 0304, FDO, at 13.]

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• The term "lands" in the definition of "long-term commercial significance," means more than an individual parcel – it means the patterns of contiguous parcels, regardless of jurisdictional boundaries, that are "devoted to" agriculture. [Several parcels that are immediately adjacent to King County's agricultural production districts are visually, functionally and effectively a part of these lands with long-term commercial significance. [Grubb, 0304, FDO, at 13.]

• It is undisputed that the County complied with the Board's FDO as to the APD [agricultural production district] development regulations. Plainly, the County has deleted the language [in the King County Code] that permitted active recreation on designated resource lands. The remaining dispute between the parties is whether the County's action resurrecting the Plan's prior policy statements does not comply with the GMA as construed by the Supreme Court in the King County decision, and by the Board in the Green Valley FDO. [Green Valley, 8308c, 11/21/01 Order, at 9.]

• [The County's Plan language says active recreation should not be located within APDs. Petitioners contend this language carries an unspoken but implied modifier - "unless" and ask the Board to direct the County to change it to shall not for fear that the County may revisit the notion of placing active recreation on agricultural lands. The Board declined.] The Board reads the Supreme Court's decision as clear an unequivocal – the County's development regulations [which regulate the use of land] shall not permit active recreation on designated resource lands with prime soils for agriculture. Attempts to carve out loopholes, under the aegis of RCW 36.70A.177, are flatly prohibited by the Supreme Court's decision, notwithstanding any reading that the County chooses to give to [the Plan policy]. [Green Valley, 8308c, 11/21/01 Order, at 10.]

• The term "de-designated," rather than simply "re-designated" was first used by the Board in Grubb [0314, FDO]. Under the GMA all lands are either: (1) urban lands (i.e. within urban growth areas); (2) rural lands; or resource lands. These are the three fundamental building blocks of land use planning under the GMA. While "re-designation" or "rezoning" of land is somewhat common within urban or rural areas, such changes take place within the context of being within a UGA or a rural area. Appropriate "re-designations" do not change the fundamental nature of those lands as either urban or rural. In contrast, a "de-designation" of lands from resource land to either urban or rural is a change of the most fundamental and paramount kind. The term "de-designation" was coined to reflect this distinction. [Forster Woods, 1308c, FDO, at 14, footnote 4.]
• General discussion of the Grubb and Green Valley cases as they relate to resource lands. [Forster Woods, 1308c, FDO, at 16-18.]

• There are two requirements in the designation, or de-designation, of agricultural lands. As the Board noted in Grubb, at 11, "The first is the requirement that the land be "devoted to" agricultural usage. The second is that the land must have "long-term commercial significance" for agriculture.". . .Here, Petitioner . . . has made a prima facia case supporting the assertion that there have been no changes to the soil condition, nor any changed circumstances that could support the County's revision of the 216 acres from agricultural lands to allow other non-agricultural related uses. [Hensley VI, 03309c, FDO, at 36.]

• [T]he County did not alter its criteria for designating agricultural land to include only those soils, according to SCS soils capability criteria, without constraints, such as drainage limitations. Had the County done so, the necessity to "de-designate existing agricultural lands," which no longer met its designation criteria, would have likely affected far more designated agricultural land than the single 216-acre area affected by the amendment. Instead, without amending its own agricultural land soils designation criteria, the County apparently decided that a new soil constraint criterion, (Footnote omitted) regarding drainage, should be applied only to this area. [Hensley VI, 03309c, FDO, at 37.]

• [Based upon the. . . history of the property and its soil characteristics (as defined by the USDA, SCS and the County), whether drained or not, the soils found upon the property are prime agricultural soils that are "capable of being used for agricultural production." The County does not dispute that the property is currently used for agriculture. (Citation omitted.) In short, and in light of the Supreme Court's holding in Redmond, nothing has changed regarding the soil composition that persuades the Board that the property is not, or could not be, devoted to agriculture. However, even lands that are "devoted to agriculture" may not have long-term commercial significance and thereby not be appropriate for designation under the GMA. [Hensley VI, 03309c, FDO, at 37.]

• The County's decision, as reflected in its Finding F, seems to be based upon development occurring to the south, but not adjacent to the property; present tax status; and speculation on the area being acquired by the Tulalip Tribe. The discrepancies between the evidence in the record regarding mandatory designation criteria and the decision of the County to de-designate this area, as contained in Finding F, is plainly more than a disagreement over policy choices. Were that the case, the Board would defer to the sound discretion of the County. However, the County's Ordinance Finding draws scant, if any, support from the record. In contrast, the arguments advanced by 1000 Friends, are supported by evidence in the record. The record suggests that the land continues to meet all criteria for the designation of agricultural land. This is true regarding the question of prime farmland soil characteristics and whether the 216-acres are of long-term commercial significance. Contrary to the County's Ordinance Finding, the record weighs heavily toward the denial of the de-designation. The Board's review of the record and arguments presented, leads to the conclusion that this area that is devoted to agriculture and continues to be of long-term commercial significance and should not have been de-designated from the Upland Commercial Farmland designation and A-10 zoning. [Hensley VI, 03309c, FDO, at 41.]

• [The last challenged County CPP] is premised on the notion that some type of designated resource land (agricultural, forest or mineral lands) no longer meets the criteria for designation as that resource land, and may be redesignated to a rural or urban designation. As the parties are well aware, any such reclassification of resource lands to either a rural or urban designation is an event that is appeal able to the Board. Depending on the facts and circumstances surrounding the specific revised designation of natural resource lands, the Board may, or may not, find that the change complies with the goals and requirements of the Act. This CPP merely acknowledges the possibility of redesignation from resource land to a designation that would allow different economic development uses. Therefore, the Board need not consider this aspect of [the challenge.] [CTED, 03317, FDO, at 39.]

• [The County's CPP, allowing an individual UGA to be potentially expanded for economic development purposes to adjacent land that had previously been designated as resource lands, is permissible if a need for additional commercial or industrial land within the UGA is demonstrated in a land capacity analysis and if reasonable measures have been taken.] [CTED, 03317, FDO, at 39.]

• A plain reading of the Supreme Court's holdings suggests that if land has ever been used for agriculture or is capable of being used for agriculture, it meets the "devoted to" prong of the test [for designation or redesignation of agricultural lands.] [1000 Friends, 03319c, FDO, at 26.]

• Petitioners have made a prima facia case supporting the assertion that there have been no changes to the soil condition, nor any changed circumstances that could support the County's revision of [the] agricultural resource lands to non-agricultural resource lands commercial uses. [1000 Friends, 03319c, FDO, at 27.]

• [Regarding whether the land had long term commercial significance, the Board reviewed the County's findings and evidence in the record. Basing a finding upon] Anecdotal testimony, particularly from an individual whose direct experience with the area is decades removed from the present and whose declared expertise was in dairy rather than crop farming, does not constitute credible evidence on which to support the County's action. [Other anecdotal evidence also contradicted this testimony.] Further damaging to the credibility of the County's reasoning is that nowhere do Respondent or Intervenor cite to credible, objective evidence to refute or reconcile the substantial record evidence (i.e. the PDS report, the DSEIS, USDA soils survey) to the contrary. [1000 Friends, 03319c, FDO, at 28.]

• The Board construes any declarations or conclusions entered from [consultant reports prepared on behalf of the proponent of the action] to be reflections, if not direct expressions, of "landowner intent" and assigns them the appropriate weight (i.e. expressions of landowner intent, alone, are not determinative). [1000 Friends, 03319c, FDO, at 29.]

• It is an axiom of land use planning that urban uses at urban densities and intensities inhibit adjacent farm operations, and the County points to no evidence here to expect a different result in the immediate vicinity. [1000 Friends, 03319c, FDO, at 29.]

