

**CENTRAL PUGET SOUND  
GROWTH MANAGEMENT HEARINGS BOARD  
STATE OF WASHINGTON**

ANN AAGAARD, ANDREA PERRY, and	)	) <b>Case No. 08-3-0002</b>
JUDY and BOB FISHER,	)	
	)	<b>(Aagaard III)</b>
Petitioners <i>pro se</i> ,	)	
	)	<b>FINAL DECISION AND ORDER</b>
v.	)	
	)	
CITY OF BOTHELL,	)	
	)	
Respondent.	)	
	)	
	)	

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*SYNOPSIS*

*Bothell Ordinance No. 1988 (LID Ordinance) amends the City of Bothell’s zoning regulations and its design and construction standards to implement Low Impact Development (LID) provisions for the Fitzgerald/35<sup>th</sup> Ave SE Subarea (Fitzgerald Subarea). The Fitzgerald Subarea contains some of the headwaters of North Creek, an important salmon stream. The LID Ordinance is the latest step in efforts of the City of Bothell and its citizens to protect these valuable natural resources in a rapidly urbanizing area.*

*Petitioners generally support the new LID regulations; they challenge two specific provisions which, they contend, create loopholes in the protections for the North Creek Protection Area by allowing administrative exceptions, first, to the lot sizes allowed by zoning and, second, to the protections for wildlife corridors. They argue that these exceptions are inconsistent with various comprehensive plan policies and subarea plan policies, as well as internally inconsistent with other regulations. They also raise public participation, transportation, best available science and SEPA issues arising from the transportation impacts of the lot yield exception.*

*On careful review, respecting both the innovative, good-faith efforts of the City and the legitimate concerns of the Petitioners, the Board concludes that the City’s action was **not clearly erroneous**. The Board finds that the LID Lot Modification provisions are amply conditioned so that they are consistent with Bothell’s Comprehensive Plan, with the cited Fitzgerald Subarea plan policies, and with the GMA Goal of environmental protection. The Board reads the LID Wildlife Corridor provisions as creating an additional protection, not a loophole as Petitioners fear. The Petitioners have not carried their burden of demonstrating that postponement of the Bothell Connector in the City’s*

*Transportation Improvement Plan requires reassessment of the LID Lot Modification provisions. Petitioners' case is dismissed.*

## **I. PROCEDURAL BACKGROUND**<sup>1</sup>

On May 2, 2008, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review from Ann Aagaard, Andrea Perry, and Judy and Bob Fisher (**Petitioners** or **Aagaard**) *pro se*. The matter was assigned Case No. 08-3-0002, and is hereafter referred to as *Aagaard III v. City of Bothell*. Petitioners challenge the City of Bothell's (**Respondent** or the **City**) adoption of Ordinance No. 1988, which amends Bothell Municipal Code Title 12, zoning, and the Bothell design and construction standards by adopting low impact development regulations for the Fitzgerald Subarea.

The Prehearing Conference was conducted on June 2, 2008. The Prehearing Order established the legal issues to be addressed and a schedule for briefing and hearing. On July 11, 2008, in response to a medical emergency for one of the parties, the Board issued an Order Amending Case Schedule.

The following briefing and core documents were timely filed with the Board:

- Core Documents –
  - Imagine Bothell Comprehensive Plan (2004)
  - Ordinance 1985 (2007)
  - Ordinance 1973 (2006) and Exhibit A – Comprehensive Plan Amendments
  - Bothell Resolution No. 1209 (2007)
  - BMC 14.04 Critical Areas Regulations
- Petitioners' Prehearing Brief (**Aagaard PHB**), with 17 attachments
- City of Bothell's Prehearing Brief (**City Response**), with 20 attachments
- Petitioners' Reply Brief (**Aagaard Reply**)

On September 23, 2008, in response to a family emergency for another of the parties, the Board issued an Order Rescheduling Hearing on the Merits.

The Hearing on the Merits was convened at approximately 10:00 a.m., September 30, 2008, in the Olympic Room, 20th Floor, 800 Fifth Avenue, in Seattle. Board member Margaret Pageler served as Presiding Officer, with Board members David O. Earling and Edward G. McGuire also in attendance. All four *pro se* Petitioners attended and divided their argument, with Andrea Perry speaking to the lot modification provisions, Judy Fisher speaking to the Bothell Connector issue, and Ann Aagaard addressing the wildlife corridors question. The City of Bothell was represented by its attorneys Peter Eglick and Jane Kiker, accompanied by Bruce Blackburn, Senior Planner for the City of Bothell, and law clerk Ryan Espgaard. Court reporting services were provided by Barbara Hayden of Byers & Anderson.

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<sup>1</sup> A complete chronology of procedures in this matter is attached as Appendix A.  
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The Hearing on the Merits afforded the Board the opportunity to ask a number of questions and develop a clear understanding of the City's regulations and the Petitioners' challenge. The Hearing was adjourned at 12:40. The Board ordered a transcript of the proceedings. The transcript (**HOM Transcript**) was received on October 7, 2008.

## **II. STANDARD AND SCOPE OF REVIEW**

Upon receipt of a petition challenging a local jurisdiction's GMA actions, the legislature directed that the Boards, "after full consideration of the petition, shall determine whether there is compliance with the requirements of [the GMA]." RCW 36.70A.320(3); *see also*, RCW 36.70A.280, .300(1).

The Board is empowered to determine whether county decisions comply with GMA requirements, to remand noncompliant ordinances to counties, and even to invalidate part or all of a comprehensive plan or development regulation until it is brought into compliance.

*Lewis County v. Western Washington Growth Management Hearings Board (Lewis County)*, 157 Wn.2d 488 at 498, fn. 7, 139 P.3d 1096 (2006).

The GMA creates a high threshold for challengers. A jurisdiction's GMA enactment is presumed valid upon adoption. RCW 36.70A.320(1). "The burden is on the petitioner to demonstrate that [the challenged action] is not in compliance with the requirements of [the GMA]." RCW 36.70A.320(2).

In *Swinomish Indian Tribal Community, et al. v Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007), the Supreme Court summarized the Board's standard of review:

The Board is charged with determining compliance with the GMA and, when necessary, invalidating noncomplying comprehensive plans and development regulations. 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 [the GMA]." RCW 36.70A.320(3). An action is "clearly erroneous" if the Board is "left with the firm and definite conviction that a mistake has been committed." "Comprehensive plans and development regulations [under the GMA] are presumed valid upon adoption." RCW 36.70A.320(1). Although RCW 36.70A.3201 requires the Board to give deference to a [jurisdiction], the [jurisdiction's] actions must be consistent with the goals and requirements of the GMA.

161 Wn.2d at 423-24 (internal case citations omitted).

As to the degree of deference to be granted under the clearly erroneous standard, the *Swinomish* Court 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 (internal citations omitted).<sup>2</sup>

The scope of the Board's review is limited to determining whether a jurisdiction has achieved compliance with the GMA only with respect to those issues presented in a timely petition for review. RCW 36.70A.290(1).

### **III. BOARD JURISDICTION AND PRELIMINARY MATTERS**

#### **A. BOARD JURISDICTION**

The Board finds that the Petitioners' PFR was timely filed, pursuant to RCW 36.70A.290(2); Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged ordinance, which amends the City of Bothell's Comprehensive Plan and development regulations, pursuant to RCW 36.70A.280(1)(a).

#### **B. PRELIMINARY MATTERS**

The parties made no preliminary motions that required resolution in the Hearing on the Merits. The Board took official notice of several documents submitted by the City of Bothell and referenced by Petitioners in their reply as being matters of law which may be noticed pursuant to WAC 242-02-660(4): Exhibits B, C and D to City Response.<sup>3</sup>

During the hearing, Petitioners provided the following copies of exhibits in the record, for the convenience of reference by the Board and the parties.

- Wildlife Corridor Approximate Location, Exhibit C to Ordinance 1988 – **HOM Ex. 1**
- Study Area Critical Areas and Buffers, Parametrix Figure 1-3 – **HOM Ex. 2**
- Natural Features by Zoning Districts, Table 1, Staff Report, July 24, 2007 – **HOM Ex. 3**

The City's brief asserted that Petitioners had effectively abandoned Legal Issues 4 and 6. City Response, at 28-31. The Board's decision addresses those questions on the merits for the reasons stated below.

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<sup>2</sup> On October 9, 2008, the Board received a Statement of Additional Authorities from the City, citing language concerning the Board's standard of review in the Washington Supreme Court decision in *City of Arlington v. Central Puget Sound Growth Management Hearings Board*, No. 80395-1 (October 9, 2008).

<sup>3</sup> Ex. B. Interlocal Agreement with Snohomish County, 1993; Ex. C. Bothell 2009-2014 TIP; Ex. D. Snohomish County current six-year TIP.

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#### **IV. THE CHALLENGED ACTION and CONTEXT**

##### *Protecting North Creek Hydrology*

The LID Ordinance amends Bothell's development regulations and building standards to impose Low Impact Development standards on new development in the Fitzgerald Subarea. This subarea contains Bothell's portion of the North Creek Fish and Wildlife Critical Habitat Protection Area (**NCFWCHPA** or **North Creek Protection Area**). The North Creek Protection Area contains hydrologically-significant headwaters of North Creek, a valuable salmon stream system in Watershed Resource Inventory Area #8. Index 68 (Parametrix), at 2-33. Studies in the City's record indicate that cool stream flows in late summer and autumn are provided from groundwater that feeds wetlands, spring, and tributary streams in this system. *Id.* at 1-13. Salmon-recovery studies have demonstrated that protecting salmon requires not just protecting riparian areas but also protecting the hydrology that provides stream flows. *Id.* at 1-12, 1-13. Natural hydrology is destroyed by urban development which often strips the land of vegetation and topsoil, replacing it with impervious surfaces which increase storm runoff, and with turfed landscapes that do not absorb rainwater and must be maintained with landscape chemicals. *Id.* at 3. Studies commissioned by Bothell indicate that infiltrating rainwater into groundwater in the small basin around Cole Creek and other North Creek tributary headwaters will help preserve natural hydrologic processes. *Id.* at 2-20.

