

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
2 EASTERN WASHINGTON REGION  
3 STATE OF WASHINGTON  
4

5 KITTITAS COUNTY CONSERVATION,  
6 RIDGE AND FUTUREWISE,

Case No. 10-1-0013

7 Petitioners,

**FINAL DECISION AND ORDER**

8  
9 v.

10 KITTITAS COUNTY,

11 Respondent.  
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15 **I. SYNOPSIS**

16 This appeal considers a Petition for Review (PFR) in which Kittitas County Conservation,  
17 RIDGE and Futurewise (Futurewise) allege Kittitas County (County) failed to *adopt*  
18 transportation concurrency regulations as required by the Growth Management Act (GMA).  
19 In this Order, the Board finds that Petitioners' appeal is not time barred and the Board has  
20 jurisdiction to hear this "Failure to Act" appeal. The Board also finds the County has failed  
21 to adopt a transportation concurrency ordinance, as required by RCW 36.70A.070(6)(b).  
22 Because the County has failed to adopt such measures, there are no relevant plan  
23 components or development regulations to invalidate.  
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26 **II. PROCEDURAL BACKGROUND**

27 On December 6, 2010, Kittitas County Conservation, RIDGE, and Futurewise (collectively  
28 Petitioners) filed a Petition for Review (PFR) with the Growth Management Hearings Board  
29 – Eastern Washington Region (Board).  
30

31 A Hearing on the Merits for this matter was conducted on May 2, 2011 in Ellensburg,  
32 Washington. Board members Joyce Mulliken, Raymond Paoletta, and James McNamara

1 were in attendance; Board member Mulliken presiding. Petitioners were represented by Tim  
2 Trohimovich. Kittitas County was represented by Neil Caulkins.

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4 **III. PRESUMPTION OF VALIDITY, BURDEN OF PROOF,  
5 AND STANDARD OF REVIEW**

6 Comprehensive plans and development regulations, and amendments, are presumed valid  
7 upon adoption.<sup>1</sup> This presumption creates a high threshold for the Petitioners as the  
8 burden is on the Petitioners to demonstrate that action taken by Kittitas County is not in  
9 compliance with the GMA.<sup>2</sup>

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11 The Board is charged with adjudicating GMA compliance and, when necessary, invalidating  
12 noncompliant plans and development regulations.<sup>3</sup> The scope of the Board's review is  
13 limited to determining whether Kittitas County has achieved compliance with the GMA only  
14 with respect to those issues presented in a timely petition for review.<sup>4</sup> The GMA directs the  
15 Board, after full consideration of the petition, to determine whether there is compliance with  
16 the requirements of the GMA.<sup>5</sup> The Board shall find compliance unless it determines that  
17 the challenged action is clearly erroneous in view of the entire record before the Board and  
18 in light of the goals and requirements of the GMA.<sup>6</sup> In order to find Kittitas County action  
19 clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake  
20 has been committed."<sup>7</sup>

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25 <sup>1</sup> RCW 36.70A.320(1) provides: [Except for the shoreline element of a comprehensive plan and applicable  
26 development regulations] comprehensive plans and development regulations, and amendments thereto,  
27 adopted under this chapter are presumed valid upon adoption.

28 <sup>2</sup> RCW 36.70A.320(2) provides: [Except when city or county is subject to a Determination of Invalidity] the  
29 burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this  
30 chapter is not in compliance with the requirements of this chapter.

31 <sup>3</sup> RCW 36.70A.280, RCW 36.70A.302

32 <sup>4</sup> RCW 36.70A.290(1)

<sup>5</sup> RCW 36.70A.320(3)

<sup>6</sup> RCW 36.70A.320(3)

<sup>7</sup> *City of Arlington v. CPSGMHB*, 162 Wn.2d 768, 778, 193 P.3d 1077 (2008)(Citing to *Dept. of Ecology v. PUD District No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 1993); See also, *Swinomish Tribe, et al v. WWGMHB*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); *Lewis County v. WWGMHB*, 157 Wn.2d 488, 497-98, 139 P.3d 1096 (2006).