• The County's Ordinance draws scant credible evidence and objective support from the record. In contrast, the arguments advanced by Petitioners, are supported by credible and objective evidence in the record. The record suggests that the land continues to meet the criteria for the designation of agricultural land. [1000 Friends, 03319c, FDO, at 29-30.]

• The Board notes that RCW 36.70A.060 does not prohibit agricultural resource lands from being included within a UGA. However, RCW 36.70A.060(4) requires a program authorizing the transfer or purchase of development rights as a condition precedent to such inclusion in the UGA. In this case, none of the parties argued or offered any evidence pertaining to whether such a program exists to allow agricultural land within the UGA. [1000 Friends, 03319c, FDO, at 36, footnote 11.]

• [T]he land use plan and zoning designations wrought by [the ordinance adopted on remand] are identical to those created by [the prior] noncompliant and invalid [ordinance]. The only remedial action taken by the County on remand from the Board was to place more testimony in its record, both pro and con, regarding the historical or speculative future ability of specific individuals to profitably farm specific parcels within the Island Crossing triangle. The County insists that, notwithstanding soil characteristics, the Council may divine the long-term commercial significance of agricultural lands by weighing the credibility of opposing opinions. [None of the testimony relied upon addressed the criteria listed at WAC 365-190-050, or testimony reflected land-owner intent.] . . . In the final analysis, however, the relative weight or credibility that the County assigned to the opinions expressed by individuals during the [public] hearing sheds little light on the question of whether agricultural lands at Island Crossing have long-term commercial significance. While the Board would agree that soils information alone is not determinative, neither is reliance on anecdotal, parcel-focused expression of opinion nor is landowner intent. Instead, to cull from the universe of lands that are "devoted to" agriculture the subset that also has "long-term commercial significance" demands an objective, area-wide inquiry that examines locational factors (footnote omitted) as well as the adequacy of infrastructure to support the agricultural industry. [1000 Friends I, 03319c, 6/24/04 Order, at 16-17.]

• The County's reliance on anecdotal, parcel-focused witness testimony as the primary determining factor of LTCS has too narrow a focus – it misses the broad sweep of the Act's natural resource goal, which is to maintain and enhance the agricultural resource industry, not simply agricultural operations on individual parcels of land. (Citations omitted.) This breadth of vision informs a proper reading of the Act's requirements for resource lands designation under .10 and conservation under .060. Reading these provisions as a whole, it is apparent that agricultural lands with "long-term commercial significance" are area-wide patterns of land use, not localized parcel specific ownerships. Historical or speculative statements by individuals regarding their personal inability to profitably farm certain parcels does not inform a GMA-required inquiry into the long-

term commercial significance of area-wide patterns of land use that are to assure the maintenance and enhancement of the agricultural land resource base to support the agricultural industry. [1000 Friends I, 03319c, 6/24/04 Order, at 18.]

• It is an axiom of land use planning that urban uses at urban densities and intensities inhibit adjacent farm operations. This axiom is reflected in the statutory language of the Act that seeks to protect agricultural uses from more intensive adjacent activities (citing RCW 36.70A.060(1)). [1000 Friends I, 03319c, 6/24/04 Order, at 19.]

• [A new analysis regarding large lots cured an inconsistency with one of the County's CPPs regarding UGA expansion.] However, achieving consistency between [the new ordinance designation and the CPP], does not cure the County's noncompliance with RCW 36.70A.110 because it does not address the "UGA location" deficiencies identified in the FDO. . . .No new facts or reasoning are presented to disturb the Board's conclusions that Island Crossing continues to have agricultural lands of long-term commercial significance, that the presence of a sewer line is irrelevant, particularly given its limitations, that the freeway service uses do not rise to the status of "urban growth," and that Island Crossing is not "adjacent" to the Arlington UGA or a residential "population" of any sort. In fact, the private lands within this proposed UGA expansion would be connected to the Arlington UGA only by means of a 700 foot long "cherry stem" consisting of nothing but public right-of-way. While such dramatically irregular boundaries were common in the pre-GMA era, the meaning of "adjacency" under the GMA precludes such behavior. [1000 Friends I, 03319c, 6/24/04 Order, at 22-23.]
• [Adoption of the challenged ordinance] represents Snohomish County's third attempt under the GMA (and second attempt within the past nine months) to convert Island Crossing from a part of the designated agricultural resource lands of the Stillaquamish River Valley into Arlington's UGA. It has done so notwithstanding consistent contrary readings of the Growth Management Act by the Snohomish County SEPA Responsible Official, Snohomish County Executive, the Growth Management Hearings Board, Snohomish County Superior Court, the First Division of the Washington State Court of Appeals and the Governor of the State of Washington. [The Board recommended the imposition of financial sanctions as authorized by RCW 36.70A.340.] [1000 Friends I, 03319c, 6/24/04 Order, at 24.]

• It is undisputed that the GMA imposes a duty upon [cities and counties] to identify, designate and protect agricultural resource lands of long-term commercial significance. See RCW 36.70A.170, .050, .060, .020(8) and .030(2) and (10). The GMA defines terms, and mandates criteria and factors that must be considered in discharging this duty. WAC 365-190-050(1) also provides direction for meeting this duty. To fulfill this obligation, the [jurisdiction] must solicit public participation and develop a record that demonstrates that the [jurisdiction] has conducted the required analysis (i.e., application of the statutory criteria) in reaching its decision. [Orton Farms, 04307c, FDO, at 24.]
• [General Discussion of procedures and criteria for designating agricultural lands of long-term commercial significance. Court decisions and the Board's two-prong test.] [Orton Farms, 04307c, FDO, at 24-25.]

• The Board agrees that soils weigh heavily in the designation of agricultural resource lands. USDA, SCS and NRCS soils information establishes and defines the "potential universe" of lands that could be designated as agricultural resource lands. However, the Act's definition of [long-term commercial significance] requires two other factors be considered: 1) the land's proximity to population areas; and 2) the possibility of more intense use of the land. These two factors are principally locational factors requiring that the intrinsic attributes of the land [i.e., growing capacity, productivity and soil composition] be evaluated in the context of the land's location and surroundings. Application of these two factors will likely cull the size of the potential agricultural resource land universe derived solely from soils information, and yield fewer acres as appropriate for designation as agricultural resource lands of long-term commercial significance. It is these latter factors for determining [long-term commercial significance] that provide the basis for the present dispute. Note that these are not optional factors to consider, by definition they are required components of determining [long-term commercial significance]; they must be evaluated and considered. [Orton Farms, 04307c, FDO, at 25-26.]

• [The Board and the Courts have acknowledged and recognized that CTED's minimum guidelines [i.e., WAC 365-190-050(a thorough j)] are valid and valuable indicators of long-term commercial significance.] [Orton Farms, 04307c, FDO, at 26.]

• [In addition to the indicators of long-term commercial significance articulated at WAC 365-190-050(a through j), land-owner intent, current use, and "commercial viability" may be considered, but none of these individual factors can be conclusive in determining long-term commercial significance. Likewise, the presence or absence of critical areas may affect decisions regarding long-term commercial significance.] [Orton Farms, 04307c, FDO, at 26-28.]

• The Board continues to believe that de-designation of previously designated resource lands is possible under the Act. Given the importance of soils data and mapping, and the large scale of such maps, it seems reasonable that as Plans are reviewed and evaluated in terms of more current and refined information, a jurisdiction may realize that mistakes have been made or circumstances have changed that warrant revision to prior resource land designations. However, since agricultural lands were identified and designated pursuant to the GMA's criteria and requirements it follows that the de-designation of such lands demands additional evaluation and analysis to ascertain whether the GMA criteria and requirements are, or are not, still applicable to the lands being considered for change. A rationale process evaluating objective criteria is essential for designating or de-designating agricultural resource lands. . . . It logically follows that if [a jurisdiction] is required to conduct an analysis based upon GMA mandated criteria to designate agricultural lands of long-term commercial significance; it cannot simply adopt an ordinance that undoes, undermines or contradicts analysis performed to support the original designation decisions. [Orton Farms, 04307c, FDO, at 37.]

