

**Summary of Recent Cases Before  
Washington’s Growth  
Management Hearings Boards  
Winter 2005**

*This is not a complete review of the cases, nor does it constitute a legal opinion. For more information, consult the Growth Management Hearings Boards, or consult your legal counsel.*

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***Tahoma Audubon Society, People for Puget Sound, and Citizens for a Healthy Bay v. Pierce County, CPSGMHB Consolidated Case No. 05-3-0004c, July 12, 2005***

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***Factual and Procedural Background***

As required by the Growth Management Act (GMA), Pierce County reviewed and revised its critical areas regulations after a multiyear process to include the best available science (BAS). Two of the three resulting critical areas ordinances (CAOs) were challenged to the Central Puget Sound Growth Management Hearings Board – one for its treatment of facilities in volcanic hazard zones and the other for its treatment of marine shorelines.

***Volcanic Hazards***

The petitioner Tahoma Audubon Society (Audubon) challenged the provisions of Ordinance 2004-57s allowing “covered assemblies” – such as a 500-person conference center at a proposed resort 11 miles from the Mt. Rainier National Park entrance – in the volcanic hazard zones of the Upper Nisqually Valley on Mt. Rainier. Audubon argued that Pierce County failed both to protect public health and safety and to use BAS in allowing 400-person occupancy buildings in an area that could be inundated within one hour of a lahar (volcanic debris flow comprised of 60 percent or more sediment) in this valley, where an early warning system is not feasible. Pierce County responded that risk assessment is a public policy choice that the GMA leaves to elected officials.

***Board Decision***

The Board rejected Audubon’s challenges to Ordinance 2004-57s, finding that Pierce County had used BAS to designate volcanic hazard areas. “The more troubling question,” wrote the Board, “is what land use regulations are required, once the hazard is acknowledged.”

Although GMA goals direct that comprehensive plans and development regulations provide for the health and safety of residents, the Board determined that no

GMA provision requires the county to make human life and safety its paramount concern when adopting critical areas regulations. Indeed, the Board found that Pierce County incorporated BAS in its regulations by differentiating allowed land uses based on its mapping of lahar inundation zones and calculations of how long it would take for lahars to reach specific locations. It agreed with Pierce County that life-safety risk assessment is a public policy decision that rests with the moral conscience of elected officials, not with the Board.

### ***Marine Shorelines***

People for Puget Sound and Citizens for a Health Bay challenged the provisions of Ordinance 2004-56s, which address stormwater, shorelines, wetlands, and fish and wildlife habitat conservation areas. Petitioners asserted that Pierce County, by failing to designate marine shorelines as critical fish and wildlife habitat and failing to require a 150-foot vegetated buffer on marine shorelines, did not include BAS and did not comply with other GMA requirements.

Some history is necessary to best understand this case. Pierce County began developing its proposed critical areas amendments in 2000, consulting with the Washington Department of Fish and Wildlife and hiring a consultant who inventoried marine shoreline and identified and ranked marine salmon habitat. The county's draft critical areas amendments relied on *Everett Shorelines Coalition v. City of Everett*, a January 2003 Central Puget Sound Growth Board decision concluding that all marine shorelines must be classified as habitat essential to salmon recovery. The draft CAO did identify all marine shorelines as critical fish and wildlife habitat and required a shoreline vegetative buffer.

During the 2003 legislative session, the Legislature addressed the *Everett Shorelines*

*Coalition* decision and amended the GMA to clarify that marine shorelines are not *per se* critical areas. Throughout 2003, Pierce County debated and refined its marine shorelines critical areas and proposed vegetative buffers. After much debate and consideration of buffers ranging from 50' to 150', the Planning Commission recommended in July 2004 to the Pierce County Council a 100-foot marine shoreline buffer.

In September 2004 the County Council's Community Development Committee amended the Planning Commission's proposed regulation by deleting references to marine shorelines and eliminating mandatory vegetative buffers. The Committee retained marine shoreline designations for eelgrass beds, shellfish areas, and herring, sandlance and smelt spawning areas, but did not designate any salmonid habitat areas, despite the consultant report identifying marine salmon habitat used in the preparing the initial draft CAO.