1 In reviewing the planning decisions of cities and counties, the Board is instructed to  
2 recognize “the broad range of discretion that may be exercised by counties and cities” and  
3 to “grant deference to counties and cities in how they plan for growth.”<sup>8</sup> However, Kittitas  
4 County’s actions are not boundless; those actions must be consistent with the goals and  
5 requirements of the GMA.<sup>9</sup>  
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7 Thus, the burden is on Petitioner to overcome the presumption of validity and demonstrate  
8 that the challenged action taken by Kittitas County is clearly erroneous in light of the goals  
9 and requirements of the GMA.  
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#### 11 **IV. BOARD JURISDICTION**

12 The Board finds the Petition for Review was timely filed pursuant to RCW 36.70A.290(2);  
13 and the Board has jurisdiction over the subject matter of the petition pursuant to RCW  
14 36.70A.280(1).  
15

#### 16 **V. STATEMENT OF THE ISSUE**

17 *Does Kittitas County’s failure to adopt a transportation concurrency requirement in its*  
18 *implementing regulations violate RCW 36.70A.020(12), 36.70A.040(4), and 36.70A.070(6)?*  
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25 <sup>8</sup> RCW 36.70A.3201 provides, in relevant part: In recognition of the broad range of discretion that may be  
26 exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the  
27 boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements  
28 and goals of this chapter. Local comprehensive plans and development regulations require counties and cities  
29 to balance priorities and options for action in full consideration of local circumstances. The legislature finds that  
30 while this chapter requires local planning to take place within a framework of state goals and requirements, the  
31 ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and  
32 implementing a county's or city's future rests with that community.

<sup>9</sup> *King County v. CPSGMHB*, 142 Wn.2d 543, 561, 14 P.2d 133 (2000)(Local discretion is bounded by the  
goals and requirements of the GMA). See also, *Swinomish*, 161 Wn.2d at 423-24. In *Swinomish*, as to the  
degree of deference to be granted under the clearly erroneous standard, the Supreme Court has stated: The  
amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give  
the [jurisdiction's] actions a “critical review” and is a “more intense standard of review” than the arbitrary and  
capricious standard. *Id.* at 435, Fn.8.

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VI. DISCUSSION OF THE ISSUE

- **Applicable Law**

RCW 36.70A.020(12) is the GMA’s Public Facilities and Services goal. It provides:

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.**

RCW 36.70A.040(4) sets forth the requirement for implementing development regulations and provides, in relevant part [emphasis added]:

Any county or city that is required to conform with all the requirements of this chapter, as a result of the county legislative authority adopting its resolution of intention under subsection (2) of this section, shall take actions under this chapter as follows: ... (d) the county and each city that is located within the county **shall adopt a comprehensive plan and development regulations that are consistent with and implement the comprehensive plan not later than four years from the date the county legislative authority adopts its resolution of intention,** but a county or city may obtain an additional six months before it is required to have adopted its development regulations by submitting a letter notifying the [Department of Commerce] its need prior to the deadline for adopting both a comprehensive plan and development regulations.

RCW 36.70A.070(6)(b) sets forth the requirement for transportation planning and provides, in relevant part [emphasis added]:

(b) After adoption of the comprehensive plan by jurisdictions required to plan or who choose to plan under RCW 36.70A.040, local **jurisdictions must adopt and enforce ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted** in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development ...