• [Regarding de-designation of agricultural resource lands] the Board notes that both Petitioner and Intervenor applied the CTED indicators for long-term commercial

significance [WAC 365-290-050(a through j)] in testimony to the County, and in briefing, and drew different conclusions as to whether the property was of long-term commercial significance. Again, this stresses the importance of the County's conducting its own analysis and drawing its own conclusions, be they different or the same as those presented. [Orton Farms, 04307c, FDO, at 39-40.]

• [An area designated as an Agricultural Production District on the County's Agriculture and Forest Lands Map that is also designated as Rural Residential on the County's FLUM is internally inconsistent. Dual designations do not comply with the GMA provisions that rural areas not include agricultural resource lands of long term commercial significance.] [Keesling III, 04324, FDO, at 35-36.]

• The GMA "requires all local governments to designate all lands within their jurisdictions which meet the definition of critical areas." (Citation omitted.) Agricultural lands cannot be excluded. [The County's designation of critical areas within an agricultural production district] recognizes the dual obligation under GMA to protect agricultural resource lands and to protect long-term water quality for people and for fish and wildlife. The Board will defer to King County in the balance it has struck. [Keesing CAO, 05301, FDO, at 11-12.]

• [The criteria used by the County to designate agricultural resource lands (ARLs) are based upon the GMA definitions and CTED's minimum guidelines – WAC 365-190-050.] Reserve-5 areas are to accommodate the future urban growth of an adjacent city or town; it is not clearly erroneous for the County to exclude such designated lands from its consideration in the ARLs designation process. The County must balance the preservation of agricultural lands with the GMA mandate that present, and future, forecasts of urban growth be accommodated. [Bonney Lake, 05316c, FDO, at 18.]

• Establishing a criterion based upon the grass/legume yield of 3.5 tons per acre limitation is within the County's discretion. [There was substantial evidence in the record to support the County's choice.] Likewise, the County's use of a minimum parcel size of five acres is within its discretion, neither the Act nor CTED criteria require or prohibit minimum parcel sizes [as a factor in designation]. [Bonney Lake, 05316c, FDO, at 19.]

• [Petitioner's] concern with the delegation of ARLs designation or de-designation to a community planning group is unfounded. As explained by the County, any subarea plans must be consistent with the County-wide Plan and any recommendations of a land use advisory committee for a subarea plan are advisory only. The ultimate decisions are made by the County Council, representing the views of the entire County. [Bonney Lake, 05316c, FDO, at 19.]
• The Board finds the 50% development [with one acre lots] adjacent to the perimeter criterion to be a reasonable method of protecting ARLs and agricultural enterprises from incompatible encroachment. It is also a reasonable means of measuring the intensity of nearby uses and proximity to population. Such a criterion helps identify and minimize uses that are potentially incompatible with agricultural activities. [Bonney Lake, 05316c, FDO, at 20.]

• Just as the Board rejected the argument that "commercial viability" is a controlling factor in determining long-term commercial significance in the Orton Farms FDO, the Board likewise rejects [Petitioner's] contention that "economic viability" is a controlling factor in determining long-term commercial significance. [The County includes 'economic viability' as a component of the 'pressure to urbanize' criterion in the ARLs designation process. Additionally, the County's ongoing commitment to understand and address economic viability is impressive as evidenced by The Suitability, Viability, Needs and Economic Future of Pierce County Agriculture – Phase I Report, prepared by the American Farmland Trust.] [Bonney Lake, 05316c, FDO, at 20.]

• The County has specifically included ARLs de-designation procedures to correct ARLs designation mistakes. [The policy] clearly provides a process for the de-designation of ARLs that is not simply based upon a landowner's intent to quit farming, as was the case in Orton Farms. [Bonney Lake, 05316c, FDO, at 20.]

• [T]he County's duty to maintain, enhance, and conserve agricultural land [Footnote omitted], starting with its designation which keys on the three-part test recently articulated by the Supreme Court: (1) whether the land is already characterized by urban growth, (2) whether that land is primarily devoted to the commercial agricultural product, and (3) whether the land has long-term commercial significance for agricultural production. RCW 36.70A.030(2); Lewis County, 139 P.3d at 1101-1102. [Pilchuck VI, 06315c, FDO, at 41.]

• [RCW 36.70A.030(10)] has two components – the intrinsic attributes of the land component (growing capacity, productivity, and soil composition) and a locational component (proximity to population and possibility of more intense uses). Based on these components, a County must do more than simply catalogue lands that are physically suited to farming, it must consider and weigh the locational factors in determining if agricultural land has the enduring commercial quality needed to fit the agricultural land definition. Lewis County, 139 P.2d at 1102. A county must consider the guidelines developed by CTED and contained in WAC 365-190-050; but, according to the Lewis County Court, it may also weigh other factors not specifically enumerated in the GMA or the WAC in evaluating whether agricultural land has long-term commercial significance. WAC 365-190-050(1)(e) specifically states that "predominant parcel size" is a factor that may be considered and weighed in designating agricultural resource lands. . . .Nowhere in the record, nor in the Petitioner's PHB or Reply does the Board find that the County has excluded any land from the designation solely due to parcel sizes without consideration of the other criteria contained in WAC 365-195-050 and Policy 7.A.3. [Pilchuck VI, 06315c, FDO, at 42-43.]

• This Board has previously addressed what is required to remove an agricultural designation from land which has been previously designated as such. See Grubb v. City of Redmond, CPSGMHB Case No. 00-3-0004, Final Decision and Order, (Aug. 11, 2000) (Overruled in Redmond v. CPSGMHB, 116 Wn. App 48, Div. I, (2003); and Forster Woods Homeowners Association, et. al. v. King County, CPSGMHB Case No. 01-3-0008c, Final Decision and Order (Nov. 6, 1001). In analyzing the GMA's

provisions for amending policies and designations, the Board in the Grubb case found that the de-designation of resource lands may occur if the GMA's definitions and criteria for designation are no longer met. [Pilchuck VI, 06315c, FDO, at 43.]

• Although some factors may support de-designation, the City provides brief and primarily unsupported assertions as to why the property no longer is suitable for agricultural production. The City's assertion that the property is no longer devoted to agriculture because it contains structures, including a barn and outbuilding formerly utilized by the dairy operation, raises the question that if a barn cannot be seen as agriculture then what structure is? In addition, the Petitioner's assertion in regard to urban growth is confirmed by documentation submitted by the City of Arlington with their Response Brief – an aerial photo/map overlay entitled "Figure 6: Foster Request to be in the UGA." This map clearly demonstrates that urban growth, although in the area, is not immediately adjacent to Foster property. *The Board sees these 6 acres as the "farm center" or, essentially, the operational headquarters for the farm. The purpose of the farm center is to ensure the long-term survival of the agricultural land it serves by allowing farmers to support the main agricultural operation (i.e. crop production or livestock rearing) and, at times, to allow small commercial and/or retail activities that provide secondary income to the farm based on its agricultural output. The farm center is not only compatible with a GMA agricultural resource land designation, but necessary to maintain the agricultural industry. The Record indicates that the challenged 6 acres has and continues to serve as the operational center of the farm, providing both living quarters and a retail 'farm stand' from which the farmer sells agricultural products grown on the adjacent acreage in addition to recent "entrepreneurial activities." Although these 6 acres are providing "entrepreneurial" secondary income to the farm, the primary, as well as this secondary income, all arise from the agricultural activities on the adjacent land. *This is in accord with the Supreme Court's ruling in Lewis County in regard to "farm centers." In Lewis County, the Court upheld the Western Board's invalidation of County regulations which excluded farm homes and "farm centers" – up to five acres per farm - from designation as agricultural land, regardless of whether or not it was viable for agricultural production. Lewis County, 139 P.3d at 1104. *The City appears to argue that somehow Mr. Foster's participation in the County's TDR program supports the de-designation, apparently because the intent behind the TDR program is to preserve agricultural land by providing financial incentives to property owners. Arlington Response at 4. Although this may be true, the Board fails to see how eliminating the operational heart of the farm would result in the preservation of the remaining land. Removal of this land would effectively strip the farm of its ability to operate. The Board cannot conclude that the farm stand, barn and other structures located on the land amount to urban growth warranting the de-designation of the land as agricultural. This conclusion is supported by the Record, and the property owner's and City's own analysis, which describes the property as agricultural in nature. The farm land below, the land on the bench, and the structures upon it are an important component of the agricultural industry which should not be allowed to disappear, especially in the urbanized Puget Sound region. [Pilchuck VI, 06315c, FDO, at 44-45.]