Low Impact Development refers to site design, construction and management measures that keep rain water on site for infiltration to groundwater. The purpose of the Low Impact Development techniques in the North Creek Protection Area is to preserve forest cover, reduce impervious surfaces, and increase absorption of rainfall on-site in order to protect the hydrologic processes that provide groundwater flows to the salmon stream. BMC 12.52.030. Key principles are maintaining or restoring native vegetation, minimizing impervious areas (including turf), protecting streams and wetlands, and avoiding landscape chemicals. A variety of techniques may include green roofs, raingardens, porous asphalt or pavers, stormwater swales, narrower streets and turn-arounds; many of these solutions require variances or exceptions from ordinary city building standards. BMC 12.52.040.

##### *Chronology of North Creek Protection Area Planning*

The challenged LID Ordinance – Ordinance 1988 - is the most recent in a series of City enactments concerning the Fitzgerald Subarea and North Creek Protection Area. In 2004 Bothell enacted Ordinance 1942 which updated its comprehensive plan and development regulations. “*Imagine Bothell*,” the 2004 Comprehensive Plan update, created the North Creek Protection Area and assigned low-density residential zoning (R40,000 – i.e., one home per acre) in much of the Fitzgerald Subarea. These low densities were challenged and upheld in *Fuhriman II v. City of Bothell*, CPSGMHB Case No. 05-3-0025c, Final Decision and Order (Aug. 29, 2005), where the Board acknowledged the unique natural

resource of the North Creek system. Comprehensive Plan Policy LU-P4, defining how “net buildable area” is calculated, was challenged and upheld in *Fuhriman II*.<sup>4</sup>

In 2005, in Ordinance 1946, Bothell adopted its revised Critical Area Regulations using Best Available Science. These regulations are codified in BMC (Bothell Municipal Code) Chapter 14.04.

In 2006 Bothell enacted Ordinance 1973, amending its comprehensive plan and adopting Fitzgerald Subarea amendments. The new policies for the Fitzgerald Subarea:

- Rezoned 210 acres of R40,000 in the North Creek Protection Area
- Required 65% forest cover and no more than 10% impervious surface (EIA)
- Provided that Low Impact Development policies should be developed
- Provided that wildlife corridors be designated and protected
- Designated the Bothell Connector (39<sup>th</sup> Avenue) as a future minor arterial and downrated 35<sup>th</sup> Avenue SE and Fitzgerald Road from minor arterials to neighborhood connectors

In 2007 Bothell adopted Ordinance 1985 revising the forest cover and effective impervious area ratios in the proposed LID zones. The new ratios are a minimum 60% forest cover in areas zoned R40,000(LID) and R9,600(LID) and effective impervious area of no more than 20% in the R9,600(LID) zone and no more than 15% in the R40,000(LID) zone.<sup>5</sup>

In 2008, Bothell adopted the ordinance challenged here - Ordinance 1988 (**LID Ordinance**). This ordinance establishes the Low Impact Development regulations and building standards for the Fitzgerald Subarea zones with an LID designation. The context of previous ordinances is relevant because Petitioners contend that certain provisions of the LID Ordinance are inconsistent with the City’s prior enactments:<sup>6</sup>

- Ordinance 1942, Comprehensive Plan, particularly Policy LU-P4
- Ordinance 1946, Critical Area Regulations
- Ordinance 1973, Fitzgerald Subarea Plan, particularly Policies Land Use 2, 9, 10, 11 and Natural Environment 1

### Positions of the Parties

Petitioners are civic activists who are dedicated to preserving the natural hydrology and habitat of the North Creek headwaters. They have three substantive objections to Ordinance 1988, the City of Bothell’s Low Impact Development regulations for the Fitzgerald Subarea.

First, Petitioners object to the provision that allows lot area and lot circle diameter to be reduced in two zoning designations to accommodate LID implementation, without capping

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<sup>4</sup> LU-P4 is at issue in the present matter and is set forth in full *infra*.

<sup>5</sup> A portion of the Fitzgerald Subarea zoned R4,500(LID) is not at issue in this appeal.

<sup>6</sup> The referenced ordinances are in the record as Core Documents.

the number of units based on the underlying zoned density. BMC 12.52.040.C.1 (**Lot Modification provision**). Petitioners argue that this reduces protection for North Creek hydrology, creates inconsistencies with the City's comprehensive plan and other regulations, gives the Planning Director unbridled discretionary authority, and allows land use decisions to be made without public process. Aagaard PHB, at 12-32.

Second, Petitioners object to the provision that allows protections for designated wildlife corridors to be modified by the Director upon a finding of no harmful impact. BMC 12.52.040.A.1 (**Wildlife Corridors provision**). Aagaard PHB, at 32-54.

Third, Petitioners contend that the increased density possible under the LID Lot Modification provision triggers reconsideration of Bothell's plans for transportation improvements in the Fitzgerald Subarea. Petitioners argue that failure of a 2007 ballot issue which would have provided key funding for the proposed Bothell Connector along 39<sup>th</sup> Avenue SE requires the City to amend its SEPA determination and reassess its land use plans for the Subarea. Aagaard PHB, at 54-63.

The City responds that its protections for North Creek system hydrology and habitat are founded in a series of scientific and professional studies, balanced with consideration of the GMA requirements for compact urban development and protection of property rights. The City explains the process and criteria for the Director's implementation of the Lot Modification provisions, and contends that these allowances are unlikely to result in a significant net increase of new homes over the number presumed in the pre-LID zoning. City Response, at 35-51.

The City explains the basis for its designation of wildlife corridors and argues that the habitat corridor protections in its LID Ordinance exceed GMA requirements. City Response, at 52-69.

As to the adequacy of the transportation plan, the City asserts that there is no short-term road-capacity deficit in the Fitzgerald Subarea, there is no evidence in the record that even complete build-out of the area under the terms of the LID Ordinance is likely to trigger concurrency problems, and the City will continue to seek funding for the Bothell Connector in advance of any LOS deficit. City Response, at 69-83.

The Board has the highest respect for the diligence and perseverance of these Petitioners, who have long advocated for protection of the North Creek headwaters and other sensitive lands in Bothell.<sup>7</sup>

The Board also acknowledges the City of Bothell's commitment to preserve the unique hydrology of the headwater streams in the Fitzgerald Subarea, in balance with its GMA obligations for compact urban development and protection of property rights. In addition to low-density [urban] zoning and science-based critical areas protections for the Subarea,

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<sup>7</sup> *Aagaard, et al* [Judy Fisher] v. *City of Bothell*, CPSGMHB Case No. 94-3-0011c, Final Decision and Order (Feb. 21, 1995); *Aagaard et al* [Andrea Perry] v. *City of Bothell*, CPSGMHB Case No. 02-3-0012, Order of Dismissal (Dec. 18, 2003); *Fuhriman, et al* v. *City of Bothell* [Friends of North Creek and Its Neighbors, Intervenors] CPSGMHB Case No. 05-3-0025c, Final Decision and Order (Aug. 29, 2005). Ms. Perry has also served as a Bothell City Council member.

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Bothell has enacted the first detailed Low Impact Development regulations in Central Puget Sound.

Recognizing the substantive importance of the issues raised and the good-faith concerns of all the parties, the Board's analysis goes to the merits of the Ordinance. Petitioners' issues are grouped under the three primary areas of controversy. The Board first addresses Lot Modification, then Wildlife Corridors, and finally the Bothell Connector.

## **V. LEGAL ISSUES AND DISCUSSION**

### **A. LOT MODIFICATION**

#### **Legal Issues 2, 3, 5, and 6<sup>8</sup>**

Petitioners challenge the provision of the LID Ordinance that allows the Community Development Director to reduce lot size by up to 50% and reduce lot circle diameter by up to 50% in order to accommodate Low Impact Development (**Lot Modification provision**).

BMC 12.52.040.C.1 provides in its entirety:

To accommodate Low Impact Development, the community development director is authorized to modify chapters 12.14, 12.16, 12.18, and 12.20, of BMC, Title 12, Zoning, as specifically described below without the need for a variance as provided for in BMC Chapter 12.36. The City of Bothell shall decline to approve modifications in cases where conflicts occur with *Imagine Bothell...* Comprehensive Plan and Fitzgerald/35th Avenue SE subarea plan policies or if the public health, safety and welfare would not be furthered by the proposed modification.

- a. BMC 12.14.030.A may be modified pursuant to the following:

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<sup>8</sup> The applicable Legal Issues are set forth in full in Appendix B and are restated here as follows:

*Legal Issue 2: Are the Lot Modification and Wildlife Corridors provisions of the LID Ordinance inconsistent with Bothell's Comprehensive Plan and the Fitzgerald Subarea Plan (Ordinances 1942, 1973, and 1985) and thus non-compliant with RCW 36.70A.130(1)(d)?*

*Legal Issue 3: Are the Lot Modification and Wildlife Corridors provisions of the LID Ordinance non-compliant with the GMA Goal of environmental protection (RCW 36.70A.020(10)) and the requirements of RCW 36.70A.172 for protection of critical areas?*

*Legal Issue 5: Did the City fail to comply with RCW 36.70A.130(1)(d) when it enacted Lot Modification provisions that are inconsistent with Comprehensive Plan Policy LU-P4, Fitzgerald Subarea Plan Land Use Policies 2, 9, 10, 11 and Natural Environment Policy 1, and with Bothell's Critical Area Regulations – BMC 14.04?*

*Legal Issue 6: Did the City fail to comply with RCW 36.70A.172 and 36.70A.020(10) in adopting Lot Modification and Wildlife Corridors provisions that are internally inconsistent with Bothell's Critical Area Regulations – BMC 14.04?*

(i) Within the R 40,000 (LID) and R 9,600 (LID) zoning classifications, the minimum lot area per single-family dwelling unit may be reduced by as much as 50%. For example, properties with a zoning classification of R 9,600 (LID) may have a minimum lot area of 4,800 square feet.

(ii) Within the R 40,000 (LID) and R 9,600 (LID) zoning classifications, minimum lot circle diameter may be reduced by as much as 50%. For example, properties with a zoning classification of R 9,600 (LID) may have a minimum lot circle diameter of 40 feet.