The county explained that a number of its critical areas designations already protect the marine shore and that these overlapping designations, determined on site-by-site review, will protect anadromous fish. The county also argued that site-by-site review for shoreline buffers is appropriate since the science of marine buffer widths is immature. To support its argument, Pierce County, along with *amicus* Snohomish County, pointed to ESHB 1933, in which the Legislature stated that shorelines of the state are not critical areas *per se* and should not be subject to "blanket" designation. Shorelines only become critical areas, Pierce County argued, if some other critical area is located on them.

### ***Board Decision***

The Board found that the science developed in the record by Pierce County documents

the importance of Puget Sound marine shorelines in the lifecycle of anadromous fish. It noted that the marine shoreline assessment the county had done identified specific reaches of Pierce County marine shores that provide (or can be restored to provide) high quality salmon habitat. The Board also found that the record included science concerning the value of marine riparian vegetation in protecting the functions and values of marine shorelines as salmonid habitat.

Based on the evidence in the record, the Board concluded that Pierce County eliminated “marine shorelines” from the fish and wildlife conservation areas listed in its critical areas ordinance without determining whether the remaining designated critical areas adequately meet the needs of salmon. Although there is undoubtedly “overlap with habitats critical to the survival of anadromous fish,” the Board found nothing in the record indicating that the high-value shoreline reaches identified by the consultant are designated and protected in the county’s CAO.

Therefore, the Board ruled that Pierce County had failed to comply with RCW 36.70A.172(1) and remanded Ordinance 2004-56s to Pierce County.

### ***GMA Implications and Practice Tips***

All lands meeting the definition of critical areas must be designated and all designated lands must be protected. Protection means measures must be taken to preserve the structural integrity of the whole critical areas system, and its ability to continue serving the values and functions that are at stake. A CAO cannot allow a net loss of the value and function of designated ecosystems.

Critical areas within shorelines must be protected, with buffers as appropriate, if they meet the definition of critical areas. Just as RCW 36.70A.480 clarifies that there

is no “blanket designation” of marine shorelines,” neither does it justify a “blanket deletion” of marine shorelines. Rather, RCW 36.70A.480 provides a transition for critical areas within the shoreline from protection under the GMA to protection under the Shoreline Management Act. Given that Pierce County identified critical salmon habitat in developing its draft CAO, its failure to identify and protect critical salmon habitat along marine shorelines does not comply with RCW 36.70A.480.<sup>1</sup>

As to marine buffers, the Board states that there is a holistic value to marine shorelines that Pierce County fails to recognize. Agreeing with Petitioners that the county has put in place a “piecemeal protection scheme,” the Board explained that “protecting an eelgrass bed by prohibiting protruding docks, for example, addresses only one threat. An eelgrass bed will not thrive or serve its purpose as a fishery nursery if the beach and bluff above are degraded.” Deferring salmon habitat protection to a site-by-site analysis based on disaggregated factors, as Pierce County did, is inconsistent with its BAS analysis, which specified that “a *continuum* of suitable habitat” is essential for salmon survival (emphasis in original).

The science-based recommendations of the Department of Fish and Wildlife, the Department of Ecology, and other state agencies for marine buffers cannot be rejected by a local government without a “sound, reasoned process.” And, a county or city cannot balance protection with critical areas with other GMA goals,

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<sup>1</sup>The Western Washington Growth Management Hearings Board has reached a different interpretation of RCW 36.70A.480 as amended by ESHB 1933. For more information, consult: *Evergreen Islands, Futurewise, and Skagit Audubon Society v. City of Anacortes*; 05-2-0016, [Final Decision and Order](#); (December 27, 2005). The Western Board’s interpretation was rejected in Superior Court and is on appeal on the Court of Appeals. See *Futurewise vs. WWGMHB*, Court of Appeals # 35696-1-II.

particularly if the local government fails to identify specific other goals.