Fish and Wildlife Habitat Conservation Areas

• See also: Critical Areas

• The Act's directive that local governments are to "protect" critical areas means that they are to preserve the structure, value and functions of wetlands, aquifer recharge areas used for potable water, fish and wildlife habitat conservation areas, frequently flooded areas and geologically hazardous areas. [derived from WAC 365-195-825(2)(b)] [Pilchuck II, 5347c, FDO, at 20.]

• The legislature required cities and counties to designate fish and wildlife habitat conservation areas only; the legislature did not mandate that cities and counties designate every parcel of land that constitutes fish and wildlife habitat. [Pilchuck II, 5347c, FDO, at 31.]

• RCW 36.70A.170 and .060 require cities and counties to designate fish and wildlife habitat conservation areas and adopt development regulations to protect them for all species of fish and wildlife found within them. [Pilchuck II, 5347c, FDO, at 32.]

• The use of performance standards is recommended in the Minimum Guidelines for "circumstances where critical areas (e.g., aquifer recharge areas, wetlands, significant wildlife habitat, etc.) cannot be specifically identified." WAC 365-190-040(1). However, where critical areas are known, cities and counties cannot rely solely upon performance standards to designate these areas. [Pilchuck II, 5347c, FDO, at 41-42.]

• The Act's requirement to protect critical areas, particularly wetlands and fish and wildlife habitat conservation areas, means that the structure, values and functions of such natural ecosystems are inviolate must be maintained. While local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in the net loss of the structure, value and functions of such natural ecosystems within a watershed or other catchment area. [Tulalip, 6329, FDO, at 11, amending a holding in Pilchuck II, 5347c, FDO 5347, pursuant to a Superior Court remand]

• Certain critical areas, such as wetlands and fish and wildlife habitat areas, constitute ecosystems that transcend the boundaries of individual properties and jurisdictions, and that it is therefore necessary to address certain critical area issues on a watershed level. [Tulalip, 6329, FDO, at 11-12.]
• Although the Booth studies document the basin-wide 10 percent impervious surface threshold for damage to aquatic systems, the studies also identify measures to mitigate the effects of impervious surfaces. [Bremerton/Alpine, 5339c/8332c, FDO, at 31.]
• Rather than adopting a maximum limit on impervious surfaces . . . the County, utilizing best available science in a substantive way, adopted a system for critical areas protection that includes buffers, building setbacks, mitigation, and stormwater drainage controls. [Bremerton/Alpine, 5339c/8332c, FDO, at 32.]

• [Even if a maximum impervious basin-wide coverage of 10 percent constitutes the best available science, petitioners have not shown that the adopted regulations allow more than 10 percent basin-wide impervious surface coverage. [Bremerton/Alpine, 5339c/8332c, FDO, p. 32]

. [The Tribe] has raised important and provocative questions about the responsibility of a city to protect fish habitat in view of the recent federal listings of Chinook salmon, bull trout, and other species. The GMA contains specific requirements for local governments to designate and protect critical areas, including fish and wildlife habitat. . . . Significantly, the Tribes insist that they are not challenging the City's critical areas regulations adopted pursuant to {the GMA]. They instead assert that the City' [adoption of a Subarea Plan] violates the GMA because the Subarea Plan and critical areas regulations are inextricably intertwined. [Tulalip II, 9313, 1/28/00 Order, at 4.]

• From a review of the interplay between the relevant provisions of the two statutes, the Board concludes that, while development will continue to be permitted within the shorelines of the state, the primary and paramount goal, objective and purpose of the GMA/SMA total statutory scheme is to preserve, protect, enhance and restore the resources, ecology and ecosystem functions of the shorelines of the state, with special consideration paid to habitat for anadromous fish. [Everett Shorelines Coalition, 02309c, FDO, at 23.]

• The City never contended it amended its critical areas regulations as part of the SMP update. As discussed previously, this is a fatal flaw in the City's action. Consequently, it is undisputed that the City's shorelines implementing development regulations, including critical areas regulations and shorelines regulations in the SMP (reference omitted), were not adopted as critical areas regulations pursuant to RCW 36.70A.060, nor were they supported by best available science pursuant to RCW 36.70A.172. Moreover, the Board concludes that critical area regulations must assure no net loss of the functions and values of shorelines of state-wide significance. [Everett Shorelines Coalition, 02309c, FDO, at 45.]

• [Pursuant to RCW 36.70A.480] the Board agrees with Pierce County that marine shorelines are not per se fish and wildlife habitat conservation areas [critical areas]. The Board then asks (1) whether Pierce County used best available science to protect critical fish and wildlife habitat conservation areas on its marine shorelines; (2) whether Pierce County's regulations gave priority to anadromous fish; (3) whether Pierce County's regulations protect the functions and values of marine shorelines as salmon habitat, and (4) whether a vegetative buffer is required. [The County's CAO] identifies a number of critical fish and wildlife conservation areas on its marine shorelines. These include eelgrass beds, shellfish beds, surf smelt spawning areas and the like. However, [the CAO] was drafted to designate and protect all Pierce County marine shorelines. When the County Council voted to remove the marine shorelines from critical areas, it did so (a) without ascertaining whether the remaining protected salt-water areas included all the areas important for protection and enhancement of anadromous fisheries and (b) without assessing whether the overlay of elements remaining in the CAO [i.e. steep slopes,

erosion areas, eelgrass beds, etc.] would protect the "values and functions" necessary for salmon habitat. [A discussion of WEAN v. WWGMHB, 122 Wn. App. 173, (2004) follows.] [Tahoma/Puget Sound, 05304c, FDO, at 37.]

• [The Board reviewed the detailed scientific evidence in the record regarding salmon habitat along marine shorelines to determine whether the County gave "special consideration to anadromous fish."] Despite the detailed information about the function and values of salmonids habitat specific to each shoreline reach, Pierce County eliminated "marine shorelines" from the fish and wildlife habitat conservation areas listed in its critical areas ordinance without determining whether the remaining designated critical areas adequately met the needs of salmon. Undoubtedly some of Pierce County's remaining designated and mapped salt-water critical areas, such as eelgrass beds, surf smelt beaches, salt marshes and steep bluffs, overlap with habitats critical to the survival of anadromous fish. But there is nothing in the record to indicate that the high-value shoreline reaches identified by the Pentec Report for salmonids habitat [much less the restorable habitat stretches] are designated and protected in the Pierce County critical areas regulations. [Tahoma/Puget Sound, 05304c, FDO, at 38-40.]

• Deferring salmon habitat protection to a site-by-site analysis based on disaggregated factors is inconsistent with Pierce County's best available science. Nothing in the science amassed by the County supports disaggregating the values and functions of marine shorelines. [Various studies are reviewed pertaining to the integrated function and value of salmon habitat [Tahoma/Puget Sound, 05304c, FDO, at 40.]

