

**Appropriate Urban Densities in the Central Puget Sound Region:
Local Plans, Regional Visions, and the Growth Management Act**

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Informational Paper on “Appropriate Urban Densities”

This paper was developed by Joe Tovar under a contract with the Puget Sound Regional Council. The scope of the contract contained the following primary tasks:

- Provide information and perspective on the topic of “appropriate urban densities.”
- Review the issue of appropriate urban densities including relevant statutory provisions and case law established by the Central Puget Sound Growth Management Hearings Board, and any reviewing court.
- Discuss actions the Regional Council could consider taking in the VISION 2020 update project to assist local governments in addressing or clarifying this issue.

The purpose of the paper is to provide information regarding the context, origin and evolution of “appropriate urban densities” in GMA law and planning practice, specifically as it applies to areas designated for single-family residential uses. The paper examines concerns and perspectives expressed by various stakeholder groups about the meaning and application of this term and identifies potential ways that this issue could be addressed, including potential multicounty planning policies in the VISION 2020+20 update project.

I. Scope and Purpose of This Issue Paper

A. Overview

VISION 2020, the adopted regional growth management strategy for King, Kitsap, Pierce, and Snohomish counties, and the 82 cities within those counties, contains this region's multicounty planning policies (MPPs). Local government comprehensive plans and multicounty planning policies are adopted pursuant to the authority and requirements of the Washington State Growth Management Act (GMA).¹

First adopted by the Puget Sound Regional Council (PSRC) in 1990, VISION 2020 was last amended in 1995. This issue paper is prepared to assist the VISION 2020+20 Update which looks out to the year 2040, with a specific focus on the size and location of the region's urban growth areas, rural areas and resource lands.

It is the purpose of this paper to explain the context, origin, and evolution of "appropriate urban densities" in GMA law and planning practice, specifically as it applies to areas designated on the Future Land Use Maps of cities and counties for single-family residential uses. The paper examines concerns and perspectives expressed by various stakeholder groups about the meaning and application of this term and identifies potential ways that this issue could be addressed, including possible multicounty planning policies contained in the VISION 2020+20 update.

Three central assumptions underlie this discussion. First, all of the 2040 regional growth scenarios presently under review assume that the metropolitan urban growth area (UGA) boundary will remain essentially as it is today, albeit with some minor adjustments. Second, although multi-family housing at various densities will be a major component of future growth accommodation, it will be important to provide a broad range of single-family lot sizes and forms as part of the housing choices with the UGA. Third, there is a 15-year gap between the horizon year (2025) of city and county land use plans being updated pursuant to GMA and the horizon year (2040) of regional efforts, most notably the VISION 2020+20 Update.

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B. Methodology and Organization

Research in support of this paper included a review of the relevant published opinions of the Washington State Central Puget Sound Growth Management Hearings Board

(CPSGMHB or Growth Board), the Washington Appellate Courts, bill reports from the 2005 legislative session, VISION 2020, various local and national media, personal interviews with city and county planning staffs in the four-county region, and the compilation of data regarding residential densities submitted by city staff or derived at the countywide level from GIS data by PSRC staff. The sources of information are cited in the text, endnotes or the appendices. This paper is organized as follows:

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II. Short Term Local Plans in Context of Long-Term Regional Visions

The comprehensive plans developed under the authority of the Growth Management Act utilize a 20-year horizon. The urban growth areas are to be sized to accommodate 20 years of growth forecasted by the Office of Financial Management [RCW 36.70A.110]. In every county, this 20-year forecast has been allocated among the cities and county by means of the countywide planning processes.

As the name suggests, the VISION 2020+20 regional plan update utilizes a 35-year horizon, which is to say, out to the year 2040. Thus, it presumes that development that occurs in the “15-Year Gap” between 2025 and 2040 will not preclude meeting the growth, transportation and other objectives ultimately set forth in the updated regional plan. For that matter, it assumes that development that occurs even in the first 20 years will not frustrate the vision for 2040.

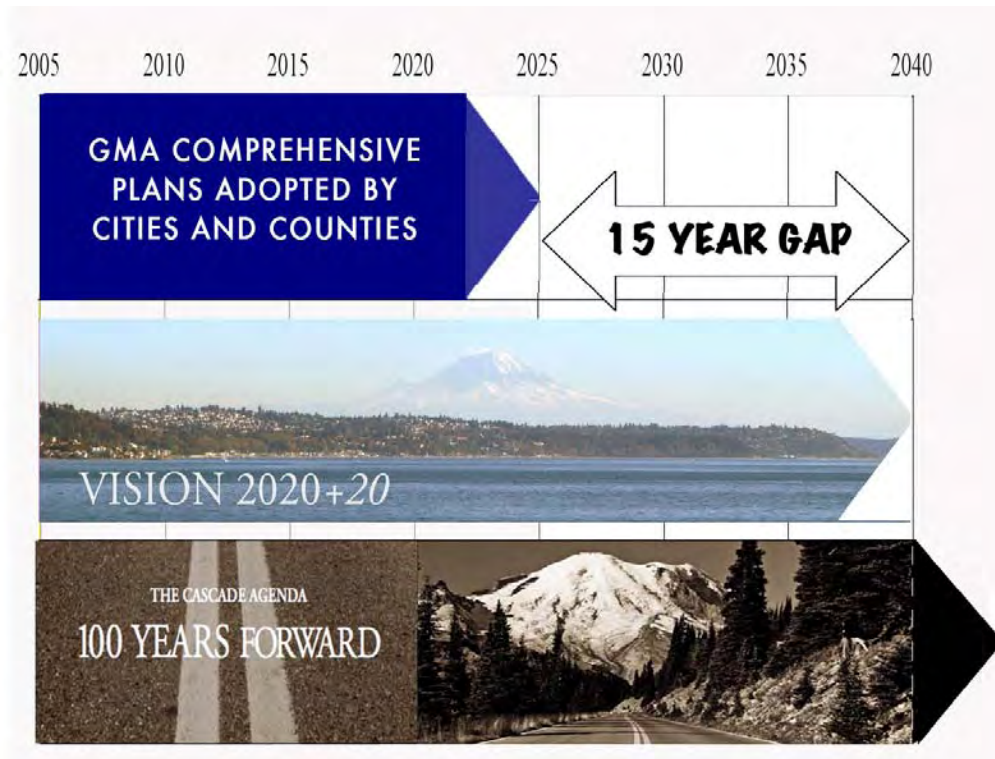


Fig. 1

In large measure, VISION 2020+20 is a growth accommodation plan, focused largely on enabling and channeling population and employment within the UGA. At the same time, other major regional initiatives with even longer time frames call for the identification and achievement of conservation and restoration priorities essential to sustainability and livability for this region.

The *Cascade Agenda*² (a private initiative not part of GMA planning) has set out to identify conservation priorities for the next 100 years. While the region of the *Cascade Agenda* (King, Pierce, Snohomish, and Kittitas counties) does not overlap exactly with the PSRC jurisdiction, it nevertheless provides significant environmental context for the “appropriate urban densities” discussion. While the *Cascade Agenda* looks well beyond even 2040, that year has been identified as a significant milestone. By that date, the *Cascade Agenda* staff suggest,³ this region will know whether the major conservation opportunities in the rural and resource areas of these three counties have been secured or lost.

The *Shared Salmon Strategy for Puget Sound*⁴ focuses on the recovery of Chinook Salmon runs within the Puget Sound Ecologically Significant Unit (ESU). While the deadlines and milestones for efforts to achieve this objective will vary from watershed to watershed, there is no doubt that these efforts will rely largely on the coordinated actions of local governments and that they will take a long-term view. As shown in Figure 2, the scope of the ESU and the Watershed Inventory Resource Areas which it includes subsume the four-county region of the VISION 2020+20 regional strategy.



Fig. 2

The Executive Summary of the *Draft Shared Salmon Strategy Plan* conveys the long-term vision necessary to address salmon recovery:

Across Puget Sound, leaders at all levels aspire for a future in which the Puget Sound region has demonstrated to the world that economic prosperity, more people and a healthy environment can co-exist. The many contributors to this draft Puget Sound Salmon Recovery Plan ... hope that fifty years from now, their great-grandchildren will be able to say:

Our elders got it right. They listened to what the salmon were telling them. Anticipating the region's growth, the choices they made in the early 2000's and the hard work that followed, created the vibrant community we share today, where both people and nature thrive and the salmon are once again teeming in our rivers and streams.

This issue paper, and subsequent research undertaken as part of the environmental review for the update, are designed to inform PSRC and its member jurisdictions about the viability of the year 2040 growth distribution alternatives under consideration. It will identify potential regional policies to increase the long-term viability of the region's

urban growth areas and improve near-term certainty for local governments seeking to achieve compliance with the regional plan and state law. Policies contained within the VISION 2020+20 Update can also provide a framework to coordinate the near-term actions of local governments to help achieve the long-term conservation objectives of the *Cascade Agenda* and the restoration objectives of the *Shared Salmon Strategy*.

III. The “Urban Densities” Controversy –Stakeholder Perspectives

An examination of this subject begins by recounting the concerns, questions, and confusion expressed by different stakeholder groups about appropriate urban densities and the meaning of the threshold of “four dwelling units per acre.”

