

MEMO

To: BOCC
From: Neil A. Caulkins
Re: Comp Plan Compliance in Light of Supreme Court Decision
Date: August 23, 2011

This memorandum seeks to describe what the Supreme Court held in its recent decision regarding the challenged comprehensive plan provisions and development regulations as well as describe the work that will need to be accomplished to come into compliance and make some recommendations as to how to conduct that work and the timeframe involved.

Background

The cases began as first a pair of challenges, brought by the Department of Commerce (then CTED) and Futurewise (along with Kittitas County Conservation and RIDGE), to the GMA-compliance of the County's comprehensive plan. Challenges were made to a variety of issues including three-acre zoning, clusters, PUDs, UGNs, and various designation changes. The Hearings Board ruled largely against the County and the County appealed the three-acre density question while BIAW appealed both the three acre density question and the GMA-compliance of clusters and PUDs. (The other issues have subsequently, except for the size of Kittitas' UGA, been brought into compliance.) The appealed issues were stayed pending appellate review and the two appeals were consolidated.

Shortly thereafter Kittitas County's update to its development regulations were also challenged before the hearings board which again ruled largely against Kittitas County. That Final Decision and Order spawned 5 appeals and was stayed pending appellate review. These five cases were consolidated and eventually also consolidated with the appeals of the comprehensive plan by the appellate courts. During briefing, the case attracted various parties who intervened and joined the litigation as amicus curiae such as Pacific Legal Foundation, CELP, and the DOE. Oral argument was held last fall and the decision was issued July 28, 2011. The Supreme Court issued its mandate August 23, 2011.

Decision

The Supreme Court divided its decision into eight sections, and so this memo will summarize those eight holdings. As a general proposition, the Supreme Court held that the Hearings Board's decision was appropriate, that the County had failed to conduct some foundational work as to the Growth Management Act, and yet the Court withheld determination upon the specific development tools, such as three-acre zoning, PUDs, clusters, and one-time lot splits, remanding that back to the Hearings Board to see if it could be convinced of the GMA compliance of those techniques once the foundational work actually was done and the County demonstrated how those techniques fit in and implemented those comprehensive plan concepts.

First, the Court held that our public testimony was irrelevant to show how three-acre zoning is consistent with rural character, protects it, or harmonizes the goals of the GMA. It only shows how it meets the short-term economic needs of farmers and rural landowners. It does not prove that short-term profit by subdivision will preserve rural character in the long-term. The Court gave very little credence to our unique “rural sprawl” problem and saw no evidence as to how three-acre zoning remedies that alleged problem.

Second, the Court found no written record explaining how our rural element harmonized the planning goals of the GMA and met the act’s requirements. Third, it appeared to the Court that the Hearings Board used a bright line rule, but because there was nothing in the record explaining our consideration of local circumstances in planning our rural element, the Court declined to strike the ruling and remanded that matter for us to justify it.

Fourth, the Court found that Kittitas County does not protect rural character. Our GPOs mouth words that regulations should address GMA requirements, but do not actually require or assure that that happens, “aspirational principles, not imperatives.” Instead of parroting the GMA’s language that rural character should be protected, our comp plan must include criteria that actually provide such protection. PUDs, clusters, conditional uses, and one-time lot splits in Ag-20 might be GMA compliant if there are sufficient controls that protect rural character.

Fifth, the Court found that the County’s plan failed to provide for a mix of rural densities. The Court discussed that, without showing in the comp plan where and how much development could potentially occur, that a series of site-specific rezones, directed merely by landowner desire, could undo the GMA provisions for rural element, protection of rural character, and guaranty of mix of appropriate rural densities.

Sixth, the Court found that conditional use permits and one-time splits in commercial ag lack standards to protect agricultural lands. The Court found that the County’s CUP process lacked criteria related to conservation of ag lands or encouragement of the ag economy. Either technique could be GMA-compliant if appropriate controls existed.

Seventh, the Court held that the Hearings Board should have deferred to the County as to airport regulation. Finally, the Court held that the County’s subdivision regulation cannot permit evasion of compliance with water permitting requirements. The Court affirmed the finding that it violated the GMA to not require information on lands in common ownership. While the Court reaffirmed the role of the DOE in permitting water rights, it found the County had a role to make a Campbell & Gwinn determination solely for purposes of its obligation under the GMA (Ch. 36.70A RCW; 58.17.110; and 19.27.097, all part of the GMA).

Compliance Effort

Now that the Supreme Court has issued its mandate, appellate review is terminated and the stays, by their own terms, would no longer be necessary. A motion is being drafted to move the Superior Court to dissolve the stay and send the matter back to the Hearings Board. This would bring back into effect the Hearings Board's Final Order, particularly in the development regulation appeal, which contained a finding of invalidity. That finding was for numerous zoning designations that created densities greater than one dwelling unit per five acres (R-3, Ag-3, performance based cluster plats, etc.) but also included the zoning map. Hence, I believe that any application seeking to create densities greater than one per five that involves a change to the zoning map, that is deemed complete after whatever date the Superior Court dissolves the stay would be under the order of invalidity and the County could not process such application. Such application would not vest.