- **Timing of the Appeal**

1 Petitioners state Kittitas County opted into the GMA voluntarily on December 27, 1990  
2 through the passage of Resolution 90-138 and adopted its first Comprehensive Plan (CP)  
3 on July 26, 1996.<sup>10</sup> Petitioners contend the County was required to adopt transportation  
4 concurrency regulations and it has failed to do so, even though it has updated its  
5 Comprehensive Plan and Development Regulations.<sup>11</sup> According to Petitioners, although  
6 Kittitas County does have regulations addressing road standards, contained in Kittitas  
7 County Code (KCC) 12.01.090, these regulations do not meet the GMA's requirement for  
8 concurrency primarily because they lack key terminology – e.g. “prohibit development that  
9 causes a decline in level of service below adopted standards.”<sup>12</sup>  
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11  
12 In response, Kittitas County notes its Comprehensive Plan “establishes levels of service and  
13 limits development to that which will not denigrate those levels.”<sup>13</sup> Specifically, the County  
14 cites to various policies within its CP that address level of service standards and the  
15 maintenance of those standards by development.<sup>14</sup> Kittitas County also contends it has a  
16 “series of regulations that create a comprehensive plan for insuring transportation currency”  
17 which satisfy the GMA's requirements.<sup>15</sup> According to the County, these regulations have  
18 been in place since July 2005, and were not amended by Ordinance 2010-12,<sup>16</sup> and  
19 therefore are not subject to challenge as the 60-day appeal period has expired.<sup>17</sup>  
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27 <sup>10</sup> Petitioners' Opening Brief, at 4.

28 <sup>11</sup> Petitioners' Opening Brief, at 4.

29 <sup>12</sup> Petitioners' Opening Brief, at 5-6.

30 <sup>13</sup> County Response, at 5 (citing to Comprehensive Plan Chapter 4 Transportation).

31 <sup>14</sup> County Response, at 5-6 (citing GPO 4.13, GPO 4.19, GPO 4.26, GPO 4.27, GPO 4.30, GPO 6-1, and  
32 GPO 6-2).

<sup>15</sup> County Response, at 5-10 (citing to various provisions within KCC 15.04, KCC 12.01, KCC 16.04, KCC  
16.20, KCC 16.32, KCC 16.36).

<sup>16</sup> Ordinance 2010-12 is the County's most recent update to its Comprehensive Plan. It was adopted  
November 2, 2010.

<sup>17</sup> County Response, at 11 (citing RCW 36.70A.290(2) and *Thurston County v. WWGMHB*, 165 Wn.2d 329  
(2008)(Limited failure to revise challenges under 36.70A.130)).

1 In reply, Petitioners first argue the appeal period has not yet expired, “[S]ince *there has not*  
2 *been the adoption of a concurrency ordinance or the publication of a notice of adoption, the*  
3 *sixty day appeal period has not yet begun.*”<sup>18</sup>  
4

5 The GMA establishes a mandatory duty to “adopt and enforce” a transportation concurrency  
6 ordinance; therefore, based on the language of RCW 36.70A.040(4), Kittitas County had  
7 until December 27, 1994 to adopt a comprehensive plan and development regulations,  
8 including those related to transportation concurrency. Kittitas County contends its road  
9 standards have been “un-appealed since 2005” and there is no amendment to the GMA  
10 which would necessitate further amendment to the County’s Ordinance 2005-30 and KCC  
11 Ordinance No. 2010-12 did not amend its concurrency regulations.  
12

13  
14 The County is mistaken in relying upon the absence of recent amendments to its own or the  
15 GMA’s concurrency provisions. This appeal is brought as a “Failure to Act” challenge. A  
16 “Failure to Act” under the GMA was referred to by the Washington Supreme Court in *Skagit*  
17 *Surveyors and Engineers v. Friends of Skagit County, 135 Wn. 2d 542, 558-59 (1998)*, and  
18 is based upon RCW 36.70A.180(1). WAC 242-02-220(5) provides that a Failure to Act  
19 petition may be brought at any time after the specified statutory deadline for action has  
20 passed. Because the question posed in this appeal is whether the County *failed to act* to  
21 comply with the RCW 36.70A.070(6)(b) requirements to adopt a concurrency ordinance, the  
22 appeal is timely. The Board has jurisdiction under RCW 36.70A.290(a) to hear failure to act  
23 appeals to determine whether the County is in compliance with the GMA as it relates to the  
24 adoption of development regulations.  
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27 **• Transportation Concurrency**

28 Concurrency is incorporated in the GMA in several ways. The first place is Goal 12 of the  
29 Act which states:  
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<sup>18</sup> Petitioners’ Reply Brief, at pg. 4, ln. 6.  
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1 Ensure that those public facilities and services necessary to support  
2 development shall be adequate to serve the development at the time the  
3 development is available for occupancy and use without decreasing current  
4 service levels below locally established minimum standards. RCW  
5 36.70A.020(12).