- Some cities contend that the “appropriate urban densities” concept, as interpreted and applied by the Growth Board, does not allow sufficient discretion to zone for large residential lots.⁵
- Some argue that an allowance must be made to accept built-out neighborhoods that fall below the four units per acre threshold.
- Some believe that the only measure of compliance with the GMA’s urban densities requirements should be meeting the 20-year growth targets.
- Some are concerned that, even with more definitive large-lot “exceptions” spelled out in recent case law, cities are still too exposed to challenges for alleged noncompliance with RCW 36.70A.110 (requirements regarding urban growth areas).
- Other jurisdictions that have designated all their serviceable and environmentally unconstrained residential lands at or above the four unit per acre threshold have questioned the equity of the continued practice by some cities of large lot zoning.
- Builder, realtor, and business organizations oppose the removal of a threshold of four units per acre, either as a benchmark or safe harbor, contending that without such parameters some local governments will needlessly restrict the supply of single-family lots and drive up costs.⁶
- Planning and growth management organizations have expressed concerns that to equate appropriate urban densities with “accommodation of the 20-year population targets” serves to promote rather than “reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.”⁷
- A shared theme of supporters of the four unit per acre threshold is the principle that scarce land should be used efficiently. Some argue that large lots needlessly limit the opportunity for additional single-family homes,⁸ while a more efficient land use pattern broadens housing choices and promotes affordability.⁹
- The 15-year gap between the 2025 and 2040 planning horizons raises the question of whether perpetuating a pattern of development at relatively low densities will foreclose future options to accommodate growth beyond 2020 without compromising the urban/rural line.

IV. The Statutory Context of the Growth Management Act

Much has been written describing the history, structure and rationale for the Growth Management Act and its many provisions. For purposes of this paper, the necessary context is grouped under these headings: (A) Regional diversity and “bottom up” planning under the GMA; (B) the GMA landscape – urban, rural, and resource lands; and (C) the purpose and inter-play between the Act’s goals and its requirements.

A. Regional Diversity and “Bottom up” Planning Under the GMA

The bulk of the GMA was initially adopted in two increments – in the 1990 and 1991 legislative sessions. The Growth Management Hearings Boards were created in 1991 to hear and determine allegations of local government noncompliance with the goals and requirements of the Act. Although the legislature did borrow the concept of urban growth areas from Oregon, it very deliberately did not adopt that state’s centralized and “top-down” approach to plan approval and appeals. States with variations on growth management statutes are shown in gray in Fig. 3.

The Oregon model requires first a review and administrative approval of local plans by an administrative state agency (the Land Conservation and Development Commission) then an opportunity for an appeal to a single state-wide land use court (the Land Use Board of Appeals or LUBA). In contrast, the GMA directs that local actions are presumed valid upon adoption and de-centralizes the appeals process to three regional Growth Boards rather than a single court in the state capital. The Washington system is designed to enable the growth boards’ reviews to reflect the regional diversity within the state.



Fig. 3 – Growth Management States (in gray)

The GMA has been described by some as a “bottom-up” planning process because it requires that comprehensive land use plans be developed by cities and counties, as

opposed to state agencies. However, by virtue of its framework of state goals and requirements, as well as its mechanism for dispute resolution and enforcement by a state agency (e.g., Growth Board authority to hear appeals, determine invalidity, and recommend gubernatorial sanctions) it is incorrect to describe the GMA as a purely or exclusively “bottom-up” system. In reality, Washington’s legislature has chosen a middle path between the extreme poles of centralized, top-down planning (i.e., Oregon) and de-centralized, “bottom-up” planning of most other states.

B. The GMA Landscape: Urban, Rural and Resource Lands

The GMA requires that counties and cities designate all lands as one of three mutually-exclusive¹⁰ landscapes: urban, pursuant to RCW 36.70A.110, rural, pursuant to RCW 36.70A.050(7), or resource lands (including agricultural and forest lands), pursuant to RCW 36.70A.170. In this sense, “designate” means to map on the Future Land Use Map adopted as part of comprehensive plans. These collective local government designations in the Central Puget Sound region are shown in Fig. 4.

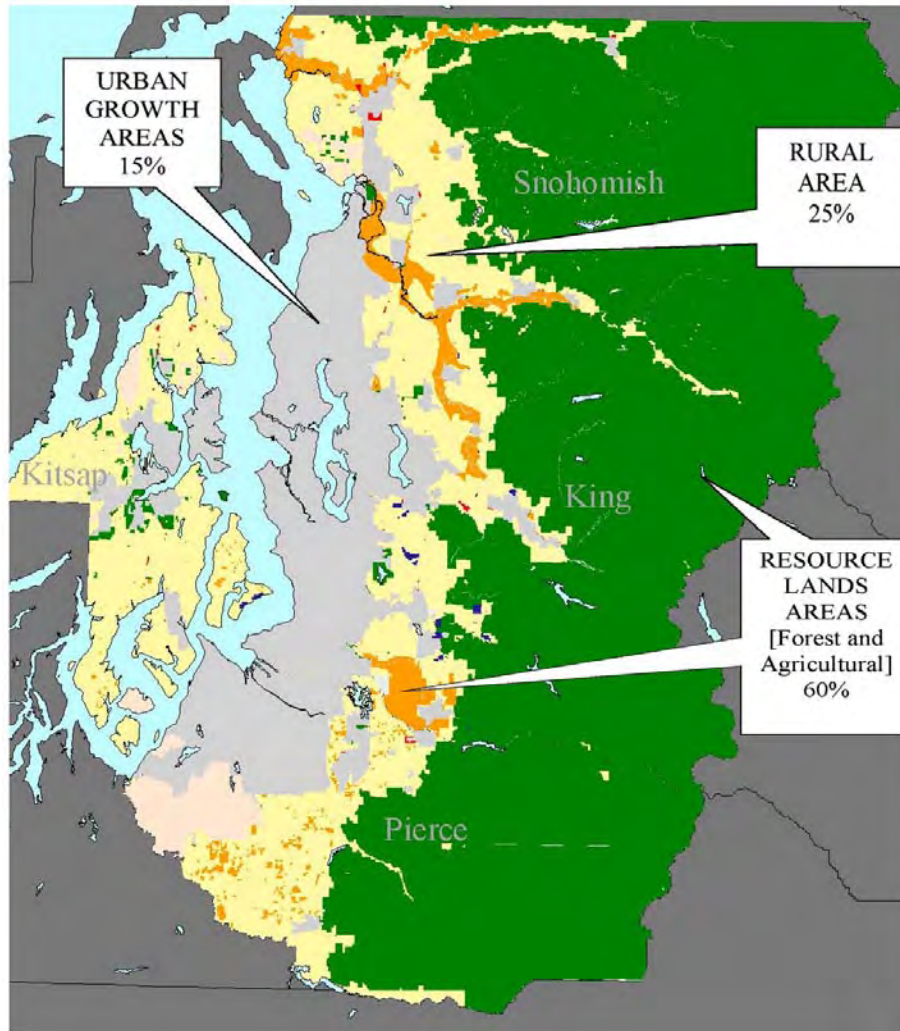


Fig. 4 – the GMA landscape

One of the key organizing principles in the GMA is to concentrate urban development within urban growth areas and to prohibit it in rural areas and resource lands. If the UGA boundary expands, it can do so only at the expense of either rural or resource lands. Therefore, the long-term sustainability of the region's rural and resource lands depends to some degree on the ability of the UGA to accommodate growth, at least for the coming 20 years, and potentially beyond. The long-term viability of the UGA, in turn, depends upon the ability to utilize serviceable and environmentally unconstrained land in an efficient manner.

C. GMA goals and GMA Requirements

In the realm of urban densities, the relevant Growth Board cases have cited not only the anti-sprawl goals of RCW 36.70A.020(1) and (2), but also the urban growth area requirements of RCW 36.70A.110. These provisions are set forth in Appendix A. The manner in which the board reviewed and applied these specific goals and requirements is discussed in Section IV below.

The planning goals of the Act are set forth at RCW 36.70A.020. The preamble to the Goals section provides:

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

Emphasis added.

The use of the word “exclusively” is accurate as it applies to the activities of cities and counties in preparation of plans and regulations. However, the planning goals also serve at least two other purposes.

First, in the event that a Growth Board rules that a local action is noncompliant with a requirement of the GMA, the board may also evaluate whether or not the local action would “substantially interfere with the fulfillment of the goals” of the Act. If the board so determines, RCW 36.70A.302 authorizes the board to enter a finding of “invalidity” which would prevent permit applications from vesting.

Second, the goals have been used by the Growth Board to help illuminate the meaning of GMA requirements. For example, the board has said that the Act's concurrency requirements at RCW 36.70A.070(6) must be reviewed “in light of, not in lieu of [GMA planning] goal 12.”¹¹

While cities and counties have a duty to be consistent with both the goals and requirements of the GMA, it is significant that most requirements are more detailed and

directive than any goal. For this reason, the Growth Board, and the courts, have consistently held that a GMA planning goal may not be used to excuse a local government from a specific GMA planning requirement.