(iii) Lots which are modified under BMC 12.52.040.C.1.(1) and (11) shall provide for a special setback of 25 feet along common property lines whenever such lots are located within 50 feet of an existing primary single family building.

Petitioners contend (1) that the additional density/intensity possible through lot modification threatens the environmental protections promised in the City's policies, (2) that lot modification will allow lot yield in excess of the net yield contemplated in LU-P4, (3) that the ordinance does not provide clear criteria to limit the Director's authority for lot modification, and (4) that required public process and consideration of Best Available Science is bypassed. Petitioners' Legal Issues 2 and 5 are directed to land use policy consistency, while Legal Issues 3 and 6 focus in on the environmental protections and processes. Because the issues overlap, the Board organizes its discussion around the four questions listed above.

### **Applicable Law**

RCW 36.70A.130(1)(d) provides:

... Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

### **Board Discussion**

#### **Will the Lot Modification provisions reduce protection of the North Creek hydrology?**

The Board begins its analysis by looking at the crux of Petitioners' concern – How can the source waters for North Creek be protected if Lot Modification allows additional homes to be built? The Board will then assess the specific legal contentions of the parties.

The City of Bothell's Comprehensive Plan policies and policies for the Fitzgerald Subarea establish special protections for North Creek groundwater resources, first designating the North Creek Protection Area (NCFWCHPA), then implementing low density zoning, and finally adopting Low Impact Development standards. Beginning in 2004, the City of Bothell commissioned a series of scientific assessments relating to the North Creek Protection Area. Relevant to the present matter are the following:

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- Pentec Environmental. *Litowitz Test Report*. July 9, 2004.
- Steward and Associates, Inc. *City of Bothell Streams and Riparian Areas: Best Available Science Report*. October 4, 2004.
- Parametrix. *NCFWCHPA Study*. October, 2006. Index 68. [**Parametrix**]
- ESA Adolfson. Memorandum on Bothell Connector wildlife crossings. September 11, 2007. Index 93.

The Pentec and Steward studies identified the North Creek Protection Area as a regional resource. Steward stated: “Portions of North Creek contain substantial blocks of intact habitat .... In rapidly urbanizing watersheds, stream reaches of this quality are quite rare and equally important to preserve.” Index 68, at 1-12. Steward pointed out that seeps and groundwater sources “are perennial sources of cool water,” essential to aquatic species during summer months. “These sources of cool water should be protected to the maximum extent practicable....” *Id.* at 1-13. North Creek is a regional resource, supporting Chinook, coho, sockeye/kokanee, steelhead and coastal cutthroat trout. *Id.* at 2-33. Of Lake Washington tributary streams, North Creek is the second greatest producer of coho in the Lake Washington watershed and has the second greatest potential for supporting Chinook. *Id.*

As a first step in protecting the sensitive hydrology of the North Creek headwaters, the City of Bothell Comprehensive Plan (2004) adopted low-density residential designations, R40,000 and R9,600, in the most sensitive portions of the Fitzgerald Subarea.<sup>9</sup> The Comprehensive Plan states that R40,000 zoning is appropriate for “land found to be a particularly important source of cool groundwater benefitting the health of anadromous fisheries in North Creek...” LU-P4.1.

In 2006, Bothell engaged Parametrix to study the North Creek Protection Area, to “assess the extent to which the area contributes to the quantity and quality of cool groundwater inputs into North, Palm, Woods, and Cole Creeks,” and to “assess the effectiveness of the existing R40,000 zoning in meeting the critical area protection goals of the city in this area.” Index 68, at 1. According to Parametrix, in order to protect the natural hydrology, a high percentage of rainfall must be absorbed into the soil or transpired on site rather than allowed to drain directly to streams or piped systems. *Id.* at 2-20. According to the study, very low density is not always the best means of protecting streams and related aquatic and terrestrial habitat. Parametrix points out that low density development patterns may damage natural hydrology if they allow large-footprint homes with extensive hardscape and fertilized turf or pasture. *Id.* at 2-21, 2-45, 2-52. Instead, natural hydrology may be protected by regulations that require retention of native vegetation, limit impervious surfaces, and absorb rainfall on site, regardless of lot size. The Parametrix study states repeatedly that protection of groundwater, surface water, and wetlands requires specific measures to address:

- Vegetation cover

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<sup>9</sup> These low densities were challenged and upheld in *Fuhriman II v. City of Bothell*, CPSGMHB Case No. 05-3-0025c, Final Decision and Order (August 29, 2005), where the Board acknowledged the unique natural resource of the North Creek system.

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- The amount of impervious surface
- Methods of stormwater management
- Use of fertilizers, herbicides and insecticides

*Id.* at 2-22 (groundwater), 2-45 (streams), 2-52 (wetlands). Parametrix concludes: “These factors can be limited to an equal or greater extent for higher density development utilizing Low Impact Development techniques.” *Id.*

Based on this assessment,<sup>10</sup> the Low Impact Development regulations adopted in Ordinance 1988 implement minimum forest cover and maximum Effective Impervious Area (EIA) in the R40,000(LID) and R9,600(LID) zones of the Fitzgerald Subarea and provide new methods of stormwater management. While retaining low-density zoning as the basis for development, the LID Ordinance allows the Community Development Director to reduce lot size by up to 50% and reduce lot circle by up to 50% in order to accommodate these Low Impact Development standards, in essence increasing the permissible density within these zones.

The City’s record contains no analysis of the additional lot yield, if any, likely or possible as a result of the Lot Modification provisions. Neither the City nor Petitioners have provided the Board with any basis for assessing the impact of the Lot Modification provisions on the potential total build-out of the Fitzgerald Subarea. However, the Parametrix study, which neither party challenges, asserts repeatedly that Low Impact Development techniques can provide “equal or greater” protection for natural hydrological systems than low density zoning alone. Index 68, at 2-22, 2-45, 2-52. The Board finds this analysis reasonable. It seems logical that, so long as total effective impervious surface area is limited to 15%, natural hydrology can be equally protected when eight compact homes are built on small lots, using green technologies, as when four large-footprint homes are built on large lots.

The Low Impact Development standards in the Ordinance:

- Preserve or restore forest cover, BMC 12.52.040.B.3,
- Minimize impervious surfaces, BMC 12.52.040.B.2,
- Manage stormwater on site, BMC 12.52.040.B.4 and D, and
- Reduce the need for landscape chemicals.

As Parametrix points out, these are the determining factors that “can be limited to an equal or greater extent for higher density development utilizing Low Impact Development techniques.” *Id.* The result should be cool, reliable groundwater that supplies steady flows to streams that support native salmon. Particularly in light of the criteria for Lot

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<sup>10</sup> Unlike the blanket rural-area grading restrictions struck down in *Citizens’ Alliance for Property Rights v. Sims*, -- Wn.App. --, 187 P.3d 789 (July 7, 2008), Bothell’s LID regulations appear to be based in analysis of specific development impacts on the documented hydrology and ecological functions and values of the North Creek Protection Area.

Modification identified below, the Board is not persuaded that the City's Lot Modification allowance reduces protection for the North Creek hydrology.

As summarized by the City:

Throughout the adoption on the LID regulations, the Council was aware of its consultant's (Parametrix's) analyses in the NCFWCHPA Study, indicating that protection of stream, wetlands, and associated aquatic and terrestrial habitat did not in all cases have to focus on density. Instead, in appropriate instances it could utilize LID regulations that required forest retention and limits to impervious surfaces on each lot – regardless of its size – as well as stricter flow control standards, and site planning and layout. The best available science in this instance indicated that reducing the overall development envelope (impervious surfaces) on each site and preserving large tracts of forest areas could be more important to protecting the NCFWCHPA than maintaining large lots in an urban growth area.

City Response, at 50.

The Board does not accept the City's suggestion that Petitioners' case is simply NIMBYism. City Response, at 4; HOM Transcript at 46-48. The Board acknowledges the "notorious fact"<sup>11</sup> that many citizens in the urbanizing Central Puget Sound are passionate about preserving dwindling runs of native salmon and work hard to protect and restore healthy streams and wetlands.

One need only look across the county line to development patterns in the adjacent Snohomish County UGA to see the results of some subdivision development in destroying the natural hydrology. Index 68, at 3. Parametrix describes "the effects of urban development" in the unincorporated Snohomish County UGA as having "led to decreased infiltration and increased surface water runoff that has resulted in destabilization of stream structure, increased erosion and incision and degradation of related resources." *Id.* Typically, vegetation and topsoil are removed, the site is regraded, and the subdivision is built out with hard roofs, paved surfaces, and turfed landscapes which increase storm runoff (often to piped systems), do not absorb rainwater, and must be maintained with landscape chemicals. *Id.* at 2-29, 2-30. In view of these nearby examples, Petitioners reasonably oppose any perceived loophole in the City's carefully-crafted Low Impact Development standards or permit review process.

At the same time, City officials are entitled to a presumption of good faith, particularly here, where they have taken a bold and innovative approach to protecting hydrologic resources of regional significance in a rapidly urbanizing area.

Having found that Lot Modification does not reduce protection for North Creek hydrology, the Board finds and concludes that the provision is not inconsistent with the prior

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<sup>11</sup> WAC 242-02-670(2): "Facts so generally and widely known to all well-informed persons as not to be subject to reasonable dispute . . ."

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ordinances or with required environmental protections. Those portions of Petitioners' allegations under Legal Issues 2, 3, and 6 are **dismissed**.

*Are the Lot Modification provisions inconsistent with LU-P4 or other policies?*

Petitioners contend that Lot Modification bends the rules for lot yield established in Comprehensive Plan Policy LU-P4. LU-P4 provides:

The City shall maintain a Comprehensive Plan Map for the purpose of illustrating the proposed allocation of land uses throughout the Bothell Planning Area. Land uses shall be categorized by the following designations.... The development potential of any individual property under the land use designations of this Comprehensive Plan shall be based on the net buildable area of that property, and shall be further subject to planned unit development provisions, availability of necessary utilities, critical areas regulations, impact mitigation, and other applicable policies, regulations and standards. Net buildable area, for the purposes of this Comprehensive Plan, shall mean the gross land area, measured in acres, minus land area in roads and other rights of way, surface stormwater retention/detention/water quality facilities, critical areas, critical area buffers, and land dedicated to the City.