• The Board finds that Pierce County's site-by-site assessment of marine shorelines during the permit application process, as established in (the CAO), does not meet the requirement of using best available science to devise regulations protective of the integrated functions and values of marine shorelines as critical salmon habitat. [Tahoma/Puget Sound, 05304c, FDO, at 40-41.]

• A final issue is whether vegetative buffers are required. Pierce County declined to establish a regulatory requirement for vegetative buffers on marine shorelines, except to the extent they might be required in connection with a narrower protective regime (eelgrass beds, for example, or bald eagle nesting sites), and has substituted a 50-foot setback from ordinary high water mark. There is a wealth of scientific opinion in the County's record supporting vegetative buffers to protect multiple functions and values of marine shoreline salmon habitat. [The Board reviewed the record documents provided to the County; and concludes that the County rejected the recommendations of experts and agencies with expertise without any sound reasoned process.] [Tahoma/Puget Sound, 05304c, FDO, at 41-44.]

• While the 2003 GMA amendments [ESHB 1933, amending RCW 36.70A.480] prohibit blanket designation of all marine shorelines (or indeed, all freshwater shorelines) as critical fish and wildlife habitat areas, the GMA requires the application of best available science to designate critical areas, explicitly recognizing that some of these will be shorelines. The legislature sought to ensure that this correction did not create loopholes.

"Critical areas within shorelines" must be protected, with buffers as appropriate, if they meet the definition of critical areas under RCW 36.70A.030(5). RCW 36.70A.480(5) and (6). [The BAS in the County's record supported the conclusion that near-shore areas meet this definition, and the BAS] may provide the basis for designating less than all of Pierce County's marine shorelines as critical habitat for salmon. ESHB 1933 does not justify Pierce County's blanket deletion of marine shorelines and marine shoreline vegetative buffer requirements from its [CAO]. [Tahoma/Puget Sound, 05304c, FDO, at 49.]

• In remanding the noncompliant regulations to [the County], the Board pointed out that . . . the record already contained abundant science concerning the matters at issue. Nevertheless, [the County] undertook additional public process and re-analysis in developing the proposal for [the remand Ordinance]. Base on the prior well-developed record, as refined in the compliance process, [the County] has now enacted both designation of critical salmon habitat in [the County] marine shorelines and measures to protect the functions and values of that habitat. While there are various ways that the science in the record might have been applied by [the County] to comply . . . the Board is persuaded that Ordinance No. 2005-80s meets the GMA standard. [Tahoma/Puget Sound, 05304c, 1/12/06 Order, at 6.

Frequently Flooded Areas

• See also: Critical Areas

• The Act's directive that local governments are to "protect" critical areas means that they are to preserve the structure, value and functions of wetlands, aquifer recharge areas used for potable water, fish and wildlife habitat conservation areas, frequently flooded areas and geologically hazardous areas. [derived from WAC 365-195-825(2)(b)] [Pilchuck II, 5347c, FDO, at 20.]

• The Act's requirement to protect critical areas means that the structure, value and functions of such natural systems are inviolate. While local governments have the or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in a net loss of the structure, value and functions of such natural systems within a watershed or other functional catchment area. [Pilchuck II, 5347c, FDO, at 21.]

• The requirement that critical areas are to be protected in the urban area is not inconsistent with the Act's predilection for compact urban development. [Pilchuck II, 5347c, FDO, at 24.]

• The use of performance standards is recommended in the Minimum Guidelines for "circumstances where critical areas (e.g., aquifer recharge areas, wetlands, significant wildlife habitat, etc.) cannot be specifically identified." WAC 365-190-040(1). However, where critical areas are known, cities and counties cannot rely solely upon performance standards to designate these areas. [Pilchuck II, 5347c, FDO, at 41-42.]

• The Act's requirement to protect critical areas, particularly wetlands and fish and wildlife habitat conservation areas, means that the structure, values and functions of such natural ecosystems are inviolate must be maintained. While local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in the net loss of the structure, value and functions of such natural ecosystems within a watershed or other catchment area. [Tulalip, 6329, FDO, at 11, amending a holding in Pilchuck II, FDO 5347, pursuant to a Superior Court remand]

• Certain critical areas, such as wetlands and fish and wildlife habitat areas, constitute ecosystems that transcend the boundaries of individual properties and jurisdictions, and that it is therefore necessary to address certain critical area issues on a watershed level. [Tulalip, 6329, FDO, at 11-12.]

• The GMA requires jurisdictions to adopt development regulations that protect critical areas; jurisdictions have the authority to supplement the GMA's mandated regulatory protection of critical areas with non-regulatory programs. [Tulalip, 6329, FDO, at 12.]

• Although the Booth studies document the basin-wide 10 percent impervious surface threshold for damage to aquatic systems, the studies also identify measures to mitigate the effects of impervious surfaces. [Bremerton/Alpine, 5339c/8332c, FDO, at 31.]

• Rather than adopting a maximum limit on impervious surfaces . . . the County, utilizing best available science in a substantive way, adopted a system for critical areas protection that includes buffers, building setbacks, mitigation, and stormwater drainage controls. [Bremerton/Alpine, 5339c/8332c, FDO, at 32.]

• [Even if a maximum impervious basin-wide coverage of 10 percent constitutes the best available science, petitioners have not shown that the adopted regulations allow more than 10 percent basin-wide impervious surface coverage. [Bremerton/Alpine, 5339c/8332c, FDO, at 32.]

• [Petitioner cited to science in the record from the City's Surface Water Management Plan, recommending regulation based upon the 500-year flood plain. Yet the City designated the 100-year flood plain as its frequently flooded area.] Although there may well be a scientific basis to support this designation, Edgewood fails to cite to a scientific basis for this 100-year flood plain designation. Consequently, the Board concludes that Edgewood's Plan declaration and designation of the 100-year flood plain, as its frequently flooded area – critical area, does not comply with the requirements of RCW 36.70A.172. [Lewis, 1320, FDO, at 15.]

• Whether FEMA changes its density fringe designation along the Snohomish River floodway, or whether the FAA approves expansion of Harvey Airfield are interesting wrinkles that the County will have to iron out when those federal decisions are ultimately made. However, the issue before the Board is whether the County's retention of some 50

acres within the City of Snohomish's UGA is clearly erroneous. The Board concludes that it is not. The focus of Petitioners' argument is that the area within the UGA is a critical area and its inclusion in the UGA indicates it is not, will not, or cannot be protected. Pilchuck has not made its case on this point, nor could it in the context of the present ordinance. Further, the Board finds that Petitioners' theory is unsupported by the GMA. The GMA acknowledges that critical areas occur throughout the landscape, within urban, rural and resource land designations. The GMA does not discriminate; it simply requires that their functions and values be protected wherever they are found. [Pilchuck VI, 06315c, FDO, at 68.]

Forest Lands

• See also: Natural Resource Lands

• The mere possibility of more intense uses of the lands does not preclude land from being classified as forest land. [Twin Falls, 3303c, FDO, at 33.]

• The fact that land is generally used by the timber industry does not necessarily mean that it meets the Act's definition of "forest land" that must be designated. [Sky Valley, 5368c, FDO, at 83.]

• As a matter of law pursuant to Section 1 of ESSB 6228 and RCW 36.70A.060(3), all cities and counties that had not adopted comprehensive plans by the effective date of ESSB 6228 were required to re-evaluate whether their prior (interim) forest land designations and development regulations complied with the 1994 definition of the phrase "forest lands" and remained consistent with their newly adopted comprehensive plans. [Sky Valley, 5368c, FDO, at 88.]

• A county or city does not per se violate the Act simply because its final forest land designations approved at the time of comprehensive plan adoption include lesser acreage than the preliminary, interim forest land designations. [Sky Valley, 5368c, FDO, at 88.]

• RCW 36.70A.170(1)(b) requires counties and cities to designate all lands that meet the definition of forest lands and that RCW 36.70A.060(1) requires that counties and cities adopt development regulations to assure the conservation of all these designated forest lands unless the forest lands would fall within a UGA. [Sky Valley, 5368c, FDO, at 89.]