This axiom was most clearly articulated in a 2003 decision of the Court of Appeals, wherein the Court rejected the City of Bellevue’s argument that in order to satisfy certain planning *goals* it was justified in exempting certain development projects from the GMA’s concurrency *requirements*. In *Bellevue v. East Bellevue*,¹² the Court held:

Bellevue argues that the concurrency requirement cannot trump all other goals of the GMA. The portion of the GMA that Bellevue infers might conflict with imposing a concurrency requirement for neighborhood shopping centers is found in RCW 36.70A.070(2) [the GMA’s concurrency requirement]. But concurrency is not a goal, it is a requirement. . . .

Emphasis added, footnote omitted.

Two weeks later, in the *Quadrant* case¹³, the same Division of the Court of Appeals re-affirmed its *Bellevue* holding as follows:

We conclude that the first two goals listed in RCW 36.70A.020 are general requirements which do not supersede the more stringent, specific requirements found in RCW 36.70A.350.

Emphasis added.

V. GMA Case Law Context from the Growth Board

A. The Central Puget Sound Growth Management Hearings Board Cases

The four counties and 82 cities within the jurisdictional boundaries of the Central Puget Sound Growth Board are identical to the service area of the PSRC and therefore are subject to the multicounty planning policies adopted as VISION 2020. This four-county region is a unique metropolitan region within the state with a population density 12 times that of the rest of the state.¹⁴

1. GMA’s cascading hierarchy of policy

While community vision will vary from city to city and county to county, they all take place within the framework and context of state law and regional policy. The Growth Board has described our state’s land use decision-making system as a “cascading hierarchy” of state statutes, regional and local plans, capital budgets, development regulations, and permits.

Figure 5 illustrates that directive and substantive policy direction flows from state statute to various policy documents adopted by cities and counties, such as multicounty planning policies (MPPS) and countywide planning policies (CPPS), then to comprehensive plans, then to development regulations and finally to development permits.

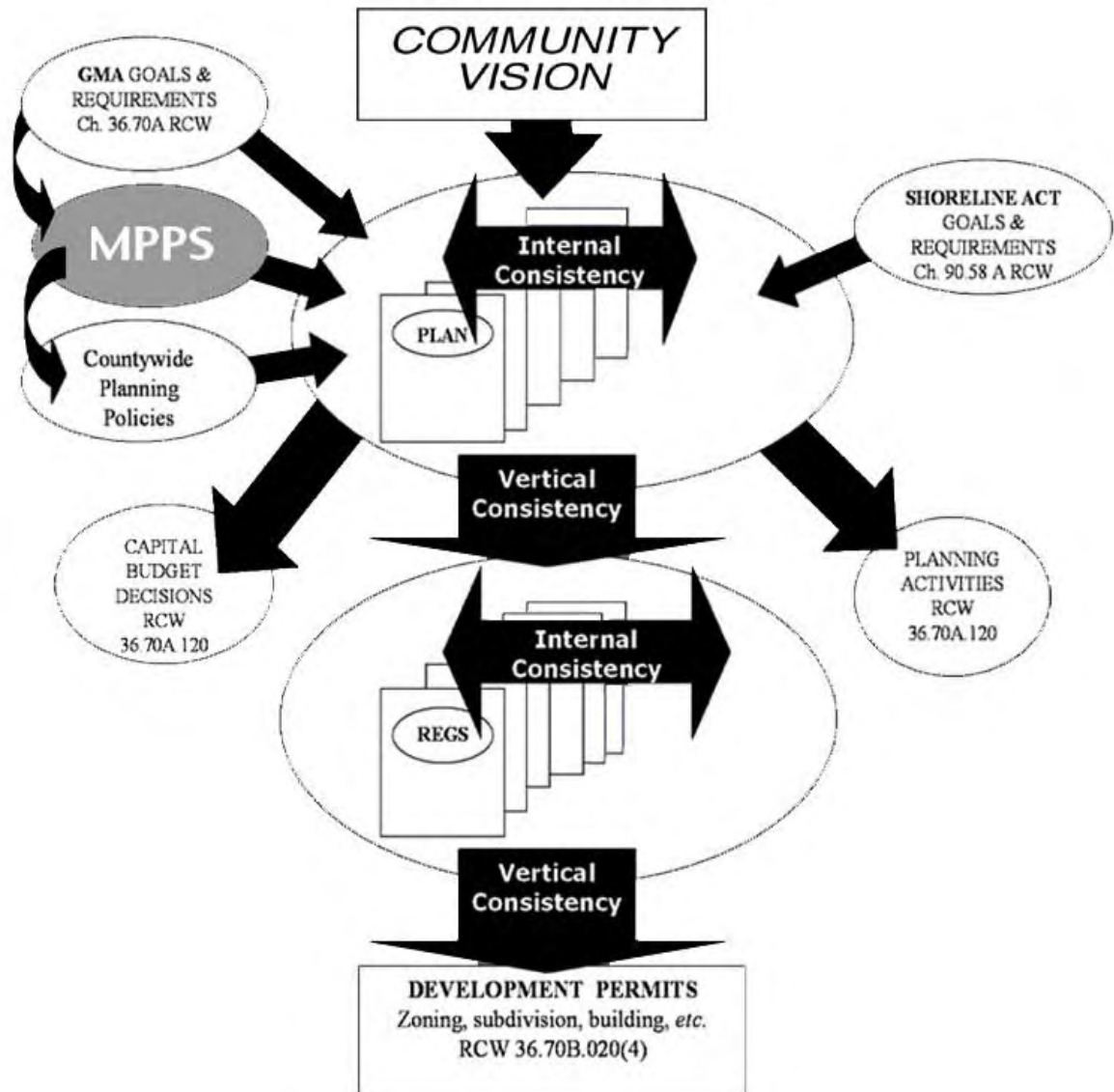


Fig. 5 – The “Cascading Hierarchy”

Because a major focus of this paper is the update of VISION 2020 and potential future multicounty planning policies, Fig. 5 highlights the place of MPPs in this planning hierarchy. As shown, MPPs may provide direction either to countywide planning policies or to city and county comprehensive plans or both.

2. VISION 2020 and Regional Form – a compact urban landscape

In the 1995 *Bremerton I* decision, the Growth Board evaluated the GMA’s requirements for urban growth areas and rural areas and described the regional physical form implicit in these collective provisions. The board cited the adopted regional plan for the region, VISION 2020, stating:

The regional physical form required by the Act is a compact urban landscape, well designed and well furnished with amenities, encompassed by natural resource lands and a rural landscape . . . This region’s unique circumstances make the compact urban development model even more compelling, as evidenced by its adopted regional growth management strategy [VISION 2020] which provide[s]:

Create a Regional System of Central Places Framed by Open Space, and provide ... a regional urban form characterized by compact, well defined communities. VISION 2020, at page 12.

...

The intent of the strategy is to promote a regional urban form characterized by compact, well-defined communities framed by a network of open spaces and connected by new transit lines and ferries. VISION 2020, at page 20.

Bremerton I, at page 20. Footnotes omitted. Emphasis added.

Ten years after the *Bremerton I* decision, the public policy rationales for a compact urban form have been augmented by two worsening national trends: one in public health, the other in energy. A study published last year by the RAND Corporation developed a “sprawl index” of 38 metropolitan regions to assess the linkage between health and auto-dependency. “Other risk factors aside, people in densely populated places graced with sidewalks and shops had the lowest rates of diabetes, hypertension, heart disease, and stroke . . . rates rose steadily as communities became more spread-out and less walkable.”¹⁵

A recent article in Business Week¹⁶ observed that U.S. gasoline prices have doubled in recent years, heralding the beginning of a post-oil economy. What was once an abstract caution has become a pressing reality. A wide variety of regional development strategies are called for in regional and local plans, including investments in transit, transit-oriented design, and a better localized balance between jobs and housing. Another vital strategy will be to optimize the cost-effectiveness of roadway and other infrastructure investments by minimizing the inefficiencies inherent in a widespread land use pattern of large residential lots.

At the same time, it is a mistake to presume that a pattern of compact urban development is a prescription for an unbroken landscape of asphalt and buildings. To the contrary, in the *Rural Residents*¹⁷ Final Decision and Order (FDO) in 1994, the Growth Board observed:

“Compact urban development” does not require that the urban environment be exclusively a built environment, nor that the built environment be of a homogenous intensity, form or character. Other provisions of the Act will require that the urban landscape be interspersed with natural systems, passive and active open space and a variety of public facilities. For example, UGAs must include “greenbelts and open space areas” (RCW 36.70A.110(2)), and critical areas must be protected (RCW 36.70A.060), regardless of whether they are inside or outside of the UGA.

One of the major reasons for designating compact urban growth areas has been to concentrate urban growth in areas with service capacity and to reduce the conversion of land to inappropriate low density sprawl [RCW 36.70A.020(1) and (2)].

3. The evolution of appropriate urban densities in Growth Board case law

The Growth Board has issued a dozen Final Decisions and Orders over the past decade addressing the GMA goals and requirements that govern urban densities. The seminal case was the first county comprehensive plan reviewed by the board in 1995, *City of Bremerton, et al. v. Kitsap County (Bremerton I)*.¹⁸ Among the many allegations against Kitsap County were that the adopted county plan impermissibly allowed urban growth in the rural area, contrary to the mandate in RCW 36.70A.110 that urban growth is to occur in urban growth areas and the mandates in .070(5) that urban growth is prohibited in rural areas.

