BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
EASTERN WASHINGTON REGION
STATE OF WASHINGTON

RESPONSIBLE GROWTH * NE WASHINGTON and SPOKANE RIVERKEEPER, Petitioners, v. PEND OREILLE COUNTY, Respondent.	NO. 23-1-0005 PETITIONERS' PREHEARING REPLY BRIEF

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The county downplays its Comprehensive Plan, Future Land Use Map, and Development Regulations, affecting more than one half million acres of land within the county, as "the mere changing of a few land use designations and providing for a few additional uses[.]" Resp. at 2. Conversely, the county exaggerates RG * NEW's burden: "Petitioners carry the heavy burden of showing that the County completely disregarded the GMA during its preparation of the Update." Resp. at 3. We bear the lighter burden of proving that the county failed to comply with the GMA (and SEPA). As demonstrated in our opening brief and below, RG * NEW meets that burden. "[N]otwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a county's plan that is not 'consistent with the requirements and goals' of the GMA." *The Cooper Point Ass'n v. Thurston Cnty.*, 108 Wn. App. 429, 444 (2001), *aff'd sub nom. Thurston Cnty. v. Cooper Point Ass'n*, 148 Wn. 2d 1 (2002).

Resolution R-2023-08 would substantially interfere with fulfillment of the goals of the Growth Management Act and may result in probable, significant, adverse impacts to the environment. The Board should issue a determination of invalidity for Resolution R-2023-08 and vacate the county's SEPA determination of nonsignificance.

A. The County Failed to Protect Rural Character (Issue Nos. 1–4, 10–16, 19).

In our opening brief, we demonstrated that the county failed to define rural character and therefore left itself unable to include measures that protect rural character. The county does not point to any definition of rural character in its response, because petitioner is correct—the county failed to define rural character. Instead, the county provides a long list of public meetings. Resp. at 4:21–6:17. Listing public hearings does not demonstrate that rural character has been defined.

Next, the county provides a list of purportedly new rural land use policies. Resp. at 8:18–10:22. The county asserts that it "adopted fourteen separate rural land use policies designed to

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protect rural land use." Resp. at 8:13–14. This is disingenuous. Of the 14 rural land use policies listed by the county, 7 of them (Rural Land Use Policy Nos. 1, 4–6, 8, 10, and 12) are simply renumbered existing rural land use policies. *Compare* RIN 001, POC00023–00025 *with* RIN 218, POC005219–5220. The listing of rural land use policies "hardly appears to be a harmonizing of the goals in light of local circumstances." *Suquamish Tribe v. Kitsap County* 2007 WL 2694968, at *33. As in that case, the county failed to comply with the provisions of RCW 36.70A.070(5)(a).

The county entirely fails to address our argument that it failed to protect rural character as required by RCW 36.70A.070(5) by allowing commercial and light industrial uses in rural and rural residential areas as conditional uses without requirements assuring that conditions will be imposed to protect rural character as required by RCW 36.70A.070(5).

The county dodges the PUD issue. Our point is not that PUDs are *per se* unlawful in rural areas. Rather, PUDs *without adequate sideboards* do not assure protection of rural character. The county does not address that at all. Likewise, we did not argue that *any* PUD would create aesthetic impacts; rather, that the PUD ordinance does not provide adequate sideboards to assure otherwise.

B. The County Failed to Conserve Natural Resource Lands (Issue No. 21).

The county ignores the 30,000 acres of federal land are to be privatized in the proposed Stimson/USFS proposed land swap. RIN 188, POC00364; RIN 261. Residential development was prohibited on those 30,000 acres, because they were designated Public Lands. "Development regulations must prevent conversion to a use that removes land from resource production." WAC 365-196-815(1)(b)(i). The county says that accessory uses may be permitted on natural resources lands, Resp. at 12:12, but Resolution R-2023-08 would permit single family residential development outright on these lands as a primary permitted use.

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C. The County Created an Internally Inconsistent Comp Plan (Issue Nos. 16, 17).

Resolution R-2023-08 creates an internally inconsistent Comp Plan by failing to protect the county's rural character in the ways described above in Section A, even though the Comp Plan states an intent to maintain the "the rural character of Pend Oreille County." RIN 001, POC000021. Good intentions are not enough to satisfy GMA's mandate to "include [in the Comp Plan] measures that . . . protect the rural character." RCW 36.70A.070(5)(c).

