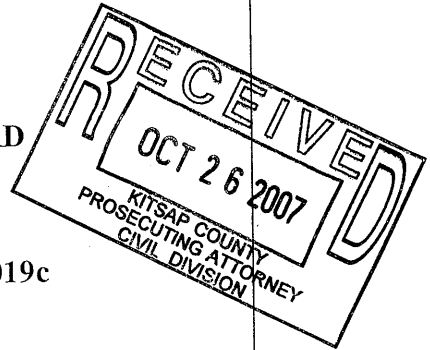


CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON



1 2 3 4 5 6 SUQUAMISH TRIBE, KITSAP CITIZENS) 7 FOR RESPONSIBLE PLANNING and) 8 JERRY HARLESS,) 9) 10) Petitioner,) 11)) 12)) 13 PORT GAMBLE S'KLALLAM TRIBE,) 14)) 15) Intervenor,) 16)) 17) v.) 18)) 19) KITSAP COUNTY,) 20)) 21) Respondent.) 22)) 23 _____) 24) 25) 26) 27) 28) 29) 30) 31) 32) 33) 34) 35) 36) 37) 38) 39) 40) 41) 42) 43) 44) 45) 46) 47) 48) 49) 50)	Case No. 07-3-0019c (<i>Suquamish II</i>) ORDER ON MOTION TO CLARIFY, MODIFY OR RESCIND
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I. BACKGROUND

On August 15, 2007, the Board issued its Final Decision and Order (**FDO**) in the above-captioned case.

On September 23, 2007, pursuant to a Request for Reconsideration, the Board issued an Order on Reconsideration, which invalidated five UGA expansion areas.¹

On October 11, 2007, the Board received “Respondent Kitsap County’s Request for Clarification, Modification or Rescission of the Orders of Invalidity” (**County Request for Clarification**).

On October 15, 2007, pursuant to RCW 36.70A.302(6), the Board scheduled a hearing on the County’s Request for Clarification.

On October 17, 2007, the Board received a letter from Intervenor Port S’Klallam Tribe indicating that the Tribe did not object to the hearing, nor would it be participating.

¹ The Board invalidated the UGA expansion areas for: Silverdale, Central Kitsap, West Bremerton, Gorst and Port Orchard. See September 13, 2007 Order on Motion for Reconsideration, at 3.

1 On October 18, 2007, the Board received "Petitioner Harless, Suquamish Tribe, and
2 KCRP Response to Kitsap County's Request for Clarification, Modification or
3 Rescission of the Orders of Invalidity" (**Suquamish Response**).
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5 On October 22, 2007, the Board conducted the hearing on the County's Motion to Clarify
6 in the Board's offices. Board Member Edward G. McGuire conducted the hearing.
7 Board members Margaret Pageler and David Earling attended, as did Board Attorney
8 Julie Ainsworth-Taylor. Shelly E. Kneip and Lisa Nickel represented Kitsap County;
9 David Bricklin represented KCRP, Jerry Harless appeared *pro se*, and Melody Allen,
10 representing the Suquamish Tribe participated telephonically. Angie Silva, Tom
11 Donnelly, Charlie Burrow, and Tom Nevins also attended. The hearing was recorded.
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13 **II. DISCUSSION**

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15 The County notes that in invalidating the specific UGA expansion areas, the Board did
16 not specifically invalidate the underlying zoning regulations, and the County assumes the
17 underlying regulations govern development. County Request for Clarification, at 2-3.
18 However, as Petitioners correctly note, the Board has previously stated:
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21 Any development regulations that attempt to implement such a fully
22 noncomplying comprehensive plan cannot stand as a matter of law during
23 the period that the plan fails to comply with the Act. Regulations that
24 attempt to implement and be consistent with a fatally flawed
25 comprehensive plan are in turn poisoned by the plan's defects. (*Bremerton*
26 *v. Kitsap County*, CPSGMHB Case No. 95-3-0039c, Final Decision and
27 Order, (Oct. 6, 1995), at 82.
28

29
30 Suquamish Response, at 2. The Board affirms this reasoning. In short, the expansion
31 UGA areas are fatally flawed and have been determined to be noncompliant and invalid.
32 The County's development regulations designed to implement the now noncompliant and
33 invalid provisions cannot stand.
34

35 The County asks the Board to rescind the Order on Invalidity because some of the areas
36 within the invalidated UGA expansion areas either have sewer service available or it can
37 easily be acquired by virtue of close proximity to existing lines. County Request for
38 Clarification, at 2-3. The County also contends that due to a new regulation² adopted
39 with the ten-year update, development cannot occur in the expansion areas unless the
40 development is served by sanitary sewer. As such, no violation of Goal 12 could occur.
41 *Id.* at 4. Alternatively, the County argues that allowing limited development to occur in
42 the noncompliant expansion areas would not substantially interfere with the GMA. *Id.* at
43 6. Finally, the County asks that in lieu of lifting invalidity, the Board should modify the
44 invalidity order to allow development to occur within 500' of a sewer line in existence on
45 September 14, 2007. *Id.* at 8.
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² The "new regulation" is Ordinance No. 367-2006 which was before the Board in this proceeding.