6 As noted above, RCW 36.70A.070(6)(b) requires that local jurisdictions must adopt and  
7 enforce ordinances which prohibit development approval if the development causes the  
8 level of service on a locally owned transportation facility to decline below the standards  
9 adopted in the transportation element of the comprehensive plan.

10  
11 The requirements for the capital facilities elements also incorporate elements of  
12 concurrency:

13 A capital facilities element consisting of: . . . e) a requirement to reassess the  
14 land use element if probable funding falls short of meeting existing needs and to  
15 ensure that the land use element, capital facilities plan element, and financing  
16 plan within the capital facilities plan element are coordinated and consistent.  
17 RCW 36.70A.070(3).

18 Under well established GMA principles, concurrency is intended to ensure that at the time of  
19 new development, public facilities and services are in place or are adequately planned. Its  
20 primary purpose is to avoid the predicament of development after development decreasing  
21 levels of service leading to complete failure with no funding plan in sight. If new  
22 development proceeds without a funding plan for associated public facilities, then local  
23 taxpayers may have to pay for those new facilities.  
24

25 The County points to various provisions of the KCC in support of its argument that it has  
26 complied with its obligation to adopt a concurrency ordinance. For example the County  
27 points to: KCC 12.01.090 (regarding parcel creation); KCC 16.04.010(B) (regarding division  
28 and boundary line adjustments); KCC 167.12.040 (regarding subdivisions and  
29 administrative segregations); and KCC 16.20.050 (regarding plat approval).<sup>19</sup> All of these  
30 provisions have one thing in common – they pertain to the subdivision of property.  
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<sup>19</sup> County Response at 6-7.  
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1 However, "development" as contemplated by RCW 36.70A.070(6)(b) is not limited to the  
2 division of property. Many development activities that result in transportation impacts do not  
3 depend on land division. For example, a change in use from warehouse to retail can  
4 dramatically increase trip generation from a parcel, to the extent that this form of land  
5 development could result in the lowering of LOS standards below adopted levels.  
6 Construction on existing lots would likewise result in increased trip generation. Yet, the  
7 KCC contains no provision that would prohibit this type of development if LOS standards  
8 were to decline below adopted standards. During questioning at the HOM, the County was  
9 unable to cite any provisions that would prohibit development approval, aside from  
10 subdivision approval, if the development causes the level of service to decline below the  
11 County's adopted standards. In the absence of such fundamental provisions, it cannot be  
12 said the County has adopted a transportation concurrency ordinance.  
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15 The Board notes and is aware RCW 36.70A.070(6)(b) provides development approval that  
16 causes LOS to fall below adopted standards must be denied *unless* "transportation  
17 improvements or strategies to accommodate the impacts of development are made  
18 concurrent with the development. Yet, here again, the KCC contains no such provisions.  
19 While the County notes GPO 4.13 requires new development that reduces County road  
20 LOS below adopted standards to mitigate their impacts,<sup>20</sup> there are no implementing  
21 development regulations in the KCC.  
22  
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24 The Board agrees with the County that it has adopted LOS standards. GPO 4.26 and the  
25 County Transportation Plan adopt intersection LOS standards of "C" in rural areas and "D"  
26 in urban areas. These LOS standards have been adopted by reference into the KCC.  
27 However, these adopted LOS standards alone do not satisfy the requirement in RCW  
28 36.70A.070(6)(b) that local jurisdictions "must adopt and enforce ordinances which prohibit  
29 development approval if the development causes the level of service on a locally owned  
30 transportation facility to decline below the standards adopted in the transportation element  
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<sup>20</sup> County Response at 5.  
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1 of the comprehensive plan, unless transportation improvements or strategies to  
2 accommodate the impacts of development are made concurrent with the development.”