***1000 Friends of Washington v. City of Issaquah, CPSGMHB Case No. 05-3-0006, July 20, 2005***

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***Factual and Procedural Background***

Since the December 1, 2004, Plan Update deadline, the Central Puget Sound Growth Management Hearings Board has had several opportunities to determine whether various cities have provided for “appropriate urban densities” as part of the Board’s compliance review. This opinion follows by one day the Central Puget Sound Growth Management Hearing Board’s decision in *Kaleas v. Normandy Park*,<sup>2</sup> in which the Board laid out the factors it would consider and weigh in determining whether a city’s designated urban densities were “appropriate urban densities.”

After the City of Issaquah amended its comprehensive plan (CP) and zoning map as part of the mandated GMA update cycle, two areas designated in the Future Land Use Map (FLUM) as Low Density Residential were challenged as not permitting urban densities. The Conservancy Residential District limits residential densities to 1 dwelling unit per 5 acres (1 dwelling unit/5 acres) and the Single Family Estates District limits residential densities to 1.24 dwelling unit/acres. Of the 6,770 acres of land designated for various uses in Issaquah, 6 percent is in districts limiting residential density to less than 4 dwelling units/acres.

***Board’s Decision***

In this decision, the Board again reviews the ongoing duty for a city to accommodate its allocation of the county’s 20-year growth

forecast and the Act’s predilection for compact urban growth. “So long as the state and region continues to grow, counties and cities must continue to plan for, manage, and accommodate the projected and allocated growth,” it wrote.

The Board discussed the 4 dwelling units per acre “bright line” or “safe harbor” as an appropriate urban density that has provided certainty and predictability to GMA planning; and the circumstances when lower densities are appropriate urban densities that provide flexibility and discretion. Typically, the Central Puget Sound Growth Management Hearings Board will reject as an “appropriate urban density” one that perpetuates an existing low density pattern.

If the jurisdiction is accommodating its share of the 20-year growth forecast, encouraging and stimulating urban growth within its borders and providing for compact urban growth at urban densities, the Board will consider the following factors to determine whether densities lower than 4 dwelling units/acre are appropriate:

- ◆ Has the jurisdiction determined that its critical areas regulations do not adequately protect designated critical areas?
- ◆ Is the jurisdiction as a whole providing for appropriate net urban densities considering the portion of residential land zoned at 4 dwelling units/acre or more and the portion of residential land zoned at less than 4 dwelling units/acre and what portion of that land is vacant, underdeveloped, and appropriate for redevelopment and infill?
- ◆ Do the areas contain large, complex, high value critical areas or limited, unique geologic or topographical features that require the additional protection that lower densities can provide?

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<sup>2</sup> The Board’s decision in *Kaleas vs. Normand Park* has been reversed on remand from Superior Court. See Case Number 05-3-0007c.

- ◆ Do the areas contain existing equestrian communities?
- ◆ Has the city adopted in these areas an explicit program phasing the provision of urban services and facilities that limits densities until a date certain, within the plan’s time horizon, when urban services and facilities will be provided?

Applying these factors to the new Issaquah CP and zoning map, the Board found the Conservancy Residential District appropriate. It determined, however, that Issaquah’s Single Family Estate zoning in an area developed with large lots on septic tanks did not provide appropriate urban densities. The Board remanded but did not invalidate the Plan Update and FLUM.

***GMA Implications and Practice Tips***

Neither the GMA nor the Department of Community, Trade and Economic Development’s (CTED) guidelines define “urban density” let alone a definition of “appropriate urban density.” Yet, the statute requires counties to designate urban growth areas – each of which “shall permit urban densities.”

In *Kaleas vs. Normandy Park*, the longstanding “safe harbor” of 4 dwelling units/acre has been reversed on remand from Superior Court. See Case Number 05-3-0007c. Although there is less certainty as to what is the minimum density that could be considered urban, this case still indicates how the Board views the role of cities in accommodating growth under the GMA.