Petitioners provide a lengthy review of the debate in City Council as to whether to include a maximum lot yield provision in the Lot Modification section. Aagaard PHB at 11-22. The result of this debate, they state, was draft language presented to the City Council by staff on March 4, 2008. This draft contained the following subsection to the Lot Modification provisions of BMC 12.52.040.C.1:

**iii.** The number of lots for any subdivision proposed under these modification provisions shall not exceed the number of lots which could have been obtained under city-wide regulations regarding lot area and dimension, street configuration, surface water facilities, critical areas regulations, and all other requirements applied to properties located outside the North Creek Fish and Wildlife Critical Habitat Protection Area.

Index 56, 3/4/08 Agenda Packet City Council meeting, Attachment 3. This language (iii) was **not adopted** by the Council and not contained in the final passage of the LID Ordinance. Aagaard PHB, at 21-22. Petitioners contend that, without this limitation on total lot yield, the Lot Modification provision will result in densities/intensities (1) that are inconsistent with the net buildable area policy of LU-P4, and (2) that are inconsistent with the protective purposes of multiple Comprehensive Plan and Fitzgerald Subarea plan policies.<sup>12</sup>

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<sup>12</sup> The City argues that Legal Issue 2 does not present a cognizable issue when it calls for revision to the prior ordinances: "It appears that Petitioners have adopted an inverted or backwards interpretation of the consistency requirement." City Response, at 34. The Board agrees. However, the same consistency issue is contained straightforwardly in Legal Issue 6.

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The City responds that the “net buildable area” defined in LU-P4 is not an absolute, but is “further subject to planned unit development provisions, availability of necessary utilities, critical areas regulations, impact mitigation, and other applicable policies, regulations and standards.” City Response, at 40. Net buildable area – lot yield – may be increased or reduced for a particular piece of property depending on other regulations, now including the LID Ordinance. *Id.*

In short, Petitioners read LU-P4 as establishing the *maximum* development potential of any individual property. The City reads LU-P4 as establishing the *base-line* for development potential of individual properties, “which shall be further subject to ... other applicable policies, regulations, and standards.”

The Board finds that LU-P4 by its own terms is “further subject to ... other applicable policies, regulations and standards.” In enacting the LID Ordinance, the Bothell City Council considered a number of alternatives on the question of lot yield, such as using the PUD process<sup>13</sup> or limiting net lot yield to pre-LID totals. Aagaard PHB, at 11-22. In the end, they enacted no specific lot yield provisions. While the matter is certainly debatable, the Board is not persuaded that the Council’s choice was clearly erroneous.

Petitioners also point to a set of Fitzgerald Subarea Plan Policies (Land Use Policies 2, 9, 10, 11, and Natural Environment Policy 1) and to the Land Use Designation Map for the Subarea (Exhibit C to Ordinance 1988). Because the Board finds these policies to be generally supportive of the City’s actions here, we set them forth in full in Appendix C.

The cited policies provide that the zoning categories in the Fitzgerald Subarea will be subject to Low Impact Development regulations and that the North Creek Protection Area will be provided a higher level of protection through implementation of these LID principles as well as low-density zoning. Fitzgerald Subarea Land Use Policy 11 recognizes “the special environmental significance of the streams and wetlands” within the area and calls for implementation of “special development regulations, standards and practices ... with the objective of maintaining the existing or pre-development stream and wetland hydrological conditions” which support the North Creek Protection Area. Policy 11 specifies mandatory imposition of forest retention, impervious surface restrictions, special stormwater design standards, and special surface water management practices. *Infra*, Appendix C. Implementation of these Low Impact Development measures requires modification of many ordinary building standards. The Board finds no basis for concluding that the flexibility allowed for Lot Modification, or for modification of other site design and building standards, will thwart the Fitzgerald Subarea Plan policies.

In summary, the Board finds and concludes that the Lot Modification provisions in the LID Ordinance are consistent with LU-P4 and with the cited Fitzgerald Subarea plan policies.

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<sup>13</sup> The PUD regulations, by contrast, state as part of the purpose of the PUD process the requirement that it “be demonstrated that such modification would result in a development which would not increase the density and intensity of land use beyond that which would be allowed if no regulations were modified....”BMC 12.30.010, Aagaard PHB, fn. 11.

What criteria govern the Director's authority for Lot Modification?

As one prong of their consistency issues, Petitioners argue that the Lot Modification provisions lack criteria to guide the Director's discretion beyond a *pro forma* requirement of consistency with the Comprehensive Plan. Aagaard PHB, at 26. In *Fallgatter/Kirkman v. City of Sultan*, CPSGMHB Case No. 04-3-0021, Final Decision and Order (June 13, 2005), at 19-21, the Board found an administrative permit option that lacked a defined process or criteria to guide administrative discretion created an inconsistency with the Comprehensive Plan. The *Fallgatter* decision built on language in *Kent C.A.R.E.S III v. City of Kent*, CPSGMHB Case No. 03-3-0012, Final Decision and Order (Dec. 1, 2003), at 12:

It is within a local government's discretion to determine whether or not it desires a development permit modification process and whether that process will be administrative as opposed to quasi-judicial; however, in doing so, it must establish the process and criteria for granting, denying or otherwise limiting ... such modifications.

Bothell's LID Ordinance acknowledges that implementation of Low Impact Development techniques will require modification of various city development regulations in order to protect forest cover, reduce impervious surfaces, and re-absorb rainfall. Petitioners look at the language of the Lot Modification subsection – BMC 12.52.040.C.1 - and find only a reference to required consistency with the Bothell Comprehensive Plan and Fitzgerald Subarea plan. Aagaard PHB, at 22-23. If this were the *only* permit modification criterion, the Board would agree with Petitioners that it is inadequate to assure GMA compliance.<sup>14</sup> But the subsection cannot be read in isolation.

The Board finds that Lot Modification decisions by the Community Development Director are delineated by the **full** requirements of Section .040 of the LID Ordinance, not limited to subsection .040.C. The first provision of Section .040 is entitled "Intent."<sup>15</sup>

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<sup>14</sup> The Board's reasoning on Goal 7 challenges is instructive on the issue of consistency between development regulations and the plans they implement. In *Pilchuk Audubon Society, et al., v. Snohomish County*, CPSGMHB Case No. 95-3-0047, Final Decision and Order, (Dec. 6, 1995), at 36, the Board approved "development regulations that provide administrators with clear and detailed criteria so that, in wielding professional judgment, the Director has regulatory 'sideboards' and policy direction." More recently in *Olson, et al., v. City of Kent*, CPSGMHB Case No. 03-3-0003, Final Decision and Order (June 30, 2003) at 7, the Board approved a permit extension ordinance that established four clear criteria to guide the administrator's flexibility. By contrast, in *Kent C.A.R.E.S. III v. City of Kent*, CPSGMHB Case No. 03-3-0012, Final Decision and Order, (Dec. 1, 2003), at 11, the Board found noncompliant a development regulation that authorized the City's planning manager to make certain determinations limited only by the criterion of "consistency" with "a planned action ordinance or development agreement." The Board commented: "There is a sharp contrast between vague direction to 'be consistent'...and clear delineation of the criteria to be used." *Id.* at 12.

<sup>15</sup> The intent of an Ordinance, when specifically articulated in the Ordinance, will not generally be reinterpreted based on Council colloquy.

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BMC 12.52.040.A. Intent. Authority is provided for the community development director and public works director to allow modification of the specific Design and Construction Standards and regulations identified in this chapter to accommodate the provisions of Low Impact Development as provided in this chapter.

In the subsequent text of Section .040, the Community Development Director is authorized to modify lot size and lot circle, parking lot, landscape standards and recreation area standards. The Public Works Director is authorized to modify public street width standards, roadway materials, cul-de-sac and turn-around dimensions, sidewalks, parking lots and other parking requirements, stormwater management (including incorporating Best Management Practices such as porous asphalt and pavement, permeable pavers, dispersion, vegetated roofs, reverse slope sidewalks, and bioretention).

The Lot Modification clause (Subsection .040.C.1) authorizes the Community Development Director to reduce the minimum lot area and minimum lot circle in the R40,000(LID) and R9,600(LID) zones “to accommodate Low Impact Development.” The Director’s authority for this lot modification is governed

- by two restrictions in .040.C.1,
- by site design criteria in preceding subsections .040.A and B, and
- by criteria for modification of infrastructure regulations in subsequent subsections .040.C and D.

The Board understands site design to include determination of the number of lots, their size, and their placement. The Board understands that infrastructure design and placement – access roads, parking, stormwater facilities, and utilities – will also help determine the number of lots, their size and placement.

Therefore, focusing solely on Section .040 that contains the Lot Modification clause, the Board finds that the following criteria guide the Director’s discretion for lot modifications to accommodate Low Impact Development:

- Single family lot area may be reduced by no more than 50%. BMC 12.52.040.C.1.a.
- Lot circle area may be reduced by no more than 50%. BMC 12.52.040.C.1.b.
- Site design [including the number of lots, their size and placement] is based on a site assessment which identifies topography, natural processes and vegetation. BMC 12.52.040.B.4.a.
- Site design will not adversely affect infiltration and recharging of the groundwater table in a manner that decreases groundwater interflow to streams or wetlands. BMC 12.52.040.B.1.a and c.
- Effective impervious surface will not exceed 20% for R9,600 and 15% for R40,000, based on gross site area (with management plans for long-term sustainability). BMC 12.52.040.B.2.