The facts before the board required it to analyze the statutory language of the GMA, particularly the planning goals at RCW 36.70A.020, the definition of “urban growth” in RCW 36.70A.030(18), and the requirements for urban growth areas at RCW 36.70A.110. These are excerpted in Appendix A. To answer the legal issues in *Bremerton I*, the board had to construe the meaning of these statutory provisions and then apply them to the facts and argument in the case. The board rejected the argument that the Act specified a hard and fast rule for urban and rural densities and held:

The Board instead adopts as a general rule a “bright line” at four net dwelling units per acre. Any residential pattern at that density, or higher, is clearly compact urban development and satisfies the low end of the range required by the Act.

Emphasis added.

The four units per acre threshold has been applied, clarified and evolved over a series of board decisions from 1997 through 2004. Several local governments (Woodway, Pierce County, Woodinville, and Bonney Lake) were determined not to have been guided by RCW 36.70A.020(1)(2) and were found non-compliant with the requirements of RCW 36.70A.110. All these local governments subsequently took action to achieve compliance. Two other cities, Federal Way and Redmond, were found to comply with

those statutory provisions, and the board dismissed the challenges to their plans. Through this series of cases and decisions, the board clarified the “general rule and reasonable exceptions” it had first articulated in *Bremerton I*.

In 1997, in *Litowitz v. City of Federal Way (Litowitz)*,¹⁹ the Growth Board held that the city was justified in designating lands below the four units per acre threshold for the Hylebos wetlands portions of the city. Based upon the information in the city’s record, the board concluded that the environmentally sensitive features in Federal Way were (1) large, (2) complex in function and (3) of a high rank order of value, and found the city’s low-density residential designations to be in compliance with GMA provisions.

Two years later, in *LMI/Chevron v. Town of Woodway (LMI)*,²⁰ the board considered this matter again. Both the petitioner and the town agreed that four units per acre was an “appropriate urban density,” but they disagreed whether the facts in Woodway justified the lower density designations. The board applied the three-part test announced in *Litowitz* to the facts in Woodway’s record and determined that there was not an adequate scientific basis to support low-density land use designations. The town was directed to amend its plan to achieve compliance with RCW 36.70A.020(1)(2) and .110.

In July of 2005, the Growth Board issued two decisions regarding appropriate urban densities for the cities of Normandy Park and Issaquah. In the first case, the board found Normandy Park’s plan non-compliant and invalidated it in its entirety. In the latter case, the board upheld the majority of Issaquah’s plan, remanding only a small portion of the land designated below the four per acre threshold for further work to achieve compliance.

In *Kaleas, et al., v. City of Normandy Park*²¹ (*Kaleas*), the Growth Board found that the city’s plan, which designated a large proportion (84%) of the city’s entire residential land area for densities between 2.2 and 2.9 dwelling units per acre, failed to comply with the goals and requirements of the Act. In the *Kaleas* case, the board affirmed its prior reasoning regarding the general rule and reasonable exceptions (e.g., critical areas addressed in the *Litowitz* decision and equestrian areas referenced in the *Bremerton* decision) and further expanded the range of factors to consider, including geological or topological features and growth phasing. The complete list of factors set forth in *Kaleas* appears in Appendix B.

The board stated that, while accommodating the allocated growth is a major component of the GMA, the Act’s predilection for compact urban growth and its explicit goals and requirements impose a broader framework within which local governments must plan.

The Growth Board concluded that Normandy Park had failed to designate appropriate urban densities because there was no support in the record to merit designating 84% of its land as low and medium density. The board found noncompliance, remanded the challenged plan update, and invalidated the noncompliant plan update provisions. Normandy Park has appealed the board’s decision to Superior Court.

The day after issuing *Kaleas*, the Growth Board issued its FDO in *1000 Friends of Washington v. City of Issaquah*²² (**1000 Friends**). At issue were the City of Issaquah’s designation of lands below the threshold of four dwelling units per acre. The board applied its reasoning and factors articulated in *Kaleas* to the facts in Issaquah.

Issaquah demonstrated that it was accommodating its targets and promoting compact urban growth with limited provisions within the city’s plan for lower densities (6% of total land area) where necessary to protect critical areas. The Growth Board agreed with the city’s arguments for the majority of the areas in question, however, it directed Issaquah to amend its policies with respect to one lower density area that currently lacks sewers and that is in the service area of an independent water and sewer district. Issaquah did not appeal the decision to Superior Court.

VI. Relevant Washington State Supreme Court Cases

A. Appellate Cases Interpreting Legislative Intent About Local Discretion

A point of conflict and confusion in the urban densities discussion has been the degree of discretion available to local governments in adopting local plans. The State Supreme Court’s most recent analysis of the deference required by RCW 36.70A.3201 was set forth in May of this year in *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board (Quadrant)*²³, the court stated:

“We hold that deference to county planning actions that are consistent with the goals and requirements of the GMA . . . cedes only when it is shown that a county’s planning action is in fact a ‘clearly erroneous’ application of the GMA.”

The *Quadrant* decision affirmed prior State Supreme Court rulings in 2000 and 2002. For instance, in 2000, the court held that “Local discretion is bounded . . . by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board (King County)*.²⁴

In 2001, Division II of the Court of Appeals applied the *King County* holding and further clarified, “Consistent with *King County*, and notwithstanding the ‘deference’ language of RCW 36.70A.3201, the board acts properly when it foregoes deference to a . . . plan that is not ‘consistent’ with the requirements and goals of the GMA.” *Cooper Point Association v. Thurston County (Cooper Point)*.²⁵

In 2002, the Supreme Court affirmed the *Cooper Point* decision by the Court of Appeals on this point; it affirmed *Thurston County v. Western Washington Growth Management Hearings Board (Thurston County)*.²⁶

All of these appellate decisions were GMA cases, which is to say that in each of these cases the meaning of RCW 36.70A.3201 (legislative intent regarding deference owed to local decisions) was directly on point, had been briefed by the parties, and ruled upon by a Growth Management Hearings Board. This is an important distinction between this

string of cases and the most recent Supreme Court discussion of the subject of urban densities in *Viking v. Holm (Viking)*²⁷, discussed below.

B. The Supreme Court's Decision in Viking v. Holm

As noted, the much commented-upon *Viking* case was not a GMA case – it was a covenants and property rights dispute between two private parties. The actual dispute requiring a judicial ruling was whether the City of Shoreline's zoning designation of four units per acre voided a pre-GMA covenant which restricted lot sizes to two units per acre. Neither the city nor the Growth Board was a party to the case, therefore, no city or Growth Board action, facts, or argument were before the court.

Nevertheless, in determining that neither the GMA nor local zoning void pre-GMA restrictive covenants, the court engaged in gratuitous and confusing *dicta*²⁸ about the meaning of RCW 36.70A.3201. This confusion was compounded by the *Viking* court's discussion of goals without always distinguishing between the meaning of goals in the generic sense as opposed to the specific planning goals set forth in RCW 36.70A.020.

First, the court said:

Viking's public policy argument also fails to the extent that it implicitly requires us to elevate the singular goal of urban density to the detriment of other equally important GMA goals. To do so would violate the legislature's express statement that the GMA's general goals are nonprioritized. RCW 36.70A.020 ("The following goals are not listed in order of priority ...") *Viking*, at page 127.

Emphasis added.

In actuality, there is no "urban density goal." While RCW 36.70A.020(1) "encourage[s] urban growth in urban areas" and .020(2) calls for "reducing the conversion of land to sprawling, low-density development," in neither instance is urban density named as a goal. In contrast, the GMA provisions on which the Growth Board's decisions regarding appropriate urban densities have turned are not the Act's goals, but rather its urban growth areas requirements set forth at RCW 36.70A.110.

Second, despite twice repeating its earlier holdings that planning goals are not prioritized,²⁹ and despite Shoreline's own balancing of those goals which resulted in the four unit per acre choice, the *Viking* court apparently went on to do its own balancing of the goals in a way that arguably would elevate Planning Goal 6 (property rights) above the other 13 Planning Goals. The *Viking* court stated:

Indeed, although enforcement of a restrictive covenant may impede some of the GMA's goals, it simultaneously furthers the achievement of others. This observation is not surprising within the context of the GMA, inasmuch as the goals are frequently in tension, if not outright in conflict. See, e.g., 1992 Op. Att'y Gen. No. 23, at page 8 (noting that "there is an inherent tension in seeking to accommodate by comprehensive action all of these goals, some of which are in

conflict”); 24 Heller Ehrman White & McAuliffe, Washington Practice: Environmental Law and Practice § 18.2, at 174 (1997) (describing the general goals as “vague and contradictory”).

Here, it is indisputable that enforcement of the covenant furthers certain GMA goals. For example, because restrictive covenants represent valuable property interests, enforcement furthers the GMA goal of protecting private property rights. *See* RCW 36.70A.020(6).... Likewise, enforcement of the covenant furthers the GMA goal of preserving open space... Balancing the GMA’s goals in accordance with local circumstances is precisely the type of decision that the legislature has entrusted to the discretion of local decision-making bodies. RCW 36.70A.3201. *Viking Properties, Inc. v. Holm*, 155 Wn.2d 112, 128, 118 P.3d 322 (August 2005).

