

68045-1

68045-1

NO. 680455-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

SLEEPING TIGER, LLC,

Petitioner,

vs.

THE CITY OF TUKWILA,

Respondent.

BRIEF OF RESPONDENT

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I. INTRODUCTION

This case involves the Growth Management Hearings Board's impermissible substitution of its own policy judgment regarding the appropriate location and zoning in the City of Tukwila for a never before seen form of land use -- a King County-sponsored regional "crisis diversion facility" ("CDF"). The parties agree that a CDF constitutes an "essential public facility" ("EPF") under the Growth Management Act ("GMA").

The CDF would temporarily house people -- most transported directly from law enforcement custody -- in varying states of psychiatric crisis. But unlike a jail or psychiatric treatment facility, the proposed CDF would be "non-compelled," *i.e.*, arrestees or other patients could leave at will. Given the novelty of the proposed CDF and the obvious public safety implications, the Tukwila City Council (a) first exercised the specific authority conferred by the express terms of the GMA to adopt a temporary, limited moratorium on CDFs, and then (b) solicited input from the public and other stakeholders, repealed the moratorium, and adopted appropriate, revised zoning providing for CDF siting.

King County is the sponsor of the CDF. King County did not challenge Tukwila's moratorium or its new zoning ordinance.

Appellant Sleeping Tiger, LLC ("Sleeping Tiger") is a property

owner in Tukwila. Sleeping Tiger likewise never challenged the City's moratorium. Sleeping Tiger hoped that King County would select its property as the site for the new CDF, but Sleeping Tiger and King County never entered into an agreement to do so.

Rather than challenge Tukwila's moratorium, Sleeping Tiger waited until after the City adopted a new CDF zoning ordinance -- which does not allow a CDF on Sleeping Tiger's property but which does allow a CDF at multiple other locations in the City -- before seeking review of the new zoning ordinance by the Growth Management Hearings Board ("Growth Board" or "Board").

There, and even though the moratorium had not been appealed and was not before the Growth Board, the Board nonetheless issued a Final Decision and Order ("Decision") that repeatedly relied on the unchallenged moratorium as evidence of GMA noncompliance. The Decision concludes that the City had somehow impermissibly precluded the siting of an essential public facility because King County selected a CDF proposal other than Sleeping Tiger's while the City Council considered and adopted a CDF zoning ordinance during the period of the City's moratorium.

The Board compounded its error by reversing the statutorily defined burden of proof. Under the GMA, the City's zoning ordinance is

presumed valid, and Sleeping Tiger bears the statutory burden to prove otherwise. Despite this directive, the Board erroneously ruled that the City had failed to demonstrate the feasibility of permitting a CDF under the terms of its new zoning ordinance.

On Tukwila's appeal, the Hon. Jay White of the King County Superior Court issued a thoughtful, 11-page order detailing multiple errors committed by the Growth Board. For the reasons explained below, the City respectfully requests that this Court AFFIRM Judge White's decision reversing and setting aside the Growth Board's Decision.

II. ASSIGNMENTS OF ERROR

A. The City assigns error to the Growth Board's conclusion, at pages 12 – 17 of the Decision, that Tukwila Ordinance No. 2287 ("Ord. 2287") violated RCW 36.70A.200(1), exceeded the Board's jurisdiction, was an erroneous interpretation and/or application of the law, and was inconsistent with a rule of the Board and the result of an unlawful procedure, meriting relief pursuant to RCW 34.05.570(3)(b), (c), (d) and/or (h). RCW 36.70A.200(1) applies only to a comprehensive plan, not a development regulation like the one at issue here in the form of Ord. 2287, and the Board's Decision acknowledges at page 11 that the City's "Comprehensive Plan contains the necessary process"

B. The City assigns error to the Growth Board's conclusion, at

pages 11 – 17 of its Decision, that Ord. 2287 was inconsistent with the City’s Comprehensive Plan policy for identifying and siting EPFs, and that Ord. 2287 accordingly did not comply with the requirements of RCW 36.70A.040 and .070 that development regulations be consistent with and implement a comprehensive plan. The Board’s error merits relief to the City pursuant to RCW 34.05.570(3)(d) and (e) because it was an erroneous interpretation and/or application of the law, and was not supported by substantial evidence. Ord. 2287 does not in any way change or even address the process for siting EPFs set forth in the City’s Comprehensive Plan policy.