3  
4 Thus, on remand, the County must adopt development regulations that comply with RCW  
5 36.70A.070(6)(b)'s requirement to “adopt and enforce ordinances which prohibit  
6 development approval” and which apply beyond subdivisions and boundary line  
7 adjustments.  
8

9 **CONCLUSION**

10 The Board finds Petitioners have satisfied their burden of proof and have demonstrated  
11 Kittitas County has failed to adopt transportation concurrency regulations as required by  
12 RCW 36.70A.040(4) and 36.70A.070(6)(b). Therefore, the Board concludes Kittitas County's  
13 failure to adopt a transportation concurrency ordinance is clearly erroneous in view of the  
14 entire record before the Board and in light of the goals and requirements of the GMA.  
15

16  
17 • **Invalidity**

18 As provided in RCW 36.70A.302, the Board may invalidate all or part of a comprehensive  
19 plan or development regulation if the Board has found the County non-compliant and  
20 determines the continued validity of a comprehensive plan or development regulations  
21 would substantially interfere with the fulfillment of the GMA's goals. Within both their PFR  
22 and briefing, Petitioners requested a Determination of Invalidity be imposed. Specifically, in  
23 Petitioners' briefing they seek invalidity for the Upper Teanaway Subarea Planning Process  
24 as reflected in Resolution 2009-100, contending the lack of transportation concurrency will  
25 substantially interfere with RCW 36.70A.020(12). Kittitas County argues Petitioners' request  
26 must be denied because there is no government action to which an order of invalidity could  
27 be applied.<sup>21</sup>  
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30 By the very nature of a failure to act challenge there is no comprehensive plan or  
31 development regulation for the Board to invalidate. Rather, what Petitioners seek to  
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<sup>21</sup> County Response, at 12-13  
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1 invalidate is a resolution adopted in July 2009 that sets in motion a process for the Upper  
 2 Teanaway Subarea Plan. Resolution 2009-100, in and of itself, does not adopt a policy, a  
 3 goal, or a regulation; rather it speaks to the establishment of a process to develop  
 4 recommendations for presentation to the Planning Commission and Board of County  
 5 Commissioners "as a possible amendment to the Kittitas County Comprehensive Plan."<sup>22</sup>  
 6 Even if Resolution 2009-100 did amend the County's comprehensive plan or development  
 7 regulations, the time for challenging its validity was 60 days after its publication, not with the  
 8 filing of a PFR in 2010.  
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10  
 11 Therefore, finding no comprehensive plan or development regulation the subject of these  
 12 proceedings, the Board will not enter a Determination of Invalidity in this matter.  
 13

14 **VII. ORDER**

15 Based upon the foregoing, Kittitas County is ordered to adopt transportation concurrency  
 16 regulations, as required by RCW 36.70A.070(6) within 180 days. The following schedule for  
 17 compliance, briefing and hearing shall apply:  
 18

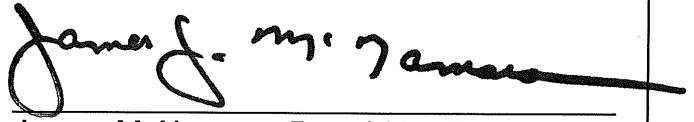
19 Compliance Due on identified areas of 20 noncompliance	December 5, 2011
21 Compliance Report/Statement of Actions Taken to 22 Comply and Index to Compliance Record	December 19, 2011
23 Objections to a Finding of Compliance	January 2, 2012
24 Response to Objections	January 16, 2012
25 Compliance Hearing (Telephonic) 360 407-3780 pin 861703#	January 24, 2012

26 DATED this 6<sup>th</sup> day of June, 2011.  
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28   
 Joyce Mulliken, Board Member

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 30 Raymond L. Paoella, Board Member  
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<sup>22</sup> Resolution 2009-100, at 3  
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James McNamara, Board Member

Pursuant to RCW 36.70A.300 this is a final order of the Board.<sup>23</sup>

<sup>23</sup> Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate Court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19).