Emphasis added.

It is both ironic and perplexing that the above-emphasized portions of the court’s *dicta* would seem to suggest that deference would be accorded to Shoreline (i.e., the “local decision-making body” whose “balancing [of] the GMA’s goals in accordance with local circumstances” resulted in the four units per acre choice) rather than that of the parties to the *Viking* case or the court itself.

Finally, the court’s discussion about the “inherent tension” and “conflict” between and among the GMA’s goals offers an incomplete characterization of the GMA provisions at issue in the court’s *King County* case decided in 2000. In *Viking*, the court said:

We are ever cognizant that this is a legislative prerogative and have prioritized the GMA’s goals only under the narrowest of circumstances, where certain goals came into direct and irreconcilable conflict as applied to the facts of a specific case. *See King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 12 Wn. 2d 543, 558, 14 P.3d 133 (2000).

Emphasis added.

However, a detailed review of the court’s decision in *King County* reveals that the “conflict” was not simply between or among GMA goals – rather, it was between a GMA requirement (the conservation of designated agricultural resource lands required by RCW 36.70A.060), and the recreation goal (RCW 36.70A.020(9)) to which the county and soccer enthusiasts had pointed to justify soccer fields on farm lands. In *King County*, the fact that the county had “prioritized” the planning recreation goal (9) ahead of the resource industries goal (8) did not excuse it from the GMA requirement to conserve designated agricultural land.³⁰ This construction of the law is parallel to and consistent with the Court of Appeals conclusions in the *Bellevue* concurrency case cited on page 9 of this paper.

In summary, the *Viking* decision lacked the clarity of the earlier Supreme Court decisions on these subjects. Much of what the *Viking* court said on the subjects of deference, the relationship of goals to requirements and hence, appropriate urban densities, was *dicta*, rather than holdings, and therefore of limited, if any, precedential value.

To clarify, GMA goals and GMA requirements are not the same. Goals are not requirements and vice versa. Standing alone and in the abstract, there is inherent tension and even conflict between and among goals. However, tension or conflict between a GMA goal and a GMA requirement is resolved in favor of the requirement, not the reverse.

Perhaps most significantly, in *Viking* the Supreme Court did not repudiate or modify its above cited holdings in *King County* (2000), *Thurston County* (2002), and *Quadrant* (2005) regarding the level of deference owed to local governments under RCW 36.70A.3201. Cities and counties continue to enjoy deference in how they plan for growth – including their choices about appropriate urban densities - provided that their choices are consistent both with the goals and the requirements of the Act. The *Viking* decision did not alter that.

VII. Growth Board Decisions after *Viking*

In a case decided in August of 2005, the Growth Board upheld the City of Bothell against challenges filed by many parties on the urban densities issues. The case was captioned *Fuhriman v. City of Bothell (Fuhriman II)*.³¹

All petitioners challenged some of Bothell’s residential land use designations and the city’s definition of “net buildable area.” The city’s definition provided that certain areas be deducted from gross acreage to determine the net acreage upon which density calculations are to be based. The board found that Bothell’s definition was not clearly erroneous and within its discretion to define. The board found that the densities provided for by the city’s residential land use designations were appropriate urban densities, including two low density designations established to protect critical areas – a hydrologic system critical area [North Creek] and a geological critical area [Norway Hill].

The board was aware of the *Viking* decision issued by the Supreme Court the preceding week, as evidenced by its explicit statement on page 7 of the FDO:

Pursuant to WAC 242-02-660(2), the Board takes notice of *Viking Properties Inc. v. Oscar W. Holm and Martha J. Holm*, 2005 WL 1981699 (Wash).

Although there is no specific discussion in the *Fuhriman II* FDO of *Viking* or its meaning, it is notable that the only references to “bright line” in the FDO appear where those words were uttered by the petitioners, not the board [FDO, at pages 20-23]. In contrast, the board characterized the four dwelling units per acre threshold as a “safe harbor” rather than a “bright line.”

On page 24 of the FDO, the board said:

In another early case also involving, among other things, the sizing of final urban growth areas and urban residential density designations, the Board concluded that 4 *net* du/acre constituted an appropriate urban density, generally, a residential density that complied with the Act – a safe harbor.

Emphasis added.

Notwithstanding the *Viking* court’s *dicta* regarding GMA goals, the board reiterated the view that the four dwelling unit per net acre threshold is a matter of settled land use planning practice in this region (see Section VIII for preliminary documentation of this fact).

Thus, while the board does not presently assert that the four units per acre threshold constitutes a “bright line,” the board nevertheless affirmed that this threshold constitutes a “safe harbor” which is to say that it is an irrefutably valid appropriate urban density.

VIII. Existing Land Use Designations in Central Puget Sound

King, Pierce, and Snohomish counties have adopted the four units per net acre threshold for unincorporated urban areas, as have many cities. Table 1 below shows aggregate numbers for cities in the four counties in the region, derived from a review by PSRC staff of geographic information system (GIS) data of adopted future land use maps (FLUMs) in city comprehensive plans. The information in Table 2 was provided by city staff contacted by the author at one of four meetings with the technical staffs of the cities and counties in the region.³²

The aggregate numbers in Table 1 include all 82 cities in the region and represent only those portions that their FLUMs designate as residential single-family areas. Most cities contain residential uses of much greater densities in multi-family, mixed-use, and commercial centers (for example, Everett, Bellevue, Bremerton, Tacoma, and Seattle); however, due to the topical scope of this paper, the Tables 1 and 2 focus only on those portions of the communities typically described as single-family neighborhoods of varying lot sizes.

Table 1
**Percentage, by county, of aggregate city residential land areas
designated above and below four gross units per acre threshold**

County	% above threshold	% below threshold	Notes
Snohomish	92	8	
Pierce	89	11	
King	85	15	
Kitsap	20	70	Bainbridge Island skews aggregate figure

Table 2

Percentage of single family residential land area designated above and below 4 du/acre. (See explanation in paragraphs following table)

City	% above	% below	Notes
100% ABOVE			
Algona	100	0	
Arlington	100	0	
Bremerton	100	0	
Everett	100	0	
Fircrest	100	0	
Gig Harbor	100	0	
Lynnwood	100	0	
Mountlake Terrace	100	0	
Port Orchard	100	0	
Poulsbo	100	0	
Ruston	100	0	
Seattle	100	0	
Shoreline	100	0	
Snohomish	100	0	
Steilacoom	100	0	
Tacoma	100	0	

90 to 99%			
SeaTac	98	2	
Covington	95	5	1 acre/du in “urban separator” creek zones
Monroe	95	5	
Issaquah	94	6	
Kirkland	94	6	97:3 w/o equestrian areas per <i>Bremerton</i> case
Puyallup	94	6	
Renton	93	7	96:4 w/o urban separators, wetlands, and parks
Bothell	92	8	The 8% was upheld in <i>Fuhriman II</i> case
DuPont	92	8	
Maple Valley	91	9	100:0 w/o golf courses

70 to 79%			
Lynnwood	79	21	
North Bend	79	21	The 21% is constrained land in the floodplain
Pacific	75	25	
Auburn	77	23	

There is no data for 80-89 percent.

Federal Way	76	24	81:19 w/o Hylebos wetlands per <i>Litowitz</i> case
Sammamish	76	24	
Kent	75	25	Pending rezoning would change this to 87:13
Redmond	72	28	83:17 if parks are deducted

City	% above	% below	Notes
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60 to 69%			
Mercer Island	64	36	

50 to 59%			
	None		
Bellevue	59	41	81:19 w/o public, parks, equestrian lands
Burien	59	41	61:39 w/o parks and schools

40 to 49%			
Sumner	49+	51-	Lowest density ranges from 3.93 to 5.1 du/acre
Woodinville	49	51	

30 to 39%	None		
20 to 29%	None		

10 to 19%			
Normandy Park	16	84	
Woodway	10	90	

0 to 9%			
Brier	5	95	
Bainbridge Island	3	97	Very anomalous situation in region.
Clyde Hill	0	100	20,000 sq. foot lots, some existing are smaller
Hunts Point	0	100	
Medina	0	100	

The information in Table 2 gives a general sense that the future land use maps of the cities which participated in the survey have designated the majority of their lands above the four units per acre threshold. It also indicates that many of those cities with lands below that threshold have circumstances that either were specifically upheld by the Growth Board as “appropriate urban densities” (e.g., Bothell in *Fuhrman II*, Federal Way in *Litowitz*, and Redmond in *Benaroya*) or, in the assessment of this observer, would be (e.g., Covington, Kirkland, and Sumner).

The aggregate totals for cities in King, Snohomish, and Pierce counties show a relatively high percentage of residential lands above the four units per acre threshold (between 85% and 92%). The aggregate percentage for Kitsap cities is very low (only 20%) due to

Bainbridge Island. The other three cities in Kitsap County have 100% at or above the four units per acre threshold. The city aggregate figure is heavily skewed by Bainbridge Island, which has 97% of its land area below the four units acre threshold, and a land area nearly as large as the three other cities combined (28 square miles vs. 31 square miles for Poulsbo, Port Orchard and Bremerton collectively.)