Petitioners' opening brief described several ways in which the amended Comp Plan is internally inconsistent and the county responds with vague generalities. As one example, Resolution R-2023-08 is not consistent with the protection of natural surface water flows and groundwater and surface water recharge and discharge areas. Op. Br. at 6:21–7:2. In reply, the county cites Environmentally Sensitive Area Policy #5 which calls for developers to document water availability and attention to sewage disposal. RIN 001, POC000026. But the development regulations do not require that documentation for permit-exempt domestic wells. Op. Br. at 25:4–14. The county's response ignores this gap, while opening up thousands of acres to residential development where none was allowed before.

As another example, Resolution R-2023-08 creates an internal inconsistency with the Plan's capital facilities element, which was not updated to address the increased need for fire protection capital facilities and services to serve the increased residential development. Op. Br. at 7:3–6. The county did not respond to this issue at all.

D. The County Failed to Adopt Regulations Implementing the New Industrial and Commercial Land Use Designations on the FLUM (Issue No. 22).

Our opening brief described how the county's regulations failed to implement the Comp Plan's and FLUM's new Industrial and Commercial designations. While the amended zoning code

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mentions the existence of these new districts (RIN 001, POC000149), nowhere in the text of the amended zoning code are those new zoning districts implemented. The county asserts that it has "robust guidelines and requirements for all commercial and industrial uses" but then it merely recites the performance standards and requirements that apply to "all proposals" within the county. Resp. at 17:14–16. The county does not deny that its regulations lack a description of the uses, density limits, lot size and coverage specifications, setbacks, or buffers that apply in these new industrial and commercial zoning districts.

Neither the existing development regulations nor the amended regulations adopted in Resolution R-2023-08 implement the new industrial and commercial designations. This situation, where the county has adopted amended regulations concurrently with the amended Comp Plan, is the inverse of the situation in *City of Bremerton v. Kitsap County*, 2004 WL 3249863, where the Board stated: "concurrent adoption of development regulations may not be necessary if the existing development regulations continue to implement the Plan as amended." *Id.* at *10. In that case, new development regulations implementing a clustering incentive program provided in an amended Comp Plan were yet to be adopted and the existing regulations were consistent with the amended Comp Plan. Here, though, the existing regulations do not implement the new industrial and commercial designations and the amended regulations adopted concurrently with the Comp Plan do not implement them, either.

E. Lack of Notice and Opportunity for Comment (Issue No. 26).

The statute requires new notice and an opportunity to be heard if the legislative body considers amendments that were proposed after the comment period closed. RCW 36.70A.035(2)(a). It does not matter if the changes were proposed by the planning commission or

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by the board of commissioners. Regardless of their origin, if they were proposed and considered after the comment period ended, a new opportunity for comment is required. *Id.*

Here, the public comment period ended on May 28, 2021. RIN 160 (audio recording of May 11, 2021 PC meeting) at 1:03:05–1:05. Thereafter, with no opportunity for public comment, the Planning Commission considered and endorsed significant changes to the proposal. Op. Br. at 10–11. The County acknowledges that the Board of Commissioners then considered and adopted those changes "wholesale" with no opportunity for comment. Resp. at 19. That admission requires a finding that the County violated the Act.

F. Former Ponderay Newsprint Company Papermill (Issue Nos. 23–25).

The county misstates our argument regarding the Ponderay Newsprint site. We are not arguing that the county violated the GMA by failing to adopt the draft sub-area plan for this site. The county violated the GMA by failing to protect critical areas and cultural resources on the Ponderay Newsprint site. Those critical areas and cultural resources were carefully considered in the draft sub-area plan and, had the county adopted the subarea plan (as both the existing and amended Comp Plan specify), then those critical areas and cultural resources would have been protected. But instead, the county simply blanketed the entire site with its new industrial designation. RIN 160 (audio recording of May 11, 2021 PC meeting) at 43:20–46:37. As noted above, the development regulations do not specify the uses, density limits, lot size and coverage specifications, setbacks, or buffers that apply in the new industrial zone.