Significantly, the Board not only articulated the factors it will consider when reviewing lower densities, it also revealed when higher densities may be appropriate. “As growth continues,” the Board explains, “higher residential densities become a corollary to compact urban development.” In footnote 11, it adds that “when *all* developable vacant and undeveloped land is developed, a

jurisdiction’s ‘growth accommodation’ obligations do not disappear, but instead are redirected toward redevelopment possibilities and opportunities.”

Density, the Board explains, is a means of achieving almost every GMA goal: urban growth, sprawl reduction, efficient multimodal transportation systems, affordable housing, economic development, maintaining and enhancing natural resource industries, preserving open space and enhancing recreational opportunities, environmental protection, adequate and timely public facilities and services, and historic preservation. For instance, higher densities along major transportation corridors that allow mixed uses at designated centers support transit and encourage economic development. And, increasing the density and intensity of development in urban areas helps to preserve natural resource industries, open spaces, and the environment.

In rejecting Issaquah’s Single Family Estate zoning that featured large lots on septic tanks, the Board suggested hypothetically such zoning may be appropriate in a city with an explicit phasing program that sequences and times the provision of urban services to mesh with the capital facilities and transportation elements, “particularly if offset by much higher densities where capital facilities are already in place.” In this case, if the city were to change the zoning district to one that permitted 4 du/acre, the Board reasoned the sewer district serving the area may have an incentive to establish a time certain to extend sewer service to the subdivision.

Without the certainty provided by the Board’s longstanding 4 dwelling units/acre “safe harbor,” communities should carefully review the assumptions contained in their comprehensive plan to ensure that urban densities are being permitted. It is also

advisable to compare their comprehensive plan assumptions with the actual densities being achieved, as reported in their Buildable Lands report.

***Futurewise and Citizens for Good Governance v. Walla Walla County, EWGMHB Case No. 05-1-0001, August 10, 2005***

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***Factual and Procedural Background***

Walla Walla County adopted its initial GMA CP in May 2001, designating over 727,000 acres – about 93 percent of the county’s land – as agricultural land of long-term commercial significance. The CP established four agricultural zones:

- ◆ Exclusive Agriculture/120 acres.
- ◆ Primary Agriculture/40 acres (AG-40).
- ◆ General Agriculture/20 acres (AG-20).
- ◆ Agriculture Residential/10 acres (AR-10).

The Primary Agriculture zoning accounts for almost 90 percent of the agricultural land of long-term commercial significance in Walla Walla County.

In order to help permanently preserve large tracts of land for farming, in December 2004, the Walla Walla County Commissioners amended the agricultural policies in its CP to allow cluster development in all agricultural areas except the Exclusive Agriculture zone and adopted development regulations (DRs) for clustering on agricultural lands. Ordinance 308 allows clustering to a maximum of 12 units per parcel (except in agricultural lands with 10-acre zoning), requires that a right-to-farm covenant be recorded with the land division, requires at least a 50-foot buffer between any dwelling in the cluster development and the adjacent resource land, and requires that all final plats contain notification of agricultural activities.

The minimum land needed for clustering in each zone is 80 acres in AG-40, 40 acres in AG-20, and 20 acres in AR-10. The ordinance allows development only at the density permitted by the assigned zoning, with the average lot size in the cluster limited to two acres, and requires that at least 70 percent of the overall site shall be maintained and preserved for agricultural use.

Under these clustering rules, 480 acres zoned as AG-40 could support a 12-lot cluster on no more than 24 acres – leaving 456 acres (minus roads) in agricultural production. In the AR-10 zone, the density of potential clusters is limited only by the size of the parcel. Although this would allow a 40-unit cluster on a 400-acre parcel, the 70 percent provision in the cluster ordinance and the two-acre average lot size would preserve between 280 and 320 acres for agriculture.