C. The City assigns error to those portions of the Board’s conclusions, at pages 11 - 25, which relied on the existence of the City’s moratorium as evidence of Ord. 2287’s noncompliance with the GMA, RCW 36.70A.200(1) and (5), RCW 36.70A.040 and .070, and RCW 36.70A.020(7). The Board’s reliance on the moratoria was an impermissible collateral attack, exceeded the Board’s jurisdiction under RCW 36.70A.290(1), constituted an unlawful procedure, was an erroneous interpretation and/or application of the law, and was arbitrary and capricious, warranting reversal pursuant to RCW 34.05.570(3)(b), (c), (d), and (i). The moratorium was never challenged to the Board, and the City Council adopted the moratorium under the express terms of the GMA set

forth in RCW 36.70A.390.

D. The City assigns error to the Growth Board's conclusion, at pages 17 – 21 of its Decision, that Ord. 2287 did not comply with the requirement of RCW 36.70A.200(5), which prohibits a development regulation from precluding the siting of EPFs. The Board's error merits relief to the City pursuant to RCW 34.05.570(3)(c) and (d) as a result of the Board's failure to follow a prescribed procedure and/or its erroneous interpretation or application of the law. In order to conclude that Ord. 2287 did not comply with RCW 36.70A.200(5), the Board improperly reversed the burden of proof and required Tukwila to demonstrate that Ord. 2287 did not unlawfully preclude the siting of EPFs. Under RCW 36.70A.320(2), however, the burden of proof in that regard is squarely on Sleeping Tiger. Further, substantial evidence amply demonstrates that Ord. 2287 does not preclude CDFs. The Board conceded (on page 19) that King County, as the facility sponsor, had adopted locational criteria for CDFs, that multiple properties permitted to house CDFs under Ord. 2287 satisfied King County's locational criteria, and that at least seven different sites were available for purchase or lease at the time of the Growth Board hearing. Sleeping Tiger provided no evidence that any of these sites could not be used to house a CDF and conceded on the record that Ord. 2287 allows the siting in Tukwila of CDFs.

E. The City assigns error to the Board's conclusion, at pages 23 – 25 of the Decision, that Ord. 2287 was not guided by, and substantially interferes with, RCW 36.70A.020(7) (GMA Planning Goal 7, "Permits"). The Board's error merits relief to the City pursuant to RCW 34.05.570(3)(d) and (e) as an erroneous interpretation and/or application of the law, and because it is unsupported by substantial evidence. The Decision states that there was no way for the Downtown Emergency Services Center, as a potential applicant, or Sleeping Tiger, as a property owner, to know what the process would be, how long it would take, or what requirements or restrictions might ultimately be imposed. The record, however, reflects that the moratorium complied with the GMA's statutory time limits, lasted only eight months, and that Sleeping Tiger participated throughout and was thus adequately informed.

F. Finally, and given the foregoing legal errors, the City assigns error to the Board's findings and conclusions regarding Invalidity, at pages 25 – 26 of the Decision, as an erroneous interpretation and/or application of the law. The Board's Decision in this respect is additionally unsupported by substantial evidence. The Board's error merits relief to Tukwila under RCW 34.05.570(3)(d) and (e).

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

A. Did the Board err in concluding that Ord. 2287 did not comply

with RCW 36.70A.200(1), where that section applies only to comprehensive plan policies and not to development regulations like Ord. 2287, where Tukwila's Comprehensive Plan does in fact include the GMA-required policy pertaining to the siting of essential public facilities, and where Ord. 2287 did not change in any manner this existing Comprehensive Plan policy?