G. The County Failed to Use Best Available Science in Reducing the Buffers for Streams and Wetlands (Issue Nos. 5–9, 18).

Futurewise told the county: "None of the riparian buffers the County is proposing are wide enough to perform [key ecological functions of riparian areas] and so the buffers violate the GMA."

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RIN 178, POC002959. Futurewise cited Riparian Ecosystems, Volume 1: Science Synthesis and Management Implications (2020), a peer-reviewed scientific study prepared by WDFW. The county did not change the inadequate buffer widths in response. Instead, it relied on a study prepared for a different county (Resp. at 23:5–10) and attempted to immunize itself against BAS challenges by padding the record with a draft memorandum that is unsigned and has no apparent author. RIN 069, POC001412.

The allowance to deviate from BAS includes a requirement that the county explain the basis for the deviation. *Ferry Cnty. v. Growth Mgmt. Hearings Bd.*, 184 Wn. App. 685, 740, 339 P.3d 478, 503 (2014) (county must "show its work"). The County says it determined "from a policy perspective" that not following the BAS was acceptable, RIN 069, POC 1412, but it failed to disclose the policies that it was seeking to further and the extent of harm that would result by not using the BAS.

H. The County Failed to Comply with SEPA (Issue Nos. 27–39).

The county failed to base its SEPA determination of nonsignificance on adequate information regarding the impacts of turning prohibited uses into permitted uses (Op. Br. at 21:15–24:4; the impacts to critical areas and wildlife habitat (*id*. at 24:8–28:16); and the impacts to sprawl in rural areas, attendant increased fire danger, and how climate change could exacerbate these impacts (*id*. at 28:20–31:2). In response, the county says that the SEPA checklist is supposed to be based on the "applicant's own knowledge and observations" and that 'I do not know,' 'not applicable,' or 'does not apply' are perfectly acceptable answers.

It is perfectly acceptable for a private applicant to say 'I do not know' or 'not applicable' on a SEPA checklist. But then the reviewing Responsible Official needs to assess whether the missing information is a gap that must be filled. WAC 197-11-080. Here, Development Director

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Greg Snow was both applicant (RIN 004, POC000271) and Responsible Official (RIN 002, POC000269). He was checking his own work. Mr. Snow answered "not applicable, non-project action" forty-nine times in the SEPA checklist. But Mr. Snow did not assess whether the information he failed to provide was "essential to a reasoned choice among alternatives." We addressed this failing in our brief at 18:5–19:23, but the county does not address this issue at all in its response.

The county says that it identified "the prospective uses that would be permitted in each of the Comprehensive Plan designations and related zones." Resp. at 32:13–14. But the county stopped there. It did not consider the environmental impacts that will result from those new uses and designations. "[A]gencies must evaluate environmental impacts of non-project actions up-front and not wait until the project level." *Assoc. of Citizens Concerned About Chambers Lake Basin v. City of Olympia*, 2013 WL 5212386, at *9. The "County must evaluate the impacts allowed under the changed designation at the time of that non-project action." *Whidbey Environmental Action Council v. Island County*, WWGMHB No. 03-2-0008, FDO (Aug. 25, 2003) at 39. But here, as the applicant, Mr. Snow repeatedly answered checklist questions with: "Impacts of specific projects will be addressed by project-level SEPA review" or "[p]otential impacts will be addressed by project-level review." RIN 004, *passim*. Then as the Responsible Official reviewing his own application, he failed to evaluate the impacts of the new uses and designations.

The county baldly asserts: "There is no probable, significant adverse environmental impacts [sic] that will result due to the Update." Resp. at 26:8–9. But the Update "may have" probable significant adverse environmental impacts (WAC 197-11-360(1)) and those impacts of the new uses and designations are neither remote nor speculative. *See* RIN 244, POC005965–POC005966 (Average of 26 new homes per year for 10-year period 2013–2022 and 45 new homes in 2022

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alone); RIN 276, POC006200 ("[A]s more land areas become available on the real estate market, The District is experiencing additional growth in previously undeveloped areas. This creates new challenges with regards to response time, water supply availability, and interface issues.").