1 Petitioners counter that the Board was aware of the regulation adopted in Ordinance No.
2 367-2006 and that it remains in effect, but does not merit a rescission of invalidity.
3 Suquamish Response, at 3. Petitioners also assert that the County's focus is on new
4 subdivisions, not applications to build homes on single family lots. Thus, Petitioners
5 contend that under the County's regulation: 1) new subdivisions would be allowed even
6 if the land is not currently served by existing sewers; 2) even if served by existing sewer,
7 such development would interfere with the GMA; and 3) development on the fringe of
8 the UGA would be encouraged. *Id.* at 4-8. Finally, Petitioners claim that allowing
9 development within 500 feet of an existing sewer line would violate the GMA since the
10 County has not amended its Plan or regulations to reflect such a new configuration, nor
11 could the Board issue such an advisory opinion. *Id.* Petitioners do note that, as
12 acknowledged by the County, they are negotiating to identify areas likely to be included
13 within UGA expansion areas and those areas that should be removed. *Id.*

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16 The Board encourages the parties to continue discussions to identify those areas to be
17 served by sewer and to be included in a UGA expansion area, and to identify those areas
18 that should be removed. The Board emphasizes the importance of sanitary sewer
19 planning to ensure that urban areas will be served by urban services – without ignoring
20 existing areas within the UGA that lack such service.

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23 On the whole, the County misses the point. The Board has found the five UGA
24 expansion areas noncompliant with the GMA and entered a determination of invalidity
25 for them. Because of this, these lands are no longer “urban lands.” Rather, they are “rural
26 lands” until such time as the County achieves compliance with the GMA, as interpreted
27 in the Board's FDO and Order on Reconsideration. The County's apparent zoning is
28 inconsistent with these fatally flawed expansion UGAs and cannot govern development
29 of these lands. To allow urban development on rural lands is contrary to the GMA.

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31 Additionally, the Board's concern is not solely with the expansion areas, but with the lack
32 of capital facility planning [sanitary sewers] for the UGAs generally, including existing
33 urban development that is un-served. Assessing the entirety of the scope of the County's
34 capital facility planning efforts to support urban development within the UGAs is the task
35 the County must face. The linkage of capital facility planning and UGA designation
36 should not be new to the County. The Board noted the importance of this linkage a
37 decade ago. *See Bremerton, et al. v. Kitsap County*, CPSGMHB Case No. 95-3-0039c,
38 coordinated with *Port Gamble, et al v. Kitsap County*, CPSGMHB Case No. 97-3-0024c,
39 Finding of Noncompliance and Determination of Invalidity in *Bremerton* and Order
40 Dismissing *Port Gamble*, (Sep. 8, 1997), at 41; *cited in Suquamish II*, FDO, at 25.

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43 However, as noted in the *Suquamish II* FDO, the County may consider reconfiguring its
44 UGA expansion areas to include those limited areas it is concerned about or take other
45 steps to achieve compliance by amending its Plan. But absent that type of analysis and
46 planning by the County, the Board will not either rescind invalidity or modify or clarify
47 its Order. The outcome the County seeks may, in fact, be plausible when the County
48 completes its remand work. However, that is not the situation at the present time.
49 Therefore, the Board will decline to clarify, modify, or rescind its determination of
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1 invalidity as set forth in the September 23, 2007 Order on Reconsideration. The
2 County's request is **DENIED**.

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4 **III. ORDER**

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6 Based upon review of the GMA, the Board's Rules of Practice and Procedure, review of
7 the August 15, 2007 FDO, September 23, 2007 Order on Motion for Reconsideration, the
8 briefing and exhibits provided by the parties, and having considered and deliberated on
9 the arguments of the parties at the hearing, the Board enters the following ORDER:
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12 • Kitsap County's Motion to Clarify, Modify or Rescind the Determination
13 of Invalidity for the expanded UGAs in Silverdale, Central Kitsap, West
14 Bremerton, Gorst and Port Orchard is **DENIED**.

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16 So ORDERED this 25th day of October, 2007.

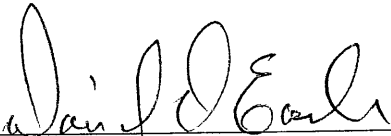
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18 CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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22 Edward G. McGuire, AICP
23 Presiding Officer

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29 Margaret A. Pageler
30 Board Member

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36 David O. Earling
37 Board Member

CPSGMHB Case No. 07-3-0019c
Suquamish Tribe II, et al.,

v.

Kitsap County

DECLARATION OF SERVICE:

I certify that I mailed a copy of the **Order on Motion to Clarify, Modify or Rescind** to the persons and addresses listed hereon, postage prepaid, in a receptacle for United States mail at Seattle, Washington, on **October 25, 2007**.

Signed: *Lynda Kenstoves*

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