- Forest cover on site will be not less than 60% for R9,600 and R40,000, based on gross site area (with management plans for long-term sustainability); forest cover portions of the parcel will be designated in accordance with specific priorities. BMC 12.52.040.B.3.
- Site design locates all land alterations on the least sensitive portions of the site, protecting forest cover, critical areas and buffers, and wildlife corridors. BMC 12.52.040.B.4.b.
- Site design for roads, parking areas and utilities minimizes alteration of topography and natural hydrologic features. BMC 12.52.040.B.4.c.
- Lot layout minimizes area needed for access roads and driveways. BMC 12.52.040.B.4.d.
- Development activities minimize alteration of topography, minimize disturbance of soil and native vegetation, and provide for water infiltration. BMC 12.52.040.B.4.e.
- Building location and design will allow maintenance of existing topography. BMC 12.52.040.B.4.e.ii.
- Parking lots and landscaping requirements may be modified to allow landscape areas in parking lots to function as dispersion or bioretention areas. BMC 12.52.040.C.1.b.
- Lot modification should accommodate decisions of the public works director pursuant to BMC 12.52.040.C.2 reducing public street width standards, on-street parking requirements, roadway materials standards, cul-de-sac and turn-around dimensions, sidewalk and parking lot standards.
- Lot modification should accommodate decisions of the public works director pursuant to BMC 12.52.040.D determining credits for stormwater control to meet Effective Impervious Surface requirements by employing Best Management Practices (porous asphalt and pavement, permeable pavers, dispersion into preserved forest, vegetated roofs, reverse slope sidewalks, and bioretention).

The intent of allowing lot modifications is “to accommodate the provisions of Low Impact Development.” BMC 12.52.040.A, .040.C.1. The Board notes that the intent of allowing modifications is **not** to double the lot yield; it is **not** to maximize lot yield; it is **not** even to ensure that the property owner achieves as many lots as were possible under the pre-LID regulations. In order to meet all the design criteria noted, it may be possible and desirable to modify lot size and circle in order to fully achieve the benefits of the LID Ordinance and protect the North Creek hydrology.

The Board concludes that the criteria governing the Director’s discretion for lot size and lot circle reduction is sufficiently specific to ensure consistency with Bothell’s Comprehensive Plan and with the Fitzgerald Subarea plan.<sup>16</sup>

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<sup>16</sup> In the interest of clarity for property owners, neighbors, and the hearing examiner, the Board suggests that the City consider assembling the Lot Modification criteria in a Director’s Rule, perhaps including the negative criteria: “Lot Modification is not intended to maximize lot yield or even to ensure the property owner will achieve as many lots as might have been allowed under pre-LID regulations.”

What is the public process for Lot Modification? Is Best Available Science considered?

Petitioners assert that the City failed to consider Best Available Science for protection of critical areas when it adopted the Lot Modification provisions. Aagaard PHB, at 30-32. Petitioners reason that low density zoning for the North Creek Protection Area, as established in the Fitzgerald Subarea plan policies, was supported by Best Available Science. Increased density which might result from Lot Modification decisions “without clear criteria or defined process” (*id.*) should also be subject to a BAS test, they argue. Without this test, Petitioners contend, Lot Modifications are inconsistent with the City’s Critical Area Regulations, BMC 14.04. Petitioners are particularly concerned that the Director’s lot modification determination is a Type I administrative decision, without public notice or review. *Id.* at 23, 64.

The City responds that the process for application of Low Impact Development standards, including Lot Modifications, is the subdivision process. City Response, at 41; HOM Transcript at 68-70.<sup>17</sup> Contrary to Petitioners’ concerns, the City says, Lot Modification is not a behind-closed-doors administrative discretionary decision but follows the well-established process for subdivision review, including public notice, SEPA analysis and hearing examiner review. Subdivision proposals, the City points out, are subject to critical area regulations requiring the preparation of science-based studies that identify and mitigate possible adverse impacts. *Id.* The Director’s Lot Modification determination would thus be subject to public comment and hearing examiner review in the context of all the LID criteria. *Id.*

The Board finds that LID Lot Modifications are governed by the subdivision process and subject to its public notice, comment, and appeal provisions. The only “short-cut” in the Lot Modification clause is to eliminate the requirement of a variance for lot size and lot circle. The Director is not given authority to modify any requirements of the Critical Area Regulations, BMC 14.04. The Board further finds that the Lot Modification criteria specify: “Site design shall locate all land alteration on the least sensitive portions of the site ... to achieve ... preservation and buffering of critical areas as provided in BMC 14.04.” BMC 12.52.040.B.4.b. The Board is satisfied that the process for approval of Lot Modifications is consistent with Bothell’s Critical Area Regulations.

**Conclusion**

The Board finds and concludes that Petitioners **have not carried their burden** of proving that the Lot Modification provisions of the LID Ordinance are inconsistent with the City’s Comprehensive Plan, the Fitzgerald Subarea Plan, the Critical Area Regulations, or other cited policies or regulations. After a careful reading of the LID Ordinance and, in particular, the whole of Section BMC 12.52.040, the Board is not persuaded that a mistake has been made in enactment of the challenged provision. The Board finds and concludes that the Lot Modification provision of Ordinance 1988, BMC 14.52.040.C.1 is **not clearly**

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<sup>17</sup> The Lot Modification provisions will only be available through the short plat (Type II) or subdivision (Type III) process, as the LID regulations expressly do not apply to pre-existing lots of record. City Response, at 40, fn. 26; HOM Transcript, at 68-70.

**erroneous** but complies with GMA Goal .020(10) and GMA requirements .130(1)(d) and .172.

## **B. WILDLIFE CORRIDORS** **Legal Issues 2, 3, 5(C) and 6<sup>18</sup>**

Petitioners challenge BMC 12.52.050.A (**Wildlife Corridors provision**) for inconsistency with the City’s critical areas regulations (Legal Issues 2 and 5.C), failure to consider best available science (Legal Issue 3), and failure to protect critical areas and the natural environment (Legal Issue 6).<sup>19</sup>

BMC 12.52.050.A provides in its entirety:

The North Creek Fish and Wildlife Critical Habitat Protection Area (NCFWCHPA) is assigned to properties within the Fitzgerald/35<sup>th</sup> Avenue SE Subarea as a special regulation to protect the known critical fish and wildlife habitat present in this subarea. NCFWCHPA special regulations are *intended to augment the fish and wildlife protections* afforded under BMC 12.52.050 [sic – 030], Protection of groundwater resources; Chapter 14.04 BMC, Critical Area Regulations; and BMC Title 13, Shorelines Master Program where applicable. *The primary emphasis of this section shall be the application of best available science for the protection of any critical fish and wildlife habitat* present on or in the vicinity of the subject property. All development occurring within the NCFWCHPA shall be subject to the following special provisions:

### A. Designation of Wildlife Corridors

1. All critical areas and buffers providing a continuous connection to North Creek along Cole Creek are designated a wildlife corridor and *may not be*

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<sup>18</sup> The applicable Legal Issues are set forth in full in Appendix B and are restated here as follows:

*Legal Issue 2: Are the Lot Modification and Wildlife Corridors provisions of the LID Ordinance inconsistent with Bothell’s Comprehensive Plan and the Fitzgerald Subarea Plan (Ordinances 1942, 1973, and 1985) and thus non-compliant with RCW 36.70A.130(1)(d)?*

*Legal Issue 3: Are the Lot Modification and Wildlife Corridors provisions of the LID Ordinance non-compliant with the GMA Goal of environmental protection (RCW 36.70A.020(10)) and the requirements of RCW 36.70A.172 for protection of critical areas?*

*Legal Issue 5C: Did the City fail to comply with RCW 36.70A.130(1)(d) when it enacted Wildlife Corridor provisions that are inconsistent with Bothell’s Critical Area Regulations – BMC 14.04?*

*Legal Issue 6: Did the City fail to comply with RCW 36.70A.172 and 36.70A.020(10) in adopting Lot Modification and Wildlife Corridors provisions that are internally inconsistent with Bothell’s Critical Area Regulations – BMC 14.04?*

<sup>19</sup> The City urges the Board to dismiss Petitioners’ Legal Issue 6 as abandoned “for failure to present cognizable arguments in [its] support.” City Response, at 29. The Board finds sufficient argument in Petitioners’ briefing to enable it to decide the issue on the merits.

*varied, averaged or reduced except where specific findings are made that such variation will not compromise their function as a wildlife corridor.*

2. Additional wildlife corridors are designated on the zoning map to provide additional connections between critical areas that may not be provided by contiguous buffers and to provide corridors to the rural and resource areas of unincorporated Snohomish County to the north and east.

Emphasis supplied.

### Applicable Law

RCW 36.70A.130(1)(d) provides that development regulations must be consistent with and implement the comprehensive plan. To achieve this consistency, the Board has required that a jurisdiction's development regulations be internally consistent and consistent with other regulations.<sup>20</sup>

GMA Goal 10 provides:

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

RCW 36.70A.172 provides:

(1) In designating and protecting critical areas under this chapter, counties and cities shall include the best available science in developing policies and development regulations to protect the functions and values of critical areas. In addition, counties and cities shall give special consideration to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

Wildlife corridors are not specifically listed among the GMA's defined "critical areas." RCW 36.70A.030(5).<sup>21</sup> Fish and wildlife habitat conservation areas must be designated and protected; however, the GMA contains no technical requirement for the establishment of wildlife corridors. Authority for *identifying* [but not protecting] wildlife corridors is found in RCW 36.70A.160:

Each county and city that is required or chooses to prepare a comprehensive land use plan under RCW 36.70A.040 *shall identify open space corridors* within and between urban growth areas. They shall include lands useful for

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<sup>20</sup> *West Seattle Defense Fund v. City of Seattle (WSDF II)*, CPSGMHB Case No. 95-3-0040, Final Decision and Order (Sep. 11, 1995), at 7: "All development regulations must be consistent with each other." See also, *Corrine R. Hensley and Jody L. McVittie v. Snohomish County*, CPSMGHB Case No. 01-3-0004c, Final Decision and Order (Aug. 15, 2001) at 20; *Olson, et al., v. City of Kent*, CPSGMHB Case No. 03-3-0003, Final Decision and Order (June 30, 2003) at 7.

<sup>21</sup> RCW 36.70A.030(5) and WAC 365-190-080 list critical areas for protection as follows: wetlands, aquifer recharge areas, frequently flooded areas, geologically hazardous areas, and fish and wildlife habitat conservation areas. These are the five types of critical areas Bothell regulates under BMC 14.04. BMC 14.04.080.

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recreation, *wildlife habitat*, trails, and *connection of critical areas* as defined in RCW 36.70A.030. [Emphasis supplied.]