The county cites *Heritage Baptist Church v. Cent. Puget Sound Growth Mgmt. Hr'gs Brd.*, 2 Wn.App. 2d 737, 753, 413 P.3d 590 (2018) for the proposition that "not every remote or speculative consequence need be considered." Resp. at 33:20–22. But in that case, the rezone required an EIS and the SEIS prepared by the applicant "had to evaluate all possible adverse environmental consequences of the rezone[.]" *Id*. at 737. The applicant relied on the protections of the existing code to argue that the environmental effects were remote and speculative. The applicant argued that "the Board improperly focused on the existence of a reasonable use exception to the City's regulations." *Id*. at 599, n. 9 (internal quotations omitted). Both the GMHB and the reviewing court rejected these arguments. Here, similarly, the county relied on the protections of its sensitive areas code to assert that "no probable, significant adverse environmental impacts" will result from its action. RIN 004, POC000288–289 (repeatedly stating that the sensitive areas code protects against adverse environmental impacts). Again, similarly, the county states: "Petitioners attempt to cloak their argument that nonconforming uses, variances and reasonable use exemptions were not analyzed as part of the environmental review that the County engaged in. That is simply not true[.]" Resp. at 32:14–16. We do not "cloak" those arguments, they are front and center in our brief (at 21:15–24:4). It is true that the county failed to analyze the probable, significant adverse environmental impacts, including cumulative impacts, of converting nonconforming uses to permitted uses that qualify for variances and reasonable use exemptions (including exemptions from the sensitive areas code). Like the Board and the court in *Heritage Baptist* Church, the Board should reject the county's arguments here.

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The county cites *Spokane County*, 176 Wn. App. 555 (2013) (Resp. at 35–40), but that case supports our argument. Both the Board and the Court of Appeals ruled that the county could not defer environmental analysis in a site-specific rezone until future developments were proposed. The adoption of the amendment "approved the property's existing nonconforming use, thereby affecting the environment." *Id*. at 581. Here, the county seeks to legitimize nonconforming uses by making them permitted uses, and convert conditional uses to permitted uses, in a wholesale fashion across more than one half million acres of land. The effects of those sweeping changes need to evaluated now, as describing in our brief at 21:15–24:4, because the county will not have any ability to address whether these uses are allowed later, based on the information developed during subsequent environmental review. The county says subsequent environmental review "would occur when the County was presented with an application and the existence of environmental impacts could be ascertained and analyzed." Resp. at 37:5–6. But at that time, the county could be analyzing a permitted use, rather than a prohibited or conditional use. Its hands will be tied. Variances and reasonable use exceptions will be available to allow uses otherwise precluded and to modify a variety of performance conditions. Even the lowered protections of the amended sensitive areas code are subject to further degradation using reasonable use exceptions to allow additional uses. Op. Br. at 22:9–23:14, 24:22–25:4, RIN 212, POC004798. The basic use decision and the allowance for these modifications are being made now. The cumulative environmental impacts of that decision must be analyzed now, or not at all.

I. Table of Permitted Uses (Issue Nos. 19, 20, 21).

Resolution R-2023-08, RIN 001, does not adopt an amended Table of Permitted Uses. The county responds that the Planning Commission recommended adopting an amended TOPU and: "On February 6, 2023, the Board of County Commissioners voted to adopt the recommendation of

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the Planning Commission from January 17, 2023, including the Future Land Use Map, Zoning Map and the Table of Permitted Uses [citing RIN 001]." Resp. at 24. But the BOCC did not, in fact, vote to adopt an amended TOPU. POC000001–000003 nowhere even mentions the terms "table of permitted uses" or "TOPU"—not in its description of the Planning Commission's recommendations and not in its resolutions. The adopted documents which follow do not include a TOPU. Decisively, the county now admits that "no revised Table of Permitted Uses was generated." Resp. at 25, n.4.

Moreover, even if the draft TOPU had been adopted (which it was not), the county would still be violating RCW 36.70A.070(5) and RCW 36.70A.060(1). The draft TOPU allows commercial and light industrial uses in rural and rural residential areas as conditional uses, without requirements assuring that conditions will be imposed to protect rural character. It also allows non-resource land uses on designated natural resource lands. Op. Br. at 31:18–32:2. The county did not respond to these arguments at all.

Dated this 21st day of August, 2023.

Respectfully submitted,

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