Futurewise and Citizens for Good Governance allege that the Walla Walla County cluster ordinance violates several sections of the GMA because it does not limit clusters to areas with poor soil or soil unsuited for agriculture, places no restrictions on the number of clusters in the same area, and fails to limit the number of lots per cluster in the AR-10 zone. The petitioners also argue that implementation of the clustering ordinance, contrary to the county’s intention to preserve its agricultural industries, will disrupt farming and harm, not aid, the farming industry.

***Board’s Decision***

Citing both the Washington Supreme Court decision of *King County v. Central Puget Sound Growth Management Hearings Board* and the Western Washington Board’s decision of *Panesko v. Lewis County*, the Eastern Washington Board identifies the two key issues in this case as whether the cluster ordinance complies with the GMA when it

makes no reference to restricting clusters to land with poor soil or lands otherwise unsuited for agriculture, and whether the allowed cluster density complies with the statutory requirement that clustering must *conserve* agricultural land and *encourage* the agricultural economy.

While acknowledging that RCW 36.70A.177 allows residential clusters in areas designated as agricultural lands of long-term significance, the Board found Ordinance 308 out of compliance. It explained that Walla Walla County improperly failed to ensure that clusters are located on poor soils or soils not suited for agricultural uses, failed to limit the number of clusters in the same area, and failed to limit the number of clustered lots in the AR-10 zone.

The Board relies on RCW 36.70A.060 (1) to require that adjacent uses be compatible with agriculture and on RCW 36.70A.177 to require both limits on the size of any single cluster and the total number of clusters in an area. The size and density of clusters must be capped “so as to preclude clusters of such magnitude that they demand urban services.”

The Board invalidated the AR-10 cluster provisions reasoning that they have the potential to allow clustering near cities without a limit to the number of clustered lots, resulting in the replacement of large blocks of agricultural land with urban densities and a demand for urban-type services that would conflict with on-going agriculture.

### ***GMA Implications and Practice Tips***

The Eastern Washington Board approaches its review of Ordinance 308 from the perspective of “the overall GMA agricultural conservation mandate.” To see if a cluster ordinance complies with the GMA, the Board will examine whether the

cluster regulations and policies restrict or encourage the location of clusters to land with poor soils or lands otherwise unsuited for agriculture. The limitations on clustering must “go much further,” said the Board, stating that the county “must direct the landowner to locate these clusters upon poor soils, the soil and location least productive and less likely to reduce the land available for farming.”

In addition, counties must limit the size and density of a residential cluster in an agricultural zone. The cluster ordinance cannot cause a drastic change in the character of the surrounding area and the remaining farmland has to be large enough to accommodate a true commercial farming operation.

***Richard Apollo Fuhriman, Master Builders Association of King and Snohomish Counties, North Creek Village LLC, James & Sharlyn Phillips, Tom & Susan Berry and CamWest Development v. City of Bothell, CPSGMHB Consolidated Case 05-3-0025c, August 29, 2005***

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### ***Factual and Procedural Background***

As required by GMA, the City of Bothell enacted an ordinance updating its GMA CP. The Board received six separate petitions for review challenging the city’s action. All petitions were consolidated into one proceeding, but prior to briefing two petitioners sought and received settlement extensions. The remaining petitioners continue in this consolidated case.

The challenges involve most of Bothell’s residential land use designations, involving its definition and application of “net buildable area” to calculate density, and the requirement for a 100-foot buffer between residential uses. The definition of *net buildable area*, reproduced below, removes certain portions of a parcel’s gross acreage to determine (in the city’s words) “the

development potential of any individual property” – put differently, the net acreage upon which density calculations are based.

“Net buildable area, for the purposes of this Comprehensive Plan, shall mean the gross land area in roads and other rights-of-way, surface stormwater retention/detention/water quality facilities, critical areas, critical area buffers, and land dedicated to the City.”