• Cities and counties can adopt development regulations for designated forest lands that regulate these lands differently (in manner or degree) as long as adopted development regulations assure the conservation of forest lands. [Sky Valley, 5368c, FDO, at 101.]

• Although the Act requires that all lands that meet the definition of forest lands be designated, unless they are located within a UGA, cities and counties retain discretion as to the degree and manner of conservation afforded designated forest lands by adopted development regulations. As long as the adopted development regulations assure the

conservation of designated forest lands, these regulations may control designated forest lands in a different manner or degree. [Sky Valley, 5368c, FDO, at 101.]

• The reference in RCW 36.70A.070(1) to "timber production" is not synonymous with "forest lands." The latter is a term of art unique to the GMA, for which specific requirements have been adopted, particularly RCW 36.70A.060 and .170. In contrast, the former, "timber production," is used within the definition of the phrase "forest lands." "Forest lands" are a subset of broader category of lands, those devoted to timber production. [Sky Valley, 5368c, FDO, at 103.]

• Just because land is available for timber production does not mean that it constitutes "forest lands" as defined by the Act for which the designations specified at RCW 36.70A.170 and development regulations specified at RCW 36.70A.060 must be adopted. [Sky Valley, 5368c, FDO, at 104.]

• RCW 36.70A.170 is unequivocal: a county has a duty to designate, where appropriate, forest lands of long-term commercial significance. A County is compelled to decide whether it has such lands and if so, to designate them. [Bremerton/Alpine, 5339c/8332c, FDO, at 35.]

• Under the sequencing scheme of the GMA, the land does speak first; but, on the rare occasion, as is the case here, where the land may speak late − it will be heard. [Bremerton/Alpine, 5339c/8332c, FDO, at 35.]

• The record supports the County's determination that the [property] is forested in character. Petitioners have not shown that the County's portrayal of the property as "forested in character" was clearly erroneous. [Screen II, 9312, FDO, at 8.]

• Where land meets the criteria for more than one land use designation, the County has the discretion to determine the designation to be applied to that land. [Screen I, 9306c, 10/11/99 Order, at 21.]

• The record is clear that the County designated GMA forest lands and adopted development regulations. The County did not "fail to act." Petitioner's disagreement with the County's actions at this late date cannot re-open review of the County's action. [Gain, 9319, 1/28/00 Order, at 6.]

• [One of the criterion used by the County to designate forest lands was that such lands could not be designated as forestry if they fell within one-mile of existing commercial or industrial property.] The one-mile criterion was used for the initial identification and designation of forest lands only. It has no applicability beyond the initial designation of such lands; it is not a de facto exclusion zone [precluding a UGA and urban uses within one-mile of designated forest lands.] [Kitsap Citizens, 0319c, FDO, at 22.]

• The term "de-designated," rather than simply "re-designated" was first used by the Board in Grubb [0314, FDO]. Under the GMA all lands are either: (1) urban lands (i.e.

within urban growth areas); (2) rural lands; or resource lands. These are the three fundamental building blocks of land use planning under the GMA. While "re-designation" or "rezoning" of land is somewhat common within urban or rural areas, such changes take place within the context of being within a UGA or a rural area. Appropriate "re-designations" do not change the fundamental nature of those lands as either urban or rural. In contrast, a "de-designation" of lands from resource land to either urban or rural is a change of the most fundamental and paramount kind. The term "de-designation" was coined to reflect this distinction. [Forster Woods, 1308c, FDO, at 14, footnote 4.]

• The Board rejects the argument that the 1994 designation of the . . .parcel as forest resource lands was a "mistake." The record supporting that prior designation is not before the Board and the time to challenge the GMA sufficiency of that designation has long since passed. [The Board notes that the original property owner did not characterize the prior resource lands designation as a "discrepancy" or "mistake" in 1994, nor in 1995 when it sold the property with that designation intact. Nor did Intervenor characterize the prior designation as a "mistake" until after the property was logged in reliance upon that resource land designation. To advance such argument at this time is ironic, if not disingenuous.] [Forster Woods, 1308c, FDO, at 16 and footnote 5.]

• General discussion of the Grubb and Green Valley cases as they relate to resource lands. [Forster Woods, 1308c, FDO, at 16-18.]

• Forestry activities are permissible on lands designated "Rural" in the County's Plan. See RCW 36.70A.070(5)(b). However, forestry on these [rural] "wooded lands" is not entitled to the protections from encroachment of incompatible uses that attach to lands designated as forest resource lands of long-term commercial significance. See RCW 36.70A.170, .060, .030(8) and .020(8). [Bremerton II, 04309c, FDO, at 23.]

Geologically Hazardous Areas

• See also: Critical Areas

• The Act's directive that local governments are to "protect" critical areas means that they are to preserve the structure, value and functions of wetlands, aquifer recharge areas used for potable water, fish and wildlife habitat conservation areas, frequently flooded areas and geologically hazardous areas. [derived from WAC 365-195-825(2)(b)] [Pilchuck II, 5347c, FDO, at 20.]

• The presence of special environmental constraints, natural hazards and environmentally sensitive areas may provide adequate justification for residential densities under 4 du/acre within a UGA. [Benaroya I, 5372c, 3/13/97 Order, at 13.]

• [The question before the Board was whether Seattle's policy preference for preventing harm to steep slopes by minimizing disturbance and maintaining and enhancing existing ground cover was developed and derived from a process where the evidence of best available science was in the record and was considered substantively – was it discussed,

deliberated upon and balanced with other factors? The Board found BAS was included in the record and considered substantively in developing the policy preference.] [HEAL, 6312, 10/4/01 Remand Order, at 4-7.]

• The GMA defines geologically hazardous areas as areas that are not suited to siting of . . . development consistent with public health or safety concerns," [RCW 36.70A.030(9)], but there is no affirmative mandate associated with this definition except to "protect the functions and values." Petitioners have not persuaded the Board that the requirement to protect the functions and values of critical areas has any meaning with respect to volcanic hazard areas or that the GMA contains any independent life-safety mandate. [Tahoma/Puget Sound, 05304c, FDO, at 25.]

• The Board finds that "best available science' was included in the designation of Lahar Inundation Zones and Lahar Travel Time Zones. To the extent the new regulations were built around that mapping exercise, they reflect best available science as required by RCW 36.70A.172(1). . . . The more troubling question is what land use regulations are required, once a hazard is acknowledged. . . . The County reasons that the only remaining question – reasonable occupancy limits [for a covered assembly in the lahar zone] – is a policy choice based on weighing risks. In the County's calculus, the low frequency of lahar events, the likelihood of early warning, and the opportunity for evacuation must be weighed against the economic opportunity presented by new tourist facilities. . . . The Board agrees with Pierce County that land use policy and responsibility with respect to Mount Rainier Case II lahars – "low probability, high consequence" events – is within the discretion of the elected officials; they bear the burden of deciding "How many people is it okay to sacrifice." [Tahoma/Puget Sound, 05304c, FDO, at 23-25.]

• The analogy between floods and lahars is limited. The scientific references linking 100-year floods and Case II Lahars refer only to periodicity, not to depth or viscosity or rate of flow ore even predictability. . . The GMA imposes no duty on the County to treat both hazards alike in its development regulations just because their frequency may be analogous. [Tahoma/Puget Sound, 05304c, FDO, at 26.]

• The Board reads the cautionary approach recommended in the CTED guidelines [WAC 365-195-920] to refer to situations where incomplete science may result in inadequate protection for the "functions and values" of critical areas. In this case, we are not concerned with protecting the "function and values" of volcanic debris flows. Here, the science of lahar inundation hazards on Mount Rainier is sufficiently detailed; the question dealt with in the County occupancy regulations is the feasibility of rapid evacuation from sites very close to the mountain – identified by the URS report as an engineering and life-safety question rather than an issue of vulcanology.. [Tahoma/Puget Sound, 05304c, FDO, at 28.]

