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Legal Department
Brett C. Vinson, City Attorney

September 28, 2010

Chair Bobbi Allison, Pierce County Regional Council
Pierce County Planning and Land Services
2401 South 35th, Room 228
Tacoma, WA 98409

Re: Department of Commerce Letter regarding Proposed CPP Policy 2.3.2.

Dear Chair Allison:

The Commerce letter expresses concerns that proposed Policy 2.3.2 in the Amendments and Transitions section of the CPPs is “inconsistent with the requirements of the Growth Management Act and with recent court and growth management hearings board decisions.” The City of Sumner disagrees with Commerce’s legal analysis. The City of Sumner co-defended this issue with Pierce County in the North Clover Creek GMHB matter cited in the Commerce comment letter and, as such, is intimately familiar with the issue, the Board proceedings, and the legal effect of the Board’s decision.

The issue presented to the GMHB on that appeal, in relevant part, was stated as whether Pierce County’s adoption of Amendment T-6, UGA expansion criteria, (which closely parallels the language in proposed CPP 2.3.2) failed to comply with GMA requirements for urban growth areas.

The relevant T-6 language that was being challenged before the Board is, as follows:

PCC 19A.30.010 Urban Growth Areas.

(H) LU-UGA Objective 6. Provide criteria and priorities for the expansion of urban growth areas.

(1) Expansions of the Comprehensive Urban Growth Areas (CUGA) and satellite urban growth areas shall be approved by the County Council through a Comprehensive Plan amendment process as established in Chapter 19C.10 PCC, only if the following criteria are met:

Chair Bobbi Allison, Pierce County Regional Council
Pierce County Planning and Land Services
2401 South 35th, Room 228
Tacoma, WA 98409 p-2

(a) Residential land capacity within all urban growth areas is evaluated and the need for additional residential land capacity within all or any specific urban growth area is clearly demonstrated. (underline shows the amendment)

Much of the argument and, correspondingly, the Board's decision on the T-6 amendment related to implications for ARL lands in UGAs, not this amendment regarding individual versus county-wide UGA capacity. However, in its decision, the Board concluded that "Futurewise [. . .] failed to carry its burden of demonstrating that the County's adoption of Amendment T-6 did not comply with RCW 36.70A.060, §110 and §170 . . ." *North Clover Creek v. Pierce County*, Case No. 10-3-0003c (FDO, August 2, 2010), at p. 40. While the Board's reference to RCW 36.70A.060 and §170 relate to the ARL and UGA issue, the reference to RCW 36.70A.110 relates to the UGA capacity issue. The Board upheld the amendment and dismissed the challenge by clearly deciding that UGA amendments based on a single jurisdiction analysis *are* allowed by the GMA.

The Board's discussion of overall County UGA capacity and the 2007 Buildable Lands Report (BLR) conclusions were neither the factual nor the legal issue before the Board. As such, those statements should not be applied as the holding of that decision. The Board's statements are at best dicta, and, at worst, an inappropriate advisory opinion on a fact that was not fully presented to the Board. The 2007 BLR adoption ordinance itself acknowledges that the 2007 BLR information and conclusions may need to be updated based on more current information:

PCC 19A.30.010 Urban Growth Areas (B) LU-UGA Objective 1 (b) "For review of proposed new urban growth areas or expansion of existing urban growth areas, more timely information on population and development trends, such as census reports and updated projections from the Washington State Office of Financial Management (OFM), and regulatory changes may augment the most recent Buildable Lands Report."

Board conclusions from the 2007 BLR, which were not at issue before the Board and which were not evaluated in the context of "more timely information on population and development trends" should not be applied as a Board determination on Pierce UGA capacity in 2010 or beyond and further should not be interpreted as a rejection of the County's T-6 approach to evaluating UGA capacity. *North Clover Creek* does not support the Commerce letter assertion that proposed policy 2.3.2 is "inconsistent with the requirements of the Growth Management Act and with recent growth management hearings board decisions."