To understand the concerns regarding the term *net buildable area* to Bothell’s land use designations requires a description of the challenged residential land use zoning designations that establish minimum lot size:

- ◆ **R 40,000** providing for detached residential development at a minimum lot size of 40,000 square feet for land encumbered by large, complex, high-rank critical areas; land that is an important groundwater source for North Creek and the Sammamish River; and/or land constrained in some way to preclude the full range of services necessary to support urban development.
- ◆ **R 9,600; R 8,400; R 7,200; and R 5,400d** providing for detached residential development at minimum lot sizes of 9,600, 8,400, 7,200, and 5,400 square feet for most land in the planning area, except for land located near principal arterials and/or business and commercial centers, which may warrant higher densities. In the **R 9,600** designation, limited lot size averaging is allowed.
- ◆ **R 5,400a; R 4,000; and R 2,800** for attached or detached residential development at 1 dwelling unit per 5,400, 4,000, and 2,800 square feet of net buildable area, appropriate for land which is located near principal arterials and/or business and commercial centers.

### ***Board’s Decision***

The Board found the city’s definition of *net buildable area* was not clearly erroneous and was within its discretion to define. The Board also determined that the densities the city’s residential land use designations provided for were appropriate urban densities, including two low density designations established to protect critical areas.

Using the framework for analyzing challenges to urban density set forth in *Kaleas v. Normandy Park*<sup>3</sup> (and *1000 Friends v. Issaquah* on page 3 above), the Board stated that the City of Bothell is accommodating the growth projected by OFM and allocated to the city by King and Snohomish counties. It also said there is no question that Bothell is encouraging and stimulating urban growth within its borders and providing a variety of urban densities. The Board characterized the key issue as “how that urban density is calculated.”

Prior Board decisions have come close to addressing the *net buildable area* concept. One earlier decision said that undevelopable land such as critical areas, open spaces, and rights-of-way should be deducted from the gross acreage in *sizing* an urban growth area to ensure enough buildable acreage. Another decision established the safe harbor, or bright line, for appropriate urban density as “[a]ny residential pattern of four *net* dwelling units per acre, or higher ...” (emphasis added).<sup>4</sup>

Here, the Board equated net acreage to buildable acreage, which allows the deduction of unbuildable areas from the

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<sup>3</sup> The Board’s decision in *Kaleas vs. Normandy Park* has been reversed on remand from Superior Court. See Case Number 05-3-0007c

<sup>4</sup> This “bright line, established in *Kaleas vs. Normandy Park*, has been reversed on remand from Superior Court. In addition, the Supreme Court, in *Viking Homes vs. City of Shoreline*, has said the Hearings Boards lack the authority to create bright line rules.

gross acreage. What is included as “unbuildable area” deducted from gross acreage in the calculation is a policy choice for local governments to make. Roads, rights-of-way, and critical areas typically have been excluded from buildable area. In this ordinance, Bothell also excluded stormwater and water quality facilities, lands dedicated to the city, and critical areas buffers from its buildable acreage calculation. The Board, reasoning that the stormwater and water quality facilities and dedicated lands are public facilities similar to roads and rights-of-way, determined those areas fall within the scope of the city’s discretion.

Most of the disagreement between the parties in this case focused on the city’s decision to include critical areas buffers as a deduction in determining *net buildable area*. Based in part on evidence that other jurisdictions exclude critical area buffers, that CTED also recommends excluding buffers from buildable area calculations, and for other reasons elaborated on below, the Board concluded that buffer exclusion is reasonable.

The Board then looked to how *net buildable area* works as applied. It received evidence that when the *net buildable area* definition is applied to the **R-9,600** designation – about 63 percent of the residentially zoned lands in Bothell – that zone will usually fall short of meeting an appropriate urban density. But, relying on city plans to revise code provisions, the Board concluded that the **R-9,600** zone will yield 4 dwelling units/acre **on paper** – and reminded the city that development regulations must be consistent with and implement the plan.

The **R-40,000** zoning yields a density of just over 1 dwelling unit/acre – not generally an appropriate urban density. Bothell applied this zoning to two areas: the 357-acre Fitzgerald subarea, which embraces

wetlands and riparian areas with high quality fish habitat linked to North Creek, and to the Norway Hill subarea, where the city has mapped steep slopes and erosive soils. The Board agreed with the city that its current critical areas regulations were inadequate to protect these areas and approved the limited use of the **R-40,000** zoning to protect North Creek and the geologically hazardous Norway Hill subarea.