There is no apparent relationship between city population or overall land area and the percentage of residentially designated lands below the four units per acre threshold. A number of cities identified non-residential uses in residential areas, such as parks, institutions, golf courses and cemeteries, for which density designations are meaningless, but which are included in the “gross” statistics in Table 2 of lands below the four unit threshold. The Growth Board has not explicitly addressed the latitude available to local governments to designate such lands at low densities.

Another argument sometimes heard in this discussion has been that existing or built-out neighborhoods at below four units per acre should similarly be excluded from any general rule regarding appropriate urban densities. This may be a good point with respect those neighborhoods subject to the kind of pre-GMA restrictive covenants at issue in the *Viking* decision discussed in Section VI. However, in the absence of such covenants, national trends, recent regional development patterns and adopted policies suggest otherwise.

A 2004 paper from the Brookings Institute projects that, by the year 2030, “half of the buildings in which Americans live, work, and shop will have been built after 2000, most of that space will be residential space, and in the West that figure will be about 87%, a near doubling of built space.”³³ Locally, much of the growth and development that has occurred in this region has taken the form of urban redevelopment and infill projects. This trend is projected to continue into the future, reflected in adopted countywide population allocations wherein 35% of the current 20-year population forecast for King County is to be accommodated in Seattle, a city with only 20% of the county’s urban growth area.

The limitations of the responses and depth of the inquiry in the Table 2 survey preclude drawing more conclusions at this time. In view of the concerns expressed by a number of city officials that there is little certainty about the outcome of a potential challenge, it may be worthwhile to consider the adoption of countywide or multicounty planning policies to increase certainty. Section IX below examines that strategy. In such an effort, it would be appropriate to undertake a more complete and methodical inventory of the circumstances throughout the region under which certain cities have designated lands below the four units per acre threshold.

IX. Countywide Planning Policies (CPPs) and Multicounty Planning Policies (MPPs)

All city and county comprehensive plans must be consistent not only with the goals and requirements of the GMA, but also with other jurisdictions with whom they share issues or common borders (RCW 36.70A.100).³⁴ Local plans must also be consistent with countywide planning policies (CPPs) and multicounty planning policies (MPPs) adopted pursuant to RCW 36.70A.210. VISION 2020 and its subsequent update contain the MPPs for the central Puget Sound region.

In addition to providing the framework to coordinate city and county comprehensive plans, VISION 2020+20 provides an opportunity to take the longer-term view (longer than 20 years of UGA land) and thereby achieve a better match between local plans and major public policy decisions and investments with much longer time horizons.

1. Countywide Planning Policies

King, Pierce, and Snohomish counties have specifically adopted the 4 du/acre threshold in their comprehensive plans as an appropriate urban density for lands within unincorporated urban areas. In addition, several counties have adopted countywide planning policies (**CPPs**) that address this general issue for both the county and its cities.

For example, the Pierce County CWPPs state:

6. The County and each municipality shall adopt within their respective comprehensive plans, policies to ensure that development within the urban growth area uses land efficiently, provides for a wide variety of uses, conserves natural resources, and allows for the connection of communities to an efficient, transit-oriented, multimodal transportation system. Policies shall:
 - 6.1 provide for more choices in housing types and moderate increases in density to achieve at least an **average net density of four units per acre.**;
 - 6.2 support infill and compact development;

King County CPP Framework Policy FW-1, Step 7d states:

Development on the land added to the urban growth area under this policy shall be limited to residential development and shall be at a **minimum density of four units to the acre.** Proposals shall meet King County comprehensive plan density and affordable housing goals.

Both the Growth Board³⁵ and the Court of Appeals³⁶ have held that countywide planning policies have directive effect on the comprehensive plans of cities and counties. Thus, a CPP may provide either general, aspirational direction to city and county plans or specific and prescriptive direction. The most prominent examples of the latter are the allocation

of population and employment to cities, and the drawing of the urban growth boundaries, both of which are accomplished through CPPs.

2. Multicounty Planning Policies

The same section of the GMA that authorizes CPPs also authorizes the adoption of multi-county policies (MPPs). MPPs adopted pursuant to RCW 36.70A.210(7) are essentially CPPs adopted by two or more counties. The VISION 2020 Regional Plan includes MPPs for the four-county region. VISION 2020+20 will likewise contain MPPs.

The value added of MPPs is several-fold. First, the MPPs are incorporated into a long range vision at the multicounty level. They provide a common framework for both CPPs and regional plans.

Second, MPPs illustrate how local plans and policies adopted to meet near-term objectives (e.g., the population allocations for the next 20 years) can help achieve, or at least not thwart, long-term objectives (e.g., greater transportation efficiencies and preservation of the urban/rural line).

Third, MPPs also provide an opportunity for the local elected officials in this region to collectively craft a solution to the appropriate urban densities questions without having to craft an answer that fits other parts of the state. Regional policies could take the form of a definition, a general rule with specifically listed exceptions, or other approaches.

Finally, MPPs provide assurance to all member jurisdictions that needs defined regionally will be addressed regionwide and that local urban density designations will occur within a collaborative and equitable framework rather than 86 fragmented and unilateral ones (82 cities and four counties).

MPPs can run the gamut from very detailed to very general. At the detailed end of the spectrum might be an MPP that spells out what appropriate urban densities are. Several potential examples follow.

To better focus on the 15-year gap between 2025 and 2040, an MPP might adopt as a regional policy the need for a more efficient use of environmentally unconstrained urban land that has urban services available. For example:

MPP 06-01 In order to maintain the long-range viability of the urban growth boundaries in the region, residential development patterns within the UGA must use unconstrained lands in an efficient manner. While a portion of the housing needs for the region will be accommodated in designated centers, such as multi-family and mixed-use projects, a significant portion must also occur in neighborhoods outside of the centers.

To increase certainty about what density designations would be found compliant with the GMA, an MPP could be written to essentially codify the precedents set forth in existing

Growth Board and judicial case law. In addition, an MPP to memorialize the “general rule and reasonable exceptions” framework in case law could also add exceptions or factors heretofore not considered by the board or courts. Such an MPP might read as follows:

MPP 06-02 All residentially designated lands within the urban growth areas shall meet appropriate urban densities. In determining what an appropriate density is, cities and counties shall be guided by the following criteria:

- (a) a residential density of four net dwelling units per acre is irrefutably urban and is therefore a safe harbor designation on the future land use map.
- (b) residential densities below the safe harbor threshold are also appropriate in the following circumstances:
 - (i) when supported by evidence in the record that demonstrates the presence of critical areas that are large in scope, complex in nature, and with a high rank order value and when accompanied by a finding by the local legislative body that lower densities on the future land use map are therefore necessary to augment the critical areas protections adopted pursuant to RCW 36.70A.060(2); or
 - (ii) when supported by evidence in the record that demonstrates a pattern of equestrian facilities, such as trails, paddocks, barns, arenas, and horse parks; or
 - (iii) when applied to non-residential uses such as public schools, public parks, cemeteries, fire stations, golf courses, or essential public facilities. If and when such uses convert to residential uses, this sub-section no longer applies; or
 - (iv) when recorded covenants or documented vested rights establish long-term private rights to an existing pattern of larger lots; or
 - (v) apart from the allowances in (i) through (iii) above, and in order to provide a variety of housing types and densities, each local government may also designate residential densities below the four net dwelling units per acre threshold, provided that the land area in such designation does not exceed 5% of the residential land area of the jurisdiction. A higher percentage for individual jurisdictions to account for other factors may be approved through the adoption of countywide planning policies for the county in which the jurisdiction is located; and
 - (vi) in order to maintain the option for increasing densities in urban residential areas beyond the 20-year horizon of the local plan, development regulations shall not authorize restrictive covenants that would perpetuate lot sizes below the safe harbor threshold. Any new subdivision of residential land at below the safe harbor threshold must be “shadow platted” to show how the proposed pattern of lots, roads and utility easements could accommodate additional growth in the event of a future increase in permitted densities.

Last, it would be desirable to have city and county plans reviewed for consistency with whatever the adopted MPP states. Such certification would be a way to assure

jurisdiction to jurisdiction equity in meeting any regional policies and serve to help protect a city plan designation from GMA appeals. A PSRC “certification” process presently occurs with respect to the transportation-related provisions of city and county plans as to the regional transportation plan. An MPP to specifically address this process for appropriate urban densities might look like this:

MPP 06-03 As part of the Regional Council’s review of local comprehensive plans and certification of transportation-related provisions, those plans shall also be reviewed by PSRC for consistency with the relevant multicounty planning policies concerning appropriate urban densities. A locally adopted or amended plan will not be considered consistent with the MPPs and RCW 36.70A.100, RCW 36.70A.210(7), and RCW 47.80.023 until it has been formally certified. [Note: The certification action indicates that the plan both conforms with the provisions of the Growth Management Act and is consistent with the MPPs. Localities whose plans are not certified are not eligible to compete for PSRC-managed funds.]