• The County has prohibited density bonuses in lahar hazard zones, provided maps of flow zones which are available on line, launched significant public and landowner information and outreach, created and installed warning systems where feasible, prohibited critical facilities, and limited special occupancies and covered assemblies. The

Board finds that [Plan Policies] that might apply to the occupancies at issue here are equivocal and do not provide a basis for overturning the covered assembly occupancies in Case II, Travel Time Zone A, Lahar Inundation Zones. [Tahoma/Puget Sound, 05304c, FDO, at 31.]

• [A seismic ordinance regulating conditions on construction in seismic areas is a development regulation subject to review by the Board.] [King County IV, 05331, 8/8/05 Order, at 6.]

• [The City designated a portion of the Norway Hill area with an R-40,000 minimum lot size. Steep slopes, erosive soils, difficulty in providing urban services and connection to an aquifer and salmon stream were the basis for the designation. The Board noted that only a portion of the area designated was within the city limits, the remainder being within the unincorporated county, but within the UGA and planned annexation area of the City.] There is no question that the area designated R-40,000 within the Norway Hill Subarea is not a large scale, complex, high rank order value critical area as analyzed in the Board's Litowitz case. The City's Litowitz Test Report confirms this conclusion. However, in a recent Board decision [Kaleas, 05307c, FDO.], the Board acknowledged that the critical areas discussed in the Litowitz case, and several cases thereafter, were linked to the hydrologic ecosystem, and that the Board could conceive of unique geologic or topographical features that would also require the additional level of protection of lower densities in those limited geologically hazardous landscapes. [To qualify, geologically hazardous critical areas would have to be mapped, and use best available science, to identify their function and values. The Board concluded that the geologically hazardous areas on Norway Hill were mapped, and the area contained aquifers connected to salmon bearing streams. The Board upheld the R-40,000 designation for the affected area.] [Fuhriman II, 05325c, FDO, at 37-39.]

• [BAS is required in developing measures to protect the function and value of critical areas. BAS is not a prerequisite for a rezone.] If Petitioners believed that the City's identification, designation and protection of geologically hazardous areas along the western edge of the City was clearly erroneous, Petitioner's could have challenged the City's adoption of its critical areas regulations, the City's identification and designation of geologically hazardous areas, or the Comprehensive Plan's land use designations for the area. Petitioner did none of the above, and it is untimely to challenge any of those actions at this time. To now challenge the zoning designations that implement the unchallenged Plan designations, which are admittedly based upon BAS, is without merit. Both parties have demonstrated that BAS, as reflected in adopted documents, was part of the record in this rezoning action. [Abbey Road, 05348, FDO, at 11.]

• [A jurisdiction's] duty and obligation to protect the public from potential injury or damage that may occur if development is permitted in geologically hazardous areas is not rooted in the challenged GMA critical area provisions. Rather, providing for the life safety of occupants and the control of damage to structures and buildings is within the province of building codes. Chapter 19.27 RCW. [Sno-King, 06305, FDO, at 15.]

• There is no disagreement that construction of buildings and structures near a seismic hazard area is governed by the IBC [2003 International Building Code], as adopted by the State Building Code, and applicable to Snohomish County. However, the County has identified a "regulatory gap" which is characterized as follows: The IBC's seismic provisions only apply to faults that have been verified and mapped by the USGS. [The newly discovered faults and inferred faults have not yet been mapped by USGS.] Therefore, the IBC provisions are not directly applicable. Consequently, to protect the public and property, the County has taken the action of adopting the Seismic Ordinance to fill this gap. [Petitioners do not dispute the gap, but rather contend that the regulations do not go far enough. The Board concluded that the County's adoption of the Seismic regulations was a responsible and reasonable action in face of the regulatory gap identified.] [Sno-King, 06305, FDO, at 15-16.]

• The Board finds and concludes that there is no discrepancy between the County's definition of "seismic hazard areas" and the GMA's definition of "geologically hazardous areas." While the GMA definition imposes no independent duty upon the County to protect life safety, the Board notes that the County's definition falls within the broader GMA definition and is more protective than that included in the IBC, since it includes protections for "inferred fault" areas. [Sno-King, 06305, FDO, at 16.]

Wetlands

See also: Critical Areas

• The Act's directive that local governments are to "protect" critical areas means that they are to preserve the structure, value and functions of wetlands, aquifer recharge areas used for potable water, fish and wildlife habitat conservation areas, frequently flooded areas and geologically hazardous areas. [derived from WAC 365-195- 825(2)(b)] [Pilchuck II, 5347c, FDO, at 20.]

• It is the structure, value and functions of critical areas that are inviolate, not the critical areas themselves. The "protect critical areas" mandate does not equate to "do not alter or negatively impact critical areas in any way." While the preservation of the structure, value and functions of wetlands, for example, is of paramount importance, the Act does not flatly prohibit any alteration of or negative impacts to such critical areas. [Pilchuck II, 5347c, FDO, at 20.]

• The Act's requirement to protect critical areas means that the structure, value and functions of such natural systems are inviolate. While local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in a net loss of the structure, value and functions of such natural systems within a watershed or other functional catchment area. [Pilchuck II, 5347c, FDO, at 21.]

• The GMA requires designation and protection of critical areas and makes no qualifying statement that, for example, urban wetlands are any less important or deserving of protection than rural ones. As a practical matter, past development practices may have eliminated and degraded wetlands in urban areas to a greater degree than rural areas, but the Board rejects the reasoning that this provides a GMA rationale for not protecting what is left. [Pilchuck II, 5347c, FDO, at 23.]

• The Act's mandate for protection requires either a buffer, or a functionally equivalent protection for all wetlands, including category 4 wetlands. It may well be that some or even most category 4 wetlands can be protected by means other than a buffer. However, . . . some mechanism is needed to protect these areas. [Pilchuck II, 5347c, FDO, at 35.]

• The use of performance standards is recommended in the Minimum Guidelines for "circumstances where critical areas (e.g., aquifer recharge areas, wetlands, significant wildlife habitat, etc.) cannot be specifically identified." WAC 365-190-040(1). However, where critical areas are known, cities and counties cannot rely solely upon performance standards to designate these areas. [Pilchuck II, 5347c, FDO, at 41-42.]

• The Act's requirement to protect critical areas, particularly wetlands and fish and wildlife habitat conservation areas, means that the structure, values and functions of such natural ecosystems are inviolate must be maintained. While local governments have the discretion to adopt development regulations that may result in localized impacts upon, or even the loss of, some critical areas, such flexibility must be wielded sparingly and carefully for good cause, and in no case result in the net loss of the structure, value and functions of such natural ecosystems within a watershed or other catchment area. [Tulalip, 6329, FDO, at. 11, amending a holding in Pilchuck II, FDO 5347, pursuant to a Superior Court remand]

• Local governments have the flexibility to adopt critical area development regulations that would permit the reduction of the geographic extent of, for example, a wetland. This could result in the loss of all or a portion of an individual site-specific critical area, so long as the values and functions of the ecosystem in which the critical area is located is not diminished. [Tulalip, 6329, FDO, at 11.]

• Certain critical areas, such as wetlands and fish and wildlife habitat areas, constitute ecosystems that transcend the boundaries of individual properties and jurisdictions, and that it is therefore necessary to address certain critical area issues on a watershed level. [Tulalip, 6329, FDO, at 11-12.]

• Although the Booth studies document the basin-wide 10 percent impervious surface threshold for damage to aquatic systems, the studies also identify measures to mitigate the effects of impervious surfaces. [Bremerton/Alpine, 5339c/8332c, FDO, at 31.]