### ***GMA Implications and Practice Tips***

In this decision, the Central Puget Sound Board provides insight into its thinking on both critical areas and county-wide planning policies (CWPPs) and explains how linking the two together may improve GMA implementation.

Critical area buffers. Recognizing that critical area buffers are generally unbuildable and should be preserved to help protect critical areas, the Board postulates that they have value beyond that provided in the protection of critical areas. Their value could be regionwide, fostering solutions to the need to balance development densities on resource, rural, and urban lands with critical area protection – not only within a jurisdiction, but among jurisdictions.

Critical area buffers could provide a basis for density transfers, credits or bonuses, commonly considered as transferable development rights (TDRs). The density that would otherwise be available and permitted from “unbuildable” areas can be transferred to “buildable” areas, internally within a city, and between urban and rural areas – honoring property rights and furthering compact urban development, while protecting the functions and values of critical areas. In this way, buffers “can have an important role in providing fuel for the potential market of transferable development rights.”

The Board warned that the opportunity to create, implement, and reap the benefits of a larger scale, county-wide TDR program could be foreclosed if jurisdictions limit their ability to participate by relying on traditional regulatory approaches.

County-wide Planning Policies. Taking into account the potential regional value of critical area buffers and in anticipation that other jurisdictions will use the *net buildable density* approach it approves in this decision, the Board strongly suggested that counties and cities work together to avoid different definitions of net buildable density. Because the determination of what is excluded from gross acreage as unbuildable is within the realm of policy choices for local governments to make, the potential for jurisdictions to define *net buildable density* differently suggests “an uncoordinated and inconsistent approach in methodology [that] could create a balkanization in the Central Puget Sound (CPS) region, and could undermine coordinated planning under the GMA.”

Therefore, the Board recommended that a county and the cities within it develop a CWPP to provide consistency among all jurisdictions within a county on how critical area buffers are treated, or at least establish parameters for how a jurisdiction addresses them.

**More density discussion.** Continuing the discussion on *appropriate urban density* begun in the July 2005 Normandy Park and Issaquah decisions in light of Bothell’s minimum lot sizes, the Board rejected the petitioners’ implication that every parcel or property in the city must ultimately be developed at a density of at least 4 dwelling units/acre. Nevertheless, the Board advised that jurisdictions minimize the variations from appropriate urban density by using lot-size averaging, density bonuses or credits,

cluster development, and perhaps *maximum* lot sizes and other innovative techniques.

Planners in the Central Puget Sound can no longer rely on an interpretation of the GMA that 4 dwelling units per acre is a *per se* urban density. Community’s reviewing their development regulations can place less emphasis on hitting a specific numeric target. Without such a bright line, it is less clear what a local government must do to ensure it permits urban densities, as required by RCW 36.70A.110(2).

***Pilchuck Audubon Society v. City of Mukilteo, CPSGMHB Case No. 05-3-0029, October 10, 2005***

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***Factual and Procedural Background***

On February 7, 2005, following a lengthy process of review, study, and public participation that began in 2001, the City of Mukilteo adopted Ordinance 1112, amending its wetlands regulations in order to comply with the GMA requirement to review and revise critical areas ordinances.

Petitioner Pilchuck Audubon Society challenged the ordinance based on a section which provides for reduction of wetland buffers. Audubon contended that the City Council added the buffer reduction provision after the close of the public hearing without notice and precluding any opportunity for citizens to comment, contrary to GMA public participation requirements. Audubon also alleged that in adopting this buffer reduction amendment, the city did not include the best available science.

A first draft of the Ordinance 1112, issued in December 2001, was followed by subsequent drafts, and a consultant-prepared a best available science report in June 2003. Mukilteo held a public hearing in February 2004, on Draft Five of the ordinance. That draft contained no provision for buffer

reduction, but did allow for modifying buffer widths – so long as the total area of the wetland buffer after buffer averaging was not less than the required buffer prior to averaging.