The Board has held that RCW 36.70A.160 requires only identification, not protection or regulation, of open space corridors. *Suquamish Tribe v. Kitsap County*, CPSGMHB Case No. 07-3-0019c, Final Decision and Order (Aug. 15, 2007), at 59-60; *LMI/Chevron v. Town of Woodway*, CPSGMHB Case No. 98-03-0012, Final Decision and Order (Jan. 8, 1999), at 54; *Agriculture for Tomorrow v. City of Arlington*, CPSGMHB Case No. 95-03-0056, Final Decision and Order (Feb 13, 1996), at 17.

### **Board Discussion**

Petitioners fear that the designated wildlife corridors will not be adequately protected under the Low Impact Development regulations. Aagaard PHB, at 32-54. They point out that not all of the corridor designations are based on robust science. *Id.* at 35, 39-42. In particular, Petitioners argue that the provision allowing the Director to modify the corridors is inconsistent with and will undermine the City's critical areas protections. *Id.* at 43-44. They assert that the provision is inconsistent with Fitzgerald Subarea Policy NE-P3<sup>22</sup> which requires critical area protections based on science. *Id.* They contend that the provision allowing modification based on "specific findings ... that such variation will not compromise their function as a wildlife corridor" is unreasonably subjective, given the paucity of site-specific science. *Id.* at 46-47.

The Board does not read the challenged provision of the Ordinance as creating a loophole but as providing an *additional* environmental protection. To delineate wildlife corridors in the Fitzgerald Subarea, the City first identified continuous critical areas and buffers along the streams and wetlands in the area. HOM Ex. 2. Critical areas and buffers are already accorded a high level of protection under the City's critical area regulations – BMC 14.04. The critical areas project review process applies to any development proposal likely to impact a wildlife corridor that is a critical area or buffer. BMC 14.04.160. The applicant must submit a critical area report incorporating best available science. BMC 14.904.190.B. In particular, modification of a critical area in connection with development requires a Critical Areas Alteration Permit (CAAP). BMC 14.04.240. A CAAP is a Type II action (subject to public notice and comment and hearing examiner review), and the standard for approval is the Director's determination that alteration of the critical area is "unavoidable." BMC 14.04.240.B and E.<sup>23</sup>

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<sup>22</sup> Fitzgerald Subarea Policy NE-P3: Adopt and maintain critical areas regulations which include best available science to protect natural topographic, geologic, vegetation, fish and wildlife habitat, and hydrologic features, with special consideration given to conservation or protection measures necessary to preserve or enhance anadromous fisheries.

<sup>23</sup> This comports with the guidelines of WAC 365-195-915(2): Counties and cities should include the best available science in determining whether to grant applications for administrative variances and exemptions from generally applicable provisions in policies and development regulations adopted to protect the functions and values of critical areas. Counties and cities should adopt procedures and criteria to ensure that the best available science is included in every review of an application for an administrative variance or exemption.

The Board determines that the LID Ordinance does not exempt wildlife corridors from critical area regulations or best available science. Subsection 1 of the Wildlife Corridor provision applies to “all the critical areas and buffers providing a continuous connection to North Creek along Cole Creek.” For these critical areas and buffers, which are identified as wildlife corridors, no variation, averaging, or reduction will be allowed without a specific finding of no compromise to their function as wildlife corridor. Thus any “variation, averaging or reduction” of critical areas and buffers identified as corridors requires *not only the critical areas process and standards* of BMC 14.04 *but, in addition, a “specific finding”* concerning accommodation of wildlife movement. The “specific finding” provision is not a loophole but an added requirement.

In addition to the continuous critical areas and buffers in Subsection 1 of the Wildlife Corridor provisions, the City has also identified linear open space (connector segments) that connect non-continuous critical areas to accommodate wildlife movement, referenced in Subsection 2. The connector segments are also designated on the zoning map, adopted at Exhibit C to Ordinance 1988. For these connector segments that are not designated critical areas or buffers, the “specific finding of no compromise” does not apply. However, Section B requires preparation of a Special Fish and Wildlife Habitat Study by the applicant for development in the identified corridors, whether critical areas or connector segments. The Director may also require third party assessment of habitat functions and values on the subject property. Subsection B.4.a. Finally, Section C of BMC 12.52.050 provides the criteria under which the Community Development Director is authorized to evaluate and approve specific measures to preserve or enhance wildlife corridors. These include “documented best available science for the specific type of habitat and plant and animal species located on the subject property.” BMC 12.52.050.C.1.

In particular, the City has analyzed options and locations for wildlife movement under or across the Bothell Connector. The wildlife crossings that have been identified coincide with stream crossings and would be developed as underpasses. Index 93, ESA Adolphson memorandum, Sep. 11, 2007; Index 94, Map; Index 68, Parametrix, at 2-56; Index 53, Staff Report, at 4, Dec. 18, 2007.

The Board appreciates the Petitioners’ concern at the lack of specific documentation of species occurring in the landscape and how they might use wildlife corridors. However, the Board notes that the GMA requires a jurisdiction to apply “best *available* science;” there may be no science “available” concerning wildlife movement across some private property to which the City has no access. HOM Transcript, at 52-54. The City of Bothell appears to have made a significant investment in identifying its ecological resources and determining a scientific basis for appropriate protective measures. More site-specific Wildlife Corridors science will become “available” as property owners submit the studies that are required in connection with development permit applications in the designated areas. BMC 14.04.160.B.

### **Conclusion**

The Board finds and concludes that Petitioners **have not carried their burden** of demonstrating that the Wildlife Corridor provisions are non-compliant with RCW

36.70A.130, .172, or .020(10). The Board finds that the Wildlife Corridor provision of Ordinance 1988, BMC 12.52.050.A.1 **complies** with the GMA.

### **C. BOTHELL CONNECTOR Legal Issues 1, 4, and 7<sup>24</sup>**

#### **Applicable Law**

RCW 36.70A.070(6)(a)(iv)(C) provides as a required component of the transportation element of a comprehensive plan:

If probable funding falls short of meeting identified needs, a discussion of how additional funding will be raised, or how land use assumptions will be reassessed to ensure that level of service standards will be met.

#### **Board Discussion**

The Bothell Connector is a planned north-south arterial to be built roughly along the 39<sup>th</sup> Avenue SE roadway alignment. City Response, at 70. The project is included in transportation plans for both the City of Bothell and Snohomish County. City Response, Ex. B: 1993 Interlocal Agreement. Bothell's 6-year Transportation Improvement Plan (TIP), relied on when environmental review was undertaken for the LID Ordinance, included the Bothell Connector and identified, as a major source of funding, the proposed Regional Transportation Improvement District (RTID). City Response, Ex. C. The RTID proposal was defeated in a public vote on November 6, 2007.

Petitioners contend that, without funding for the Bothell Connector, the additional residential development made possible by the Lot Modification provisions of the LID Ordinance cannot be supported. Aagaard PHB, at 54-63. Petitioners argue that the City's action:

1. Violates the public process requirements of the GMA and BMC;<sup>25</sup> Petitioners contend that the funding shortfall triggered a requirement for

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<sup>24</sup> The applicable Legal Issues are set forth in full in Appendix B and are restated here as follows:

*Legal Issue 1: Did the City fail to comply with public process requirements of RCW 36.70A.020(11), RCW 36.70A.035(2)(a), RCW 36.70A.140 and BMC 11.18.070 concerning the Lot Modification provisions and the funding shortfall for the Bothell Connector?*

*Legal Issue 4: Did the City fail to comply with SEPA concerning the Lot Modification provisions and the funding shortfall for the Bothell Connector?*

*Legal Issue 7: Did the City fail to comply with RCW 36.70A.070 by adopting Lot Modification provisions inconsistent with RCW 36.70A.070(6)(a) in light of the funding shortfall for the Bothell Connector?*

<sup>25</sup> RCW 36.70A.020(11), .035(2)(a), .140; BMC 11.18.070.

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- public participation in a reassessment of the transportation and land use plan,<sup>26</sup> but no such public notice and review was provided (Legal Issue 1);
2. Violates SEPA,<sup>27</sup> in that the FSEIS for the LID Ordinance assumed the 2010 construction of the Bothell Connector to accommodate traffic generated by expected growth (Legal Issue 4); and
  3. Is inconsistent with the transportation policies<sup>28</sup> of the Fitzgerald Subarea Plan (Ordinance 1973 – 2006) in that construction of the Bothell Connector to serve the increased density/intensity allowed in the LOS Ordinance is no longer funded (Legal Issue 7).

The City responds, first, that Petitioners have wrongly based their consistency argument on RCW 36.70A.070, which requires consistency among the elements of a comprehensive plan, rather than on RCW 36.70A.130(1), which requires development regulations, such as Bothell’s LID Ordinance, to be consistent with Comprehensive Plan provisions, such as the Transportation Plan. City Response, at 71.

On the merits, the City argues:

1. A funding shortfall for the Bothell Connector does not trigger a land use reassessment because current transportation needs are met and there is no evidence of likely failure to meet LOS standards as a result of the LID Ordinance, whether the Bothell Connector is built or not; City Response, at 72, citing *McVittie I*, at 18.
2. Because the funding shortfall for the Bothell Connector does not trigger a land use reassessment, there is no basis for Petitioners’ argument that a new or different public process be initiated; City Response, at 80,
3. The SEPA analysis for the Fitzgerald Subarea Plan and LID Ordinance assessed a range of alternatives, including densities far higher than will be allowed under the adopted regulations; there is no basis for a new SEPA analysis. *Id.* at 80-82.<sup>29</sup>

The Board concurs with the City that Petitioners here have cited to the wrong section of the GMA in stating their consistency issue. Consistency between a plan and development regulations is required by RCW 36A.70.130(1) and .040, not by .070, which pertains to internal consistencies within a plan.<sup>30</sup>

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<sup>26</sup> Aagaard PHB, at 56, citing *McVittie IV v. Snohomish County*, CPSGMHB No. 00-3-0006c, Final Decision and Order (Sep. 9, 2000); *McVittie I v. Snohomish County*, CPSGMHB No. 99-3-0016c, Final Decision and Order (Feb. 9, 2000).