X. Conclusions and Recommendations

A. Conclusions

The state of the law

- The board has never found noncompliance with a “bright line”; it has found noncompliance with RCW 36.70A.110.
- While the controversy over the term “bright line” lingers on, it is notable that the Growth Board has not included those words in any of its holdings since 1995, even before the *Viking* Court opined that the Growth Board lacks authority to adopt a “bright line.”
- The *Viking* decision does not stand for the proposition that local governments should attach no significance to the four units per net acre threshold. It would appear that the four per acre threshold still constitutes a “safe harbor” for those local governments who are concerned about a future allegation of non-compliance with the urban growth area requirements of RCW 36.70A.110.
- The circumstances that would support a designation below the four unit per net acre threshold as an appropriate urban density have been reiterated, clarified, and expanded by the Growth Board post-*Viking* in the *Fuhriman v. Bothell* decision.
- While the *Viking* decision, and *Quadrant* before it, admonished the board for not being sufficiently deferential to the local government prerogative to balance the planning goals of RCW 36.70A.020, neither decision asserted that a local government’s discretion to balance goals excuses it from compliance with a requirement of the Act, such as the urban growth area requirements of RCW 36.70A.110.
- To the contrary, neither *Viking* nor *Quadrant* alter the Supreme Court’s prior and more complete reading of legislative intent regarding deference to local decisions

(RCW 36.70A.3201) set forth in the Supreme Court's decision in *Thurston County* (affirming the Court of Appeals holding in *Cooper Point*).

- The net result appears to be that the board will continue to review challenged plans for compliance with both the **goals** of the GMA and the **requirements**, most prominently RCW 36.70A.110.

The state of urban density designations in central Puget Sound

- The average percentage of city residential land areas designated below the four per acre threshold is relatively low – 9% among Snohomish County cities, 12% among Pierce County cities, and 15% among King County cities. Kitsap is much higher (70%), primarily due to the anomaly of Bainbridge Island.
- A large number of cities have designated no residential land uses below the four unit per acre threshold, while others have designated a relatively small percentage (less than 10%.) Most cities are below 25%.
- A relatively small number of cities have designated a large percentage of their residential land areas below the four units per acre threshold (between 50% and 100% in some King County cities).
- No comprehensive review has been made to examine what portions of these cited gross percentages meet the Growth Board's criteria, such as critical areas or equestrian areas. While it would be possible to tabulate more detailed information for comparative purposes, that exercise is beyond the scope of this paper.
- There are many land uses that are typically found within urban residential areas but for which a residential density designation is superfluous (e.g., schools, parks, golf courses).
- It is an overstatement to say that all established or built-out neighborhood patterns are permanent. Experience suggests that these terms are relative, not absolute. Much of the new housing stock in existing cities, both large and small, has been built in areas previously considered established or built out.

The Future Viability of the Urban Growth Area Boundary

- There appears to be continuing support among cities, at least in King County, to maintain the urban-rural boundary essentially in place beyond 2025, although several cities have expressed the sentiment that some minor adjustments should be considered.
- It is neither practical for the long-term viability of the region's UGA nor equitable for those cities that are stepping up to meet new growth demands, that outlying jurisdictions consider a pattern of large lots to be frozen in perpetuity.
- To say that a neighborhood will not re-develop or infill within the 20-year horizon of a GMA plan is one thing. It is quite a different thing, with potentially serious regional implications, to presume that established neighborhoods must be immune from growth and change within the 35-year horizon of VISION 2020+20, or, for example, the 100-year horizon of the *Cascade Agenda*.

- The “15-Year Gap” between the horizon of GMA plans and the horizon of VISION 2020+20 is both a problem and an opportunity. However, absent some framework, such as MPPs or CPPs, to assure that serviceable and environmentally unconstrained urban land is used efficiently, the credibility and viability of the 2040 metropolitan UGA line is compromised.

B. Recommendations

- To the extent that the member jurisdictions of the PSRC would like to increase certainty about what “appropriate urban densities” are in this region, the MPPs would appear to be a viable way to craft a region-specific solution. Such an MPP would be one way to shield local governments from GMA appeals.
- Countywide planning policies could also be one way to adopt a county-specific solution to the question of what is an appropriate urban density.
- If PSRC or member counties and cities wished to fine-tune the factors to be considered in the clarification of appropriate urban densities, it would require some additional review and analysis of a variety of information.

ENDNOTES

¹ The Growth Management Act is Chapter 36.70A of the Revised Code of Washington (RCW). City and county comprehensive plans are adopted pursuant to the authority and requirements of section RCW 36.70A.040. Multicounty planning policies, such as those contained in VISION 2020, are adopted pursuant to the authority and requirements of section RCW 36.70A.210(7).

² *The Cascade Agenda* was issued on May 18, 2005. It is posted online at www.cascadeagenda.org.

³ Conversation with Michelle Conner, Vice-President of Cascade Agenda Programs, Sept. 12, 2005.

⁴ The draft Puget Sound Salmon Recovery Plan was issued on June 30, 2005. It is posted online www.sharedsalmonstrategy.org/plan/index.htm.

⁵ Speaking in opposition to the four units per acre threshold at legislative hearings in 2005 were the Association of Washington Cities, the Washington State Association of Counties, the City of Bellevue and the City of Puyallup. Bill reports on HB 1967 and ESHB 5907.

⁶ Speaking in support of the four units per acre threshold at legislative hearings in 2005 were the Association of Washington Business, the Building Industry Association of Washington, and the Washington Association of Realtors. *Ibid.*

⁷ Speaking in support of the four units per acre threshold at legislative hearings in 2005 were the Washington Chapter of the American Planning Association and 1000 Friends of Washington (a/k/a Futurewise). *Ibid.*

⁸ Futurewise contends that King County cities alone can create an additional supply of 6,400 single family homes units simply by achieving the four unit per acre density on just their buildable lands below that threshold. Growth Management Fact Sheet: page 2.

<http://www.futurewise.org/resources/publications/Encouraging%20Urban%20Growth%20in%20the%20UGA.pdf/view?searchterm=Fact%20Sheet>.

⁹ “A large, growing, and underserved market exists for housing types that lie between the typical low-density subdivisions and high density multi-family complexes . . . and with the limitations on land availability – due to both urban growth lines and infrastructure capacity – the only way to get that supply increase is through more efficient use of the land that is developable.” The Housing Partnership, excerpted from Catalog of Housing Innovation in Washington, online at www.rightsizehome.org.

¹⁰ The only exception to this mutually exclusive aspect is when resource lands are designated within city limits. Such city designations may only occur if the city has also adopted a purchase or transfer of development rights program. RCW 36.70A.060(4).

¹¹ *McVittie v. Snohomish County*, CPSGMHB Case No. 99, 3-0016c, FDO, Feb. 9, 2000, at page 19.

¹² *City of Bellevue v. East Bellevue Community Municipal Corporation*, No. 49852-5-I, CONSOLIDATED WITH No. 50624-2-I, COURT OF APPEALS OF WASHINGTON, DIVISION ONE, 119 Wn. App. 405; 81 P.3d 148; 2003 Wash. App., LEXIS 2912, December 15, 2003, Filed.

¹³ *Quadrant Corporation v. Central Puget Sound Growth Management Hearings Board*, 119 Wn. App. 562, 578, [Division I] 81 P.3d 918 (December 2003) [Affirmed in part and reversed in part by *Quadrant Corporation v. Central Puget Sound Growth Management Hearings Board*, 154 Wn.2d 224, 110 P.3d 1132 (May 2005).]

¹⁴ *City of Bremerton, et al., v. Kitsap County, (Bremerton I)*, CPSGMHB Case No. 95-3-0039c, FDO, October 6, 1995.

¹⁵ Newsweek magazine. October 3, 2005 issue, “Designing Heart Healthy Communities.” pp. 60-66.

¹⁶ “Living too large in Exurbia” published in Business Week online (http://www.businessweek.com/magazine/content/05_42/b3955060.htm) summarizes this phenomenon:

A lifestyle built on cheap energy costs and low mortgage rates is in jeopardy. Consumers who hardly gave a thought to gassing up when regular was \$1.50 a gallon are abandoning their hulking sport-utility vehicles and pickups, signing up for carpools, and leaving the motorboat in the backyard now that prices are stuck at nearly twice that.

¹⁷ *Rural Residents v. Kitsap County, (Rural Residents)*, CPSGMHB Case No. 93-3-0010, FDO, June 23, 1994, at page 19.

¹⁸ *Bremerton I*, at page 35.

¹⁹ *Litowitz, et al. v. City of Federal Way*, CPSGMHB Case No. 96-3-0005, FDO, July 22, 1996.

²⁰ *Lawrence Michael Investments, et al., v. Town of Woodway*, CPSGMHB Case No. 98-3-0012, FDO, January 9, 1999.

²¹ *Kaleas, et al., v. City of Normandy Park*, CPSGMHB Case No. 05-3-0007c, FDO, July 19, 2005.

²² *1000 Friends of Washington v. City of Issaquah*, CPSGMHB Case No. 05-3-0006, FDO, July 20, 2005.

²³ *Quadrant v. CPSGMHB*, SUPREME COURT OF WASHINGTON, 154 Wn.2d 224, 248, 110 P.3d 1132 (2005).

²⁴ *King County v. CPSGMHB*, No. 68284-4, SUPREME COURT OF WASHINGTON, 142 Wn.2d 543, 561, 14 P.3d 133, 2000 Wash. LEXIS 834, December 14, 2000, Filed.