Similarly, the Supreme Court decision in *Thurston County v. WWGMHB*, 164 Wash.2d 329 (August 14, 2008), also cited in the Commerce letter, does not impose a GMA requirement that

Chair Bobbi Allison, Pierce County Regional Council
Pierce County Planning and Land Services
2401 South 35th, Room 228
Tacoma, WA 98409 p-3

no individual city UGAs can demonstrate a need to expand before all County UGAs are full. The Commerce letter overstates the ruling and the implications of that court decision. The *Thurston County* decision evaluated recent changes to the Thurston County UGA. While one of the parties in that appeal, Futurewise, certainly argued that the County's UGA was too large for the 2025 population, and while the court agreed that Futurewise was entitled to bring that challenge even though some of the UGA was originally adopted back in 1994 and was not being changed by the current County amendments, the court did not determine that the County's UGA was, in fact, too large, nor that the GMA imposes the limit on changes to individual city UGAs advocated in the Commerce letter. Rather, the Court remanded the County's UGA decision back to the Board to more fully evaluate whether and what market factor was used and, in addition, to then evaluate whether what was used was reasonable and justified by local circumstances, with proper deference given to the local government decision. *Id.*, 354. The Supreme Court explicitly left open the possibility that the Board might determine that the UGA changes were justified, even if they are larger than what the 20-year population would require. *Id.* It is a significant over-statement of the *Thurston County* decision to suggest that Policy 2.3.2 is inconsistent with this case, as the Commerce letter asserts.

Finally, the Commerce letter reliance on WAC 365-196-310(3)(e) is also an overstatement that implies that the regulation constitutes a "requirement" of the Growth Management Act. Notably, that specific subsection of the regulation is a "recommendation," not a GMA requirement.

In response to several public comments and objections during preparation of those GMA regulations, the department repeatedly assured commenters that "recommendations" would not be turned into "requirements" unless the GMA statute itself imposed a clear requirement. *See* Department of Commerce, *Concise Explanatory Statement and Response to Comments for the adoption of amendments to Growth Management Act Rules* (Jan. 25, 2010) at 12-13. *Compare* WAC 365-196-310(1) ("Requirements") *with* WAC 365-196-310(3) ("Recommendations for meeting requirements."). *See also* WAC 365-196-020 ("Definitions and interpretations made in this chapter by the department, but not expressly set forth in the act, are identified as such. The department's purpose is to provide assistance in interpreting the act, not to add provisions and meanings beyond those intended by the legislature.").

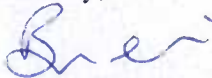
Specifically, the department used subheadings in the regulations to distinguish requirements from recommendations and added a definition to make it more clear that "should" signifies recommendations and not requirements. *Id.* *See also* WAC 365-196-020; WAC 365-196-210(30) (the word "should" "indicates the advice of the department, but does not indicate a requirement for compliance with the act"). In this case, the provision commerce cites in the letter is expressly listed as a "recommendation" and uses the word "should" throughout. Despite

Chair Bobbi Allison, Pierce County Regional Council
Pierce County Planning and Land Services
2401 South 35th, Room 228
Tacoma, WA 98409 p-4

these clear indications that the provision is meant only as a recommendation that is not required to comply with the GMA, the Commerce letter implies that it has the force and effect of a requirement. Commerce's interpretation of the regulation is contrary to the intent and express language of that regulation.

The City of Sumner strongly disagrees with Commerce's position and agrees with the GMHB decision which clearly held that UGA amendments based on a single jurisdiction analysis *are* allowed by the GMA. Therefore, the City would urge the PCRC to reject Commerce's analysis and recommendation and follow the GMA and the GMHB decisions regarding this issue. Please call the undersigned at (253) 299-5610 if there are any questions.

Sincerely,



Brett C. Vinson
City Attorney

cc: Mr. Ian Munce, Chairman, Pierce County Growth Management Coordinating Committee
Mr. Norm Abbott, Director of Growth Management Planning - Puget Sound Regional
Council
Mr. Leonard Bauer, Managing Director WA Dept of Commerce – Growth Management
Services
David Enslow, Mayor - City of Sumner
Diane Supler, City Administrator – City of Sumner
Paul Rogerson, Director Community Development - City of Sumner
Ryan Windish, Planning Manager - City of Sumner