<sup>27</sup> RCW 43.21C.031. Significant Impacts.

<sup>28</sup> TR-G4 (capacity to accommodate expected growth); TR-P2 (concurrency standard LOS E); TR-P9 (developer impact mitigation fees).

<sup>29</sup> The City urges the Board to dismiss Petitioners’ Legal Issue 4 as abandoned “for failure to present cognizable arguments in [its] support.” City Response, at 29. The Board finds sufficient argument in Petitioners’ briefing to enable it to decide the issue on the merits.

<sup>30</sup> Under Legal Issue 2, Petitioners correctly cited RCW 36.70A.130 as the basis for challenging consistency between the LID Ordinance and the Comprehensive Plan concerning Lot Modification and Wildlife Corridor provisions. Under Legal Issue 7, addressing consistency between the transportation element of the #08-0-0002 *Aagaard III v. City of Bothell*

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The Board notes that in deliberating on the LID Ordinance, the Bothell City Council considered the impact of the failure of the RTID measure and the resulting funding shortfall for the Bothell Connector. See Aagaard PHB, at 59-60, ff. 61 and 64; Index 42, 2/5/08 Tr. At 87-89. RCW 36.70A.070(6)(a)(iv)(C) provides: “If probable funding falls short of meeting identified needs [the transportation element must contain] a discussion of how additional funding will be raised, or how land use assumptions will be reassessed *to insure that level of service standards will be met.*” (Emphasis supplied). Level of service standards are currently being met in the subarea; the traffic congestion level in the Fitzgerald 35<sup>th</sup>/39<sup>th</sup> Corridor is currently at LOS C and the concurrency standard established in TR-P2 is LOS E, which gives room for growth. City Response, at 76. The Board takes official notice of the City’s and County’s six-year TIP’s.<sup>31</sup>

The City’s record contains no analysis of the additional lot yield, if any, likely or possible as a result of the Lot Modification provisions.<sup>32</sup> Neither the City nor the Petitioners have provided the Board with any basis for assessing the impact of Lot Modifications on the build-out of the Subarea.<sup>33</sup> There is no evidence in the record that the density allowed under the Lot Modification provisions of the LID Ordinance will result in significant additional traffic in the corridor or will push up against the LOS E threshold, with or without construction of the Bothell Connector in the near term.

With no record evidence that Lot Modifications will cause traffic that approaches the City’s concurrency thresholds, the Board is not persuaded that the failure of the RTID measure and loss of that source of funding for the Bothell Connector triggers a need to reassess the traffic impact of the Lot Modification provisions of the LID Ordinance, pursuant to RCW 36.70A.070(6)(a)(iv)(C) at this time.<sup>34</sup> However, the City should monitor the rate of development that occurs in the Fitzgerald 35<sup>th</sup>/39<sup>th</sup> Corridor, being mindful that a reassessment of its land use element may be necessary in the future. See, e.g., *Fallgatter IX v. City of Sultan*, CPSGMHB Case No. 07-3-0017, Final Decision and Order (Sept. 5, 2007), at 15-16. Alternatively, given the projected growth in the adjacent unincorporated Snohomish County UGA, the City and county may continue to seek additional funding sources to complete the Bothell Connector in a timely manner.

Similarly, SEPA requires a new threshold determination or supplemental EIS in response to substantial changes to a proposal which are likely to have significant adverse environmental impacts. WAC 197-11-600(3)(b). A new SEIS “is not required if probable significant adverse environmental impacts are covered by the range of alternatives and

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Comprehensive Plan and the Lot Modification provisions of the LID Ordinance as impacted by the Bothell Connector, Petitioners incorrectly cite RCW 36.70A.070 as the basis for their consistency challenge. However, the Board does not decide the matter on this basis.

<sup>31</sup> City Response, Exhibit C and D.

<sup>32</sup> Index 43, 3/4/08 Tr. at 24: City Planner Bill Wiselogle, on net yield from Lot Modifications: “I don’t think it’s true that yield could be doubled on these properties.”

<sup>33</sup> Scenarios in the City’s record, prepared by Parametrix prior to the Council’s amendment of (iii), suggest that even if the plats were filled in to maximize lot yield, the R9,600 plat would produce one fewer lots than pre-LID and the R40,000 plat would produce just one more lot than pre-LID.

<sup>34</sup> The City has the authority, and the duty, to deny permits for development that would breach concurrency thresholds. RCW 36.70A.070(6)(b).

impacts analyzed in the existing documents.” WAC 197-11-600(3)(b)(ii). The 2006 FSEIS for the Fitzgerald Subarea considered alternatives allowing far greater densities in this Subarea and included the Bothell Connector as one of the traffic mitigating measures. City Response, at 12; Index 67, FSEIS, at 24, 44-48. Delay in funding the Bothell Connector does not appear to the Board to create a new circumstance that requires re-analysis of traffic impacts in the Subarea, particularly where current traffic levels are significantly below concurrency thresholds.

### **Conclusion**

The Board finds and concludes that Petitioners **have not carried their burden** of demonstrating that the failure of near-term funding for the Bothell Connector triggers a land use reassessment pursuant to RCW 36.70A.060(6)(a)(iv)(C) or renders the City’s action non-compliant with SEPA or with GMA public process requirements. The Board is not persuaded that the City’s action in adopting the Lot Modification provisions of the LID Ordinance, notwithstanding the funding shortfall for the Bothell Connector, was clearly erroneous. Legal Issues 1, 4, and 7 **are dismissed**.

### **VI. ORDER**

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, the GMA, prior Board Orders and case law, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

1. Petitioners **failed to meet their burden** of proving that the City of Bothell’s enactment of Ordinance No. 1988, in particular the provisions related to Lot Modification and Wildlife Corridors, and the implications of the Bothell Connector funding shortfall, did not comply with the cited provisions of the GMA or SEPA and were not guided by GMA Goals 10 and 11. Petitioners’ Legal Issues are **dismissed with prejudice**.
2. The Petition for Review is **dismissed**.

So ORDERED this 24th day of October, 2008.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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David O. Earling  
Board Member

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Edward G. McGuire, AICP  
Board Member

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Margaret A. Pageler  
Board Member

Note: This Order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.<sup>35</sup>

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<sup>35</sup> Pursuant to RCW 36.70A.300 this is a final order of the Board.

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)

## APPENDIX A

### CHRONOLOGY OF PROCEEDINGS in CPSGMHB Case No. 08-3-0002

On May 2, 2008, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Ann Aagaard, Andrea Perry, and Judy and Bob Fisher (**Petitioners** or **Aagaard**) *pro se*. The matter was assigned Case No. 08-3-0002, and is hereafter referred to as *Aagaard III v. City of Bothell*. Board member Margaret A. Pageler is the Presiding Officer (**PO**) for this matter. Petitioners challenge the City of Bothell's (**Respondent** or the **City**) adoption of Ordinance No. 1988, amending Bothell Municipal Code Title 12, zoning, and the Bothell design and construction standards by adopting low impact development regulations for the Fitzgerald/35<sup>th</sup> Ave. SE Subarea. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**) and with the State Environmental Policy Act (**SEPA**).

On May 8, 2008, the Board issued a Notice of Hearing, establishing a prehearing conference and setting tentative dates for briefing and hearing.

On May 14, 2008, the Board received a Notice of Appearance from Peter Eglick and Jane Kiker of Eglick Kiker Whited PLLC on behalf of the City of Bothell.

On June 2, 2008, the Board conducted the Prehearing Conference in the Chief Sealth Room, 20<sup>th</sup> Floor, 800 Fifth Avenue in Seattle. Presiding Officer Margaret Pageler conducted the conference. Board members Ed McGuire and Dave Earling were also present. *Pro se* Petitioners Ann Aagaard, Andrea Perry, and Judy and Bob Fisher were in attendance. Peter Eglick and Jane Kiker represented Respondent City of Bothell, accompanied by legal intern, Ryan Espegard. Bothell Community Development Director Bill Wiselogle and Senior Planner Bruce Blackburn were also present.

The Board discussed with the parties the possibility of settling or mediating their dispute to eliminate or narrow the issues. The Board then reviewed its procedures for the hearing, including the composition of the Index to the Record below; filing of core documents; possible dispositive motions or motions to supplement the record; the Legal Issues to be decided; and a Final Schedule.

The City of Bothell submitted "City of Bothell's Proposed Record Index." The Board requested that the City also submit, as Core documents, two copies of the City of Bothell Comprehensive Plan and the relevant sections of Bothell Municipal Code 14.04. The parties acknowledged the importance of the Board having access to hard copy of the relevant planning documents and regulations at issue here. The parties were advised that specific portions of the Comprehensive Plan or Bothell Municipal Code that either party intends to rely upon should be attached as exhibits.

The parties indicated a willingness to confer in order to resolve any questions about the sufficiency of the County's Index and/or requests to supplement the record. The City stated that it would not file dispositive motions but would deal with all issues in briefing on the merits. The parties requested, in lieu of a motions schedule, that the Board schedule more time for briefing on the merits. After discussion and agreement on a schedule, the Legal Issues presented by Petitioners were reviewed.

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On June 6, 2008, the Board issued its Prehearing Order in this case. In establishing the case schedule, the Board took into consideration the statutory deadline for the Final Decision and Order – October 29, 2008; the representations of the parties that they would not need a motions practice; and the previously-scheduled family vacations of Petitioners’ designated representative and of the two attorneys for the City of Bothell.

On July 7, 2008, the Board received a request from Ann Aagaard to revise the case schedule due to a medical emergency. The respondent attorneys requested a teleconference, which was arranged for 1 p.m. July 9, 2008; however, none of the Petitioners was available to participate at that time. The Presiding Officer asked for clarification of the scheduling parameters for the Respondent, and then terminated the call. The Presiding Officer then circulated a proposed amended schedule by email. Both parties responded to the proposed schedule, the City indicating its objection to any compression of its time to respond, in view of the “numerous issues, sub-issues, and sub-sub-issues” in the Petition for Review. The various emails among the parties will be included in the case record file.

On July 11, 2008, the Board issued its Order Amending Case Schedule.