²⁵ *Cooper Point Ass'n v. Thurston County*, COURT OF APPEALS OF WASHINGTON, DIVISION II, 108 Wn. App. 429, 444, 31 P.3d 28 (2001).

²⁶ *Thurston County v. Cooper Point Ass'n*, No. 71746-0, SUPREME COURT OF WASHINGTON, 148 Wn.2d 1, 15, 57 P.3rd 1156; 2002 Wash. LEXIS 719, November 21, 2002, Filed.

²⁷ *Viking Properties v. Holm, et al.*, __Wn.2d__, 118 P.3d 322 (August 18, 2005).

²⁸ *Dicta (plural of dictum)* – A statement, remark, or observation. The word is generally used as an abbreviated form of *obiter dictum*, “a remark by the way;” . . . Statements or comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand are *obiter dicta*, and lack the force of an adjudication. Black’s Law Dictionary, 6th Edition.

²⁹ The *Viking* Court stated: “The GMA contains 13 expressly nonprioritized goals that guide local government...” *Viking*, at 125; and “... We are ever cognizant that this [nonprioritization of goals] is a legislative prerogative and have prioritized the GMA's goals only under the narrowest of circumstances, where certain goals came into direct and irreconcilable conflict as applied to the facts of a specific case. *See King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 558, 14 P.3d 133 (2000). *Viking*, at pages 127-128.

³⁰ The confusion about the relationship between GMA goals and GMA requirements expressed by the *Viking* Court was mirrored in the dissenting opinion of Justice Charles Johnson in the *King County* decision. Had the *Viking* court’s reasoning that “prioritization of GMA goals trumps GMA requirements” held sway in 2000, the *King County* decision arguably would have had a different outcome.

³¹ *Fuhriman (II), et al., v. City of Bothell (Fuhriman II)*, CPSGMHB Case No. 05-3-0025c, FDO issued August 29, 2005.

³² These meetings were held in August and September of 2005 with the planning staff members of the Pierce County Growth Management Coordinating Council, Snohomish County Tomorrow, Kitsap County Regional Planning Council, and the King County Planning Directors. The information in Table 2 was provided by participating city and county officials.

³³ Toward a New Metropolis: The Opportunity to Rebuild America, Executive Summary posted online at http://www.brookings.edu/metro/pubs/20041213_rebuildamerica.htm.

³⁴ In addition to the provisions in RCW 36.70A.210 of the GMA, the supporting legislation for Regional Transportation Planning Organizations in Chapter 47.80 lists a number of guidelines and principles to be addressed in transportation planning for both regional agencies and local governments. Among the factors to be addressed is “residential density.” Since the MPPs are required to include both urban growth area and transportation provisions, they are an appropriate venue for providing direction on how residential density is to be addressed to also satisfy this section of Washington state law.

³⁵ *Cities of Edmonds and Lynnwood v. Snohomish County*, (**Edmonds**), CPGMHB Case No. 93-3-0005c, FDO, Oct. 4, 1993; *see also*, *City of Snoqualmie v. King County*, (**Snoqualmie**), CPSGMHB Case No. 92-3-0004c, FDO, March 1, 1993, at pages 62-63.

³⁶ *King County v. CPSGMHB*, No. 39333-21, No. 39914-4-I, No. 40310-9-I, COURT OF APPEALS OF WASHINGTON, DIVISION ONE, 91 Wn. App. I; 951 P.2d 1151; 1998 Wash. App. LEXIS 344, March 2, 1998, Filed, as modified August 6, 1998. In this decision, the Court of Appeals, Div. I, cited and adopted the Growth Board's holdings in *Snoqualmie* regarding the directive effect of CPPs and the three-part test to determine what matters are subject to the directive effect of countywide planning policies.

Appendix A

Excerpts of Growth Management Act provisions regarding goals, definitions, substantive requirements, and Growth Board deference owed to local government decisions.

1. GMA Goals

The Act's goals are set forth at RCW 36.70A.020, which provides in relevant part:

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

- (1) Urban growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
- (2) Reduce sprawl. Reduce the inappropriate conversion of undeveloped land into sprawling, low-density development.
- (3) Transportation. Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.
- (4) Housing. Encourage the availability of affordable housing to all economic segments of the population of this state, promote a variety of residential densities and housing types, and encourage preservation of existing housing stock.
- ...
- (8) Natural resource industries. Maintain and enhance natural resource-based industries, including productive timber, agricultural, and fisheries industries. Encourage the conservation of productive forest lands and productive agricultural lands, and discourage incompatible uses.

(9) Open space and recreation. Retain open space, enhance recreational opportunities, conserve fish and wildlife habitat, increase access to natural resource lands and water, and develop parks and recreation facilities.

(10) Environment. Protect the environment and enhance the state's high quality of life, including air and water quality, and the availability of water.

...

(12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

2. GMA definition of "urban growth"

The Act's definitions are set forth at RCW 36.70A.030, which includes:

(18) "Urban growth" refers to growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources, rural uses, rural development, and natural resource lands designated pursuant to RCW 36.70A.170.

3. GMA substantive requirements

RCW 36.70A.070 clarifies that urban growth is not permitted in rural areas (emphasis underlined):

(5) Rural element. Counties shall include a rural element including lands that are not designated for urban growth, agriculture, forest, or mineral resources. The following provisions shall apply to the rural element:

...

(b) Rural development. The rural element shall permit rural development, forestry, and agriculture in rural areas. The rural element shall provide for . . . other innovative techniques that will accommodate appropriate rural densities and uses that are not characterized by urban growth and that are consistent with rural character.

RCW 36.70A.110 sets forth the Act's requirements with respect to urban growth areas (emphasis underlined), providing in relevant part:

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

growth area. An urban growth area may include more than a single city. An urban growth area may include territory that is located outside of a city only if such territory already is characterized by urban growth whether or not the urban growth area includes a city, or is adjacent to territory already characterized by urban growth, or is a designated new fully contained community as defined by RCW 36.70A.350.

(2) Based upon the growth management population projection made for the county by the office of financial management, the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period, except for those urban growth areas contained totally within a national historical reserve.

Each urban growth area shall permit urban densities and shall include greenbelt and open space areas. In the case of urban growth areas contained totally within a national historical reserve, the city may restrict densities, intensities, and forms of urban growth as determined to be necessary and appropriate to protect the physical, cultural, or historic integrity of the reserve. An urban growth area determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses. . .

4. Growth Board standard of review and deference owed to local decisions

RCW 36.70A.320 provides:

(1) Except as provided in subsection (5) of this section, comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.

(2) Except as otherwise provided in subsection (4) of this section, the burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this chapter is not in compliance with the requirements of this chapter.

(3) In any petition under this chapter, the board, after full consideration of the petition, shall determine whether there is compliance with the requirements of this chapter. In making its determination, the board shall consider the criteria adopted by the department under RCW 36.70A.190(4). The board shall find compliance unless it determines that the action by the state agency, county, or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of this chapter.

...

RCW 36.70A.3201 provides:

In amending RCW 36.70A.320(3) by section 20(3), chapter 429, Laws of 1997, the legislature intends that the boards apply a more deferential standard of review to actions of counties and cities than the preponderance of the evidence standard provided for under existing law. In recognition of the broad range of discretion

that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning and harmonizing the planning goals of this chapter and implementing a county's or city's future rests with that community.

Appendix B

The factors are listed on pages 5 and 6 of the Growth Board's *Kaleas* decision:

“In short, the factors the Board considers when a PFR [Petition for Review] is filed that challenges whether a city's urban densities are appropriate and comply with the GMA, include:

- Whether the jurisdiction is able to accommodate its share of the 20-year growth forecast by the Office of Financial Management, and allocated by the County, now and in the future;
- Whether the jurisdiction is encouraging and stimulating urban growth within its borders;
- Whether the jurisdiction is providing for compact urban growth consistent with those Goals of the Act that are typically fulfilled and furthered by providing for urban densities;
- Whether the jurisdiction has determined that its critical areas regulations do not adequately protect identified and designated critical areas;
- For those areas within the jurisdiction designated below 4 dwelling units per acre (based upon the Board's “bright-line” or “safe harbor”) do those areas;
 - Contain large scale, complex, high value critical areas that require the additional level of protection provided by lower densities than can be provided by the jurisdiction's existing critical areas regulations [*Litowitz* test-hydrologically focused].
 - Contain limited unique geologic or topographical features that require the additional level of protection provided through lower densities than can be provided by the jurisdiction's existing critical areas regulations [expansion of the *Litowitz* test].
 - Contain existing equestrian communities [*Bremerton*].
 - Perpetuate an existing low density pattern.
 - Fall within a “phasing area” where the city has adopted an explicit phasing program for the provision of urban services and facilities that limits densities

-
- until a date certain, within the Plan's time horizon, when adequate urban services and facilities will be provided; and
- Whether the jurisdiction, as a whole, is providing for appropriate net urban densities as required by the goals and requirements of the Act, considering:
 - The portion of the jurisdiction's residential land area that is designated at densities of 4 du/acre or more (in particular, the extent to which considerably higher densities are allowed and encouraged; and
 - The portion of the jurisdiction's residential land area that is designated at densities less than 4 du/acre; and what portion of this land is vacant, underdeveloped and appropriate for redevelopment and infill.”