• Rather than adopting a maximum limit on impervious surfaces . . . the County, utilizing best available science in a substantive way, adopted a system for critical areas protection

that includes buffers, building setbacks, mitigation, and stormwater drainage controls. [Bremerton/Alpine, 5339c/8332c, FDO, at 32.]

• [Even if a maximum impervious basin-wide coverage of 10 percent constitutes the best available science, petitioners have not shown that the adopted regulations allow 606 more than 10 percent basin-wide impervious surface coverage. [Bremerton/Alpine, 5339c/8332c, FDO, at 32.]

• The large scale environmentally sensitive hydrologic system that provided the context for the Board's analysis in the FDO is the Clover Creek drainage. As noted in the MBA's quote from the Board's FDO, the 729 acres zoned RR in Area 1 contains "isolated, sporadic and scattered occurrences of flooding, wetlands or priority habitat that can be appropriately addressed through existing critical areas regulation." In essence, the Board concluded that Area 1 was not an integral and significant part of the large scale environmentally sensitive system at issue – Clover Creek. Nothing has changed. [MBA/Brink, 02310, 9/4/03 Order, at 7.]

• [Petitioner challenged the low density designation of an area containing wetlands, but the site of a proposed roadway expansion – the Bothell Connector. Petitioner sought a higher density and more intense designation for the area.] It is obvious to the Board that Petitioner would have preferred a different designation; and Petitioner had the opportunity to persuade the Council to do so. However, the City chose to do otherwise; and as the Board discussed, supra, the R-40,000 designation in the Fitzgerald Subarea was not clearly erroneous and complied with the GMA. The fact that the road may, or even will, go through a critical area and connect two Regional Activity Centers, does no negate the validity of the R-40,000 designation, especially between two higher intensity areas. The Board acknowledges that such a project, if it does materialize, will be subject to the provisions of [SEPA]. Any probable adverse environmental impacts would be identified and mitigated through that process. [Fuhriman II, 05325c, FDO, at 58.]

• Although Mukilteo argues that the best available science was "included" in providing the basis for the 40% buffer reduction provision from DOE Buffer Alternative 3 methodology, nothing in the record shows that best available science was even considered in making the decision. The 50% reduction that appeared very early in the City's revision process was not informed by best available science, as discussed supra, and nothing in the record indicates a reduction of more than 25% is an appropriate deviation from DOE Buffer Alternative 3 methodology. The City's argument that changes can be made from best available science recommendations without any justification for the changes would eliminate the stated purpose of the best available science requirement – protection of the function and values of critical areas. A jurisdiction must provide some rationale for departing from science based regulations. (Citation and quote from Court of Appeals Division I decision in WEAN v. Island County). [Pilchuck V, 05329, FDO, at 10-11.]

• In designating critical areas, cities and counties "shall consider" the minimum guidelines promulgated by CTED in consultation with DOE pursuant to RCW

36.70A.050(1) and (3); .170(2). In particular, wetlands "shall be delineated" pursuant to the DOE manual. RCW 36.70A.175. [DOE/CTED, 05334, FDO, at 10.]

• Wetlands are defined in Section .030(21) and are required to be delineated according to Ecology's manual. RCW 36.70A.175. WAC 365-190-080(1) states that city and county designation of wetlands "shall use the definition" in Section .030(21). Expanding the statutory exemption results in a failure of accurate designation and, thus, a failure to protect the functions and values of these critical areas, as required by RCW 36.70A.172(1). [DOE/CTED, 05334, FDO, at 26.]

• Identifying and designating wetlands in order to protect their functions and values is a requirement of the GMA. Jurisdictions are not free to rewrite the statutory definition where its terms are explicit, as they are with respect to the exemption for accidentally-created wetlands. [DOE/CTED, 05334, FDO, at 27.]
• The GMA imposes a requirement to protect critical area functions and values based on best available science. Wetland classification schemes are not necessary, but if used, they must be based on BAS in order to ensure that the related buffer requirements provide the needed protections. [DOE/CTED, 05334, FDO, at 31]

• [T]he Petitioners have met their burden of proof by demonstrating that the City's record lacks a current scientific basis for its wetlands rating system and that the three-tier system is designed "with specific and narrow functions in mind," rather than protecting "the entirety of functions" of the City's wetlands. The Board does not find in the City's record any current science supporting the truncated wetland rating system or indicating how wetland functions will be identified and protected with this system. [DOE/CTED, 05334, FDO, at 33.]

• In reenacting its three-tier wetlands ranking system, Kent failed to account for the full range of wetland functions and therefore failed in its GMA obligation to protect critical area functions and values. [As clarified in the following section, protection of functions could possibly have been provided, even under a three-tier system, with wider required buffers and other adjustments.] Retaining this outdated system ignores the advances of science and understanding of wetland functions and values that have occurred over the last decade. Retention of an obsolete, albeit "comfortable" system makes a mockery of, and totally ignores, the requirement of RCW 36.70A.130(1) that local cities and counties must update CAOs based upon BAS, which is continually being refined. [DOE/CTED, 05334, FDO, at 34.]

• [The County exempted from regulation very small, truly isolated and poorly functioning wetlands. The County was advised by state agencies that such exemptions were not supported by BAS. The Board reviewed the case of Clallam County v. Western Washington Growth Management Hearings Board, 130 Wash. App. 127, 140, 121 P.3d 764 (2005), pertaining to the limitations on exemptions from critical areas regulations.] The Board reads the Court's opinion to require CAO exemptions to be supported by some analysis of cumulative impacts and corresponding mitigation or adaptive management. Here, Kitsap County has not expanded its small wetlands exemption; in fact the

exemption has been somewhat narrowed. But there is no evidence in the record of the likely number of exempt wetlands, no cumulative impacts assessment or adaptive management, and no monitoring program to assure no net loss. In light of the Court's guidance in Clallam County, which the Board finds controlling, the Board is persuaded that a mistake has been made; Kitsap's wetland exemption is clearly erroneous. [Hood Canal, 06312c, FDO, at 19-20.]

• In Category IV wetlands (the most degraded) of less than 1000 square feet, the City allows development impacts if they are mitigated by on-site replacement, bioswales, revegetation, or roof gardens. SMC 25.09.160.C.3. However, no buffers are required. In Hood Canal, the Board acknowledged the potential disproportionality of requiring buffers as the means of protecting functions of the smallest, most degraded wetlands. Hood Canal, at 19, fn. 23. The Board noted that other mitigating strategies, such as best management practices or compensatory on-site or off-site mitigation might be scientifically supported. Id. Here, Seattle has opted for alternative protection mechanisms for these limited cases of small, isolated, low-functioning wetlands. The Petitioners have not carried their burden of proving that the City's regulations for small Category IV wetlands are clearly erroneous. [Seattle Audubon, 06324, FDO, at 24.]

• [Seattle's CAO exempts hydrologically isolated wetlands of less than 100 square feet relying on science that states that wetlands down to 200 square feet may provide habitat for amphibians but that BAS cannot yet assess ecological functions os very small wetlands.] Nevertheless, Seattle has undertaken a study to map wetlands in Seattle, in collaboration with the U.S. Fish and Wildlife Service. Doc. 3h, at 7. Preliminary findings of the survey identified 733 possible wetlands in the City, of which 197 were estimated to be smaller than 1,000 square feet. Id. at 9. Wetlands smaller than 100 square feet – and hydrologically isolated - would necessarily be a smaller subset of the 197. To require the City to address specific harm from possible loss of this subset of very small isolated wetlands, when best available science cannot assess their ecological functions, would stretch the Board's authority. A fee-in-lieu compensatory mitigation program would of course be preferable, as it would enable the City to mitigate any cumulative impacts that future scientific understandings might bring to light. However, in the context of a narrowly-tailored exemption based on science, the Board is not persuaded that the GMA requires more. [Seattle Audubon, 06324, FDO, at 26.]