The following briefing and core documents were timely filed with the Board:

- Core Documents –
  - Imagine Bothell Comprehensive Plan (2004)
  - Ordinance 1985 (2007)
  - Ordinance 1973 (2006) and Exhibit A – Comprehensive Plan Amendments
  - Bothell Resolution No. 1209 (2007)
  - BMC 14.04 Critical Areas Regulations
- Petitioners’ Prehearing Brief (**Aagaard PHB**), with 17 attachments
- City of Bothell’s Prehearing Brief (**City Response**), with 20 attachments
- Petitioners’ Reply Brief (**Aagaard Reply**)

On September 23, 2008, in response to a family emergency for another of the parties, the Board issued an Order Rescheduling Hearing on the Merits.

The Hearing on the Merits was convened at approximately 10:00 a.m., September 30, 2008, in the Olympic Room, 20th Floor, 800 Fifth Avenue, in Seattle. Board member Margaret Pageler served as Presiding Officer, with Board members David O. Earling and Edward G. McGuire also in attendance. All four *pro se* Petitioners attended and divided their argument, with Andrea Perry speaking to the lot modification provisions, Judy Fisher speaking to the Bothell Connector issue, and Ann Aagaard addressing the wildlife corridors question. The City of Bothell was represented by its attorneys Peter Eglick and Jane Kiker, accompanied by Bruce Blackburn, Senior Planner for the City of Bothell, and law clerk Ryan Espegard. Court reporting services were provided by Barbara Hayden of Byers & Anderson.

The Hearing on the Merits afforded the Board the opportunity to ask a number of questions and develop a clear understanding of the City’s regulations and the Petitioners’

challenge. The Hearing was adjourned at 12:40. The Board ordered a transcript of the proceedings. The transcript (**HOM Transcript**) was received on October 7, 2008.

## APPENDIX B

### AAGAARD III LEGAL ISSUES<sup>36</sup>

1. Public Participation. Did the City of Bothell adoption of Ordinance 1988 (2008), specifically in relation to Exhibit B BMC 12.52.040 C. 1. a. (i),(ii),(iii) fail to comply with the requirements of RCW 36.70A.020(11), 36.70A.035(2)(a), 36.70A.140, and BMC 11.18.070 (public participation) in that it did not provide for early and continuous public participation and the public did not have adequate notice of the adopted code and accompanying changes with opportunity to comment?
  
2. Consistency. Was it necessary for the City of Bothell when adopting Ordinance 1988 (2008) BMC 12.52.040 C. 1. a. (i),(ii),(iii) and BMC 12.52.050 A.1.2. to amend Ordinances 1942(2004), 1973(2006) and Ordinance 1985(2007 Fitzgerald/35<sup>th</sup> S.E. Subarea Plan)? Did Bothell fail to comply with RCW 36.70A.130 when it did not consider revision and amendments to Ordinances 1942, 1973, and 1985?
  
3. Best Available Science. Did the City of Bothell adoption of Ordinance 1988(2008), specifically BMC 12.52.040 C. 1. a. (i),(ii),(iii) and BMC 12.52.050 A.1.2., fail to comply with the requirements of RCW 36.70A.172 and 36.70A.020(10) when it did not consider best available science in developing regulations and failed to give special consideration to measures necessary to preserve and enhance anadromous fisheries?
  - a. Specifically in adoption of BMC 12.52.050 A.1.2. did the City consider Best Available Science (BAS)?
    - i. In failing to consider BAS was the City inconsistent with NE-P3 Ordinance 1973(2006)?
    - ii. In failing to consider BAS was the City inconsistent with BMC 14.04.080?
    - iii. In failing to consider BAS was the City inconsistent with BMC 14.04.090?
    - iv. In failing to consider BAS was the City inconsistent with BMC 14.04.100?

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<sup>36</sup> The Legal Issues are condensed and restated as footnotes in each substantive section of this Order.

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4. SEPA. Did the City of Bothell fail to comply with RCW 43.21C (State Environmental Policy Act (SEPA)) when it failed to consider and evaluate these code sections under SEPA so as to determine their significant environmental impacts?
- a. Specifically did the adopted regulation BMC 12.52.040 C. 1.a. (i),(ii),(iii) comply with TR-G4 Ordinance 1973(2006)?
  - b. Specifically should BMC 12.52.040 C.1. a. (i),(ii),(iii) have been considered under SEPA in order to comply with TR-P2 Ordinance 1973(2006)?
  - c. Specifically did the adopted regulation BMC 12.52.040 C.1. a. (i),(ii),(iii) comply with TR-P9( 1973) when it was not considered under SEPA?
5. Consistency with Comprehensive Plan. Did the City of Bothell fail to comply with RCW 36.70A.130(1)(d) when it included sections in L.I.D. Ordinance 1988(2008) that were inconsistent with Comprehensive Plan Ordinances 1942(2004), 1973(2006) and 1985(2007); that were inconsistent with BMC 14.04; that were inconsistent with the land use map and land use designations?
- a. Specifically is BMC 12.52.040 C.1.a. (i),(ii),(iii) inconsistent with:
    - i. LU-P4 Ordinance 1942(2004)?
    - ii. NE-P1 Ordinance 1973(2006)? <sup>37</sup>
    - iii. NE-P2 Ordinance 1973(2006)?
  - b. Specifically is BMC 12.52.040C. 1.a. (i),(ii),(iii) inconsistent with:
    - i. Fitzgerald/35 Ave. SE Subarea Plan Elements of Comprehensive Plan Ordinance 1985(2007) including:
      - A. Land Use policy 2?
      - B. Land Use policy 9?
      - C. Land Use policy 10?
      - D. Land Use policy 11?
      - E. Natural Environment policy 1?
      - F. Exhibit C to Ordinance - Land Use Map
  - c. Specifically is BMC 12.52.050 A.1. 2. inconsistent with BMC 14.04 including?
    - i. 14.04.030 A.B.?
    - ii. 14.04.110?

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<sup>37</sup> Petitioners' PHB, at 11, notes that Policies NE-P1 and NE-P2 are not from Ordinance 1973 but rather from Ordinance 1942. Petitioners state that their argument is focused on LU-P4.

- iii. 14.04.240?
- iv. 14.04 .530?
- v. 14.04.540?

d. Specifically is BMC 12.52.040C 1. a. (i),(ii),(iii) inconsistent with BMC 14.04 including:

- i. 14.04.030?
- ii. 14.04.080?
- iii. 14.04.090?
- iv. 14.04.110?
- v. 14.04.140?
- vi. 14.04.250?

6. Critical Areas Protection. When the City adopted regulations that were internally inconsistent with BMC 14.04 did the City fail to comply with RCW 36.70A.172 and 36.70A.020(10)?

7. Consistency with Transportation Element. Did the City of Bothell fail to comply with RCW 36.70A.070 by adopting a document that was not internally consistent with all elements, specifically with 36.70A.070(6)(a) transportation element?

a. In failing to adopt regulations that were consistent did the City fail to comply with TR-G4 Ordinance 1973(2006) when they adopted BMC 12.52.040C 1. a. (i),(ii),(iii)?

## APPENDIX C

### Fitzgerald/35<sup>th</sup> Ave SE Subarea Plan Policies

**Land Use Policy 2.** Land within the North Creek Fish and Wildlife Critical Habitat Protection Area (NCFWCHPA), land within the Low Impact Development (LID) portions of the NCFWCHPA, and lands containing a critical area or areas are subject to regulations which may reduce the density or intensity of development allowed to less than that indicated by the plan designation.

**Land Use Policy 9.** The area between 39th Ave SE and 35th Ave SE (excluding the area described in Policy 8 above) between the alignment of 232 ST SE (City corporate limits) and 660 feet north of 240th SE is appropriate for detached residential development at one lot per 9,600 square feet as described in Land Use Element Policy LU-P4 subject to compliance with critical areas regulations, the provisions of the North Creek Fish and Wildlife Critical Habitat Protection Area, the provisions for implementing Low Impact Development (LID) and other development standards and mitigation requirements (R 9,600 (LID) in the central portion of the map).

**Land Use Policy 10.** The balance of the Subarea, is appropriate for detached residential development at a minimum lot size of 40,000 square feet as described in Land Use Element Policy LU-P4 subject to compliance with critical areas regulations, the provisions of the North Creek Fish and Wildlife Critical Habitat Protection Area, the provisions for implementing Low Impact Development (LID) and other development standards and mitigation requirements (R 40,000 (LID) in the central portion of the map). This designation is necessary to protect the complex structure, functions, values and high rank order of the critical areas contained within this Subarea and to establish the North Creek Fish and Wildlife Critical Habitat Protection Area as described below.

**Land Use Policy 11.** Lands within the Fitzgerald Subarea bounded by 228th Street SE in the north, 240th Street SE in the south, Fitzgerald Avenue to the west and 45th Avenue SE in the east shall be identified as the North Creek Fish and Wildlife Critical Habitat Protection Area (NCFWCHPA) as delineated in Figure 4 to recognize the special environmental significance of the streams and wetlands within the

Fitzgerald/35th Avenue SE Subarea which contains a complex, high function and value critical habitat for anadromous fish and other wildlife.

Within the NCFWCHPA special development regulations, standards and practices shall be implemented with the objective of maintaining the existing or pre-development stream and wetland hydrological conditions which support the NCFWCHPA. Such special regulations, standards and practices shall provide for implementation of special stormwater design standards, creation of special surface water management practices, cooperation with surrounding jurisdictions and agencies, and other measures as may be appropriate.

Portions of the NCFWCHPA have been determined to warrant a higher level of protection than even that afforded under the policies of the NCFWCHPA. This higher level of protection shall be provided through application of Low Impact Development principles which shall include mandatory implementation of special measures such as, but not limited to, forest retention or creation, limitation on effective impervious surface coverage, implementation of special stormwater design standards, creation of special surface water management practices, cooperation with surrounding jurisdictions and agencies, and other measures as may be appropriate.

**Natural Environment Policy 1.** Protect and preserve the wetlands, streams and steep slope critical areas in accordance with the City's Critical Area Ordinance and Shoreline Master Program.