An updated best available science report submitted by the consultant on March 18, 2004, recommended buffers from 50 feet to 160 feet, depending on the wetland classification. After the Department of Ecology issued its new wetland classification system in August 2004, Ecology and the consulting firm evaluated two Mukilteo wetlands and concluded that no major changes would result from the new classification system.

On September 22, 2004, notice went out announcing a second public hearing on the draft wetlands ordinance:

*“The purpose of the second hearing is to consider an amendment to the Mukilteo Municipal Code regarding the wetland regulation. Amendments include reasonable use provisions; public agency and utility development requirements and wetland definition, classifications, delineation, exemptions, buffers, mitigation, monitoring and maintenance requirements (Ordinance 1112).”*

The draft ordinance proposed wetland buffers ranging from 50 feet to 300 feet.

In December, after the second hearing, the City Council, concerned about the impacts of wetland buffers on private property, asked the Planning Commission to consider Ecology’s Buffer Alternative 3 methodology, which scores water quality, hydrology and habitat functions to determine overall habitat value. Buffer Alternative 3 allows flexibility for reduced wetland buffers where high-impact land uses are mitigated by specific strategies. Where the applicant demonstrates through a mitigation report prepared by a qualified

specialist and relying on the best available science that a smaller buffer would provide equal or better protection than the standard buffer, a buffer reduction of no more than 25 percent is allowed, with 75 feet the minimum buffer for wetlands with a moderate habitat value.

A Planning Commission meeting was scheduled for January 20, 2005, to consider establishing buffers using the Buffer Alternative 3 methodology, followed by a public hearing at City Council on January 24, 2005. The public notice for the Council hearing was identical to the notice for the October 4, 2004, hearing. The Planning Commission did recommend Ecology’s Alternative 3 buffer reduction provisions to the Mukilteo City Council. The Council modified Buffer Alternative 3 and adopted it.

As adopted, Ordinance 1112 allows buffer reduction of up to 40 percent, with minimum buffer widths of 35 feet, where the applicant demonstrates through a mitigation report prepared by a qualified specialist, in reliance on the best available science, that the smaller buffer would provide equal or better protection.

#### ***Board’s Decision***

The Central Puget Sound Board concurred with Audubon, agreeing that by including the buffer reduction provision at the last minute the city failed to provide for public comment. In addition, by revising the Ecology model, the Board ruled that Mukilteo did not include the best available science.

The Board reasoned that because the earlier drafts of Ordinance 1112 that included a 50 percent buffer reduction were not supported by nor within the range of the best available science, participants in the process could not reasonably be on notice that such an option was “within the scope of alternatives” that

the City Council might consider and adopt without additional public review and comment.

The Board noted that Mukilteo relied on WAC 365-195-915(2), that portion of the Washington Administrative Code providing guidance for deviating from the best available science, while disregarding the prior subsection, WAC 365-195-915(1), for demonstrating that best available science was included in development of the ordinance.

The Board remanded the ordinance to the city to complete the public process or otherwise comply with the Act.

### ***GMA Implications and Practice Tips***

The Board emphasized that the flexibility for certain buffer reductions in Ecology's Buffer Alternative 3 scheme is part of an integrated, science-based strategy whose provisions cannot be isolated, revised, or disregarded without risks to wetland functions and values.

It cautioned that WAC 365-195-915(2) does not stand alone – it must be read and applied concurrent with the prior subsection providing a local government guidance to demonstrate that the best available science was included in development of its ordinance. Even so, a jurisdiction does not necessarily satisfy the GMA by following CTED guidelines. The Board reminds once again that CTED guidelines are advisory, not obligatory. They provide a means of demonstrating that a jurisdiction has met its obligations under RCW 36.70A.172(1), but “are not a guarantee that a jurisdiction will effectively meet the standards set by the GMA, particularly when a jurisdiction adheres to only one of the applicable guidelines.”