The Hearings Board will eventually set a new compliance schedule. In the mean time, the County can certainly move forward in that it knows what work needs to be done. While significant work needs to be done, it can be accomplished with existing staff and by reusing the public participation models the County has employed in recent compliance efforts.

As part of defining our rural element and describing what our rural character is and how it shall be protected, the County needs to engage in several efforts, which can be carried out concurrently. First, the County needs to take stock of existing development patterns. In many ways, this first portion of the task is answering questions of land capacity-how much new population (growth) can be accommodated (management) now. This is a mapping exercise that our staff and equipment can accomplish. It needs to generate maps of where we are now, our starting point. It needs to show all lots actually created in Kittitas County, including by short plat, long plat, exempt/administrative segregation, one-time split, etc, as well as amass information as to when lots were created. This also needs to show lots that are proposed in applications that are currently making their way through the approval system. It may also be necessary to amass information as to lot creation within the County's municipalities.

As a second part of this inquiry, the County will need to obtain a clear picture of how much population (growth) has been coming into the County and where it's been going (management). We will need census information, all well permits, OFM numbers, and building permits, etc. It will also be necessary to bring in the findings of the Aquavella case and the USGS study as water will be a limiting factor upon development and because protection of ground and surface water, as the GMA requires, was a key issue in this case. These first two portions of the investigation will inform the description of what Kittitas County is now and, hence, what is its rural element and character that will be the subject of protection. These first two portions of the inquiry will also illuminate policy shortcomings in that they will show whether or not population (growth) has been happening in the County in accord with the population allocations made by the KCCOG (management), and hence, whether or not the County's policies have been successfully focusing growth into the urban areas as we've (via the KCCOG) established that they should. If a disjunct between where the population has been settling (growth) and where

the County policies say it should (management) appears, then that disjunct will also expose what policies need to be altered to get growth to conform to County policies. The basic idea is that, when growth does not conform to County policies (presumably in the form of too much growth in the rural areas and not enough in the urban areas when compared to KCCOG population allocations), then the County's GMA-required efforts to protect the rural element/character and to direct growth into urban areas is failing and the policies must be adjusted to remedy that failure. In short, this two-part base-line shows us where we are and what is or is not working such that we can define what our rural element/character is and what needs doing to protect it.

Another part of the background work needs to be in researching the provisions in other counties for rural element, protection of rural character, and guaranty of appropriate mix of rural densities. The County staff has met with representatives from the Department of Commerce, the entity charged with shepherding municipalities through the GMA. They have assured us that Kittitas County is one of the cases they, as an organization, have a commitment to expend resources towards our effort with GMA compliance. This is largely because, due to the County's rural nature and proximity to King County, it is the "flash point" on the question of protection of rural character. The Department of Commerce will be sending us sample documents to review as examples of comprehensive plans and development regulations that define the rural element, protect rural character, and guaranty a mix of rural densities. This will be an important means of avoiding reinvention of the wheel-to crib from GMA-compliant regulations from other jurisdictions.

Another means of avoiding wheel reinvention that County staff can be, and is engaged in, is the evaluation of work the County has already done. A couple years ago, the County's Land Use Advisory Committee completed some work and made recommendations as to amendments to the comprehensive plans and development regulations. Similarly, there was a draft of the comprehensive plan that was significantly different than what the Planning Commission and BOCC approved in 2004 that received good comments from the Department of Commerce that should be dusted off and reexamined. Given that a part of the rural element is driven by local circumstances and local vision, if some useable work has already been done locally that could shed light on those circumstances and vision, then it would be most efficient to make use of it rather than start from scratch. Hence, a part of the background (to drafting of proposed comp plan and dev. reg. amendments) is evaluating work already completed by the County that may be helpful in defining our local rural element, exemplifying means to locally protect rural character, or describing how we can guaranty a mix of rural densities.

After conducting the above-described inquiries (mapping, review of docs from other jurisdictions, review of previous Kittitas County docs), staff will draft appropriate proposed amendments to the comprehensive plan, particularly the rural element, and development regulations. The rural policies need to meet the statutory requirements and create enough clear direction that enforceable code provisions can be written to implement them. These policies need to be specific and point to how development regulations will protect rural character and meet the goals and requirements of the GMA.

Upon completion of this drafting, the public participation program begins. The proposed amendments will be presented to the public in a series of open houses in both the upper and lower County. The proposed amendments will be posted to the County's website and notice of the postings and open houses will be disseminated through email, web posting, and newspaper PSAs. After the open houses, the proposed amendments will be presented to the Planning Commission who will take testimony and written comments from the public and create both an administrative record and a recommendation to the BOCC. The BOCC will, in turn, also hold public hearing in which it too takes testimony and written comment and augments the record. Along the way, and subsequent to close of the record, staff will provide response to comments received. The BOCC will then deliberate, decide, and direct staff to prepare enabling documents.

As a rough estimate of the time-line for this process, I would estimate at least twelve months. This would be roughly divided as shown on the attached proposed schedule. I have been in conversation with Futurewise, and it expressed a belief that it would take the County a year, and was supportive of allowance for such a time-frame.