B. Did the Board err by considering as proof that Tukwila failed to comply with RCW 36.70A.040, .070 (preamble), .200(1), .200(5), and .020(7), the existence of the unchallenged moratorium which had been adopted by the City Council under the express provisions of the GMA?

C. Did the Board err in concluding that Ord. 2287 effectively precluded the siting of EPFs, when the Board's decision erroneously reversed the statutorily mandated burden of proof, failed to defer to the Tukwila City Council as statutorily required, and ignored substantial evidence in the record (including Sleeping Tiger's admission) that a CDF can be sited in Tukwila under Ord. 2287?

D. Did the Board err in concluding that Tukwila had violated the GMA by failing to comply with GMA Goal 7, which calls for timely and fair permit processing, where Sleeping Tiger never filed a permit application, and where the actual duration of the City's CDF moratorium fairly approximated the duration identified in the City's work plan adopted

pursuant to the GMA itself in RCW 36.70A.390?

Put more plainly, can a moratorium adopted by the Tukwila City Council -- under the express authority of the GMA and unchallenged to the Growth Board under the GMA -- somehow violate the GMA?

IV. STATEMENT OF THE CASE

A. King County Proposes Construction of "Crisis Diversion Facilities."

At the heart of this case are novel facilities called "crisis diversion facilities" ("CDFs") Proposed by King County.¹ The concept underlying the RFP was that the CDF would house "individuals who are in behavioral crisis due to mental health issues or substance abuse," and whose "crisis" "puts either the person or others at risk." CP 631. One part of the proposed CDF, the "Interim Services" facility, would house patients for an undefined period after their initial "crisis" had resolved, even though "their shelter situation *may be dangerous or have the potential to send him/her into crisis again.*" CP 634 (emphasis added).

The CDF would "target" adults over the age of 18 "who might

¹ This general title somewhat obscured the fact that the County was seeking construction of two separate CDF structures: (1) a 16-bed CDF licensed by the Department of Health as a "Residential Treatment Facility" for mental health and chemical dependence treatment; and (2) a 20-bed Crisis Diversion Interim Services facility, to provide housing "for people who are homeless or whose immediate [mental health] needs may take longer to resolve" CP 631-33 (King County Request for Proposal ("RFP") at 7-8). The two facilities are referred to collectively here as a "CDF."

otherwise be brought to a hospital emergency department or arrested for minor crimes and taken to jail.” CP 631. In other words, the purpose of the CDF was to serve as a “triage” facility by “diverting” mentally ill persons and/or substance abusers -- some of whom were violent and/or psychotic -- from jail or hospital emergency rooms, and placing them in the CDF instead. The CDF would also be “open to walk-ins, drop-ins, [and] drop-offs by stakeholders, including family members.” CP 1092. The County estimated, however, that 40-50 percent of CDF “clients” would be brought by police officers, “diverted” from jail, and the CDF would be required to accept those individuals. CP 446 (City staff report at 6).

Unlike a jail or a mental health treatment correctional facility holding civilly committed individuals, King County’s proposed CDF would not be a “compelled” facility. That is, participants at a CDF could only come and stay “voluntarily,” after “agree[ing] to participate in the services.” CP 635 (eligibility criterion includes requirement that the individual “agrees to participate in the services”); CP 765 (form “Agreement to Divert to Crisis Diversion Facility”). The “voluntary” diversion, however, was a euphemism, as participants in the process seemed to concede. King County Deputy Prosecutor Ian Goodhew described “diversion” “as a sort of democratic coercion, offering people a choice between treatment or [criminal] charges.” CP 1096. Because CDF residents would be in crisis,

and not entirely present of their own free will, a risk existed that they would demand to leave. CP 1084 (“[O]ften people will cooperate only as long as they know they have to”).

In its consideration of appropriate CDF zoning regulations that led to the adoption of Ord. 2287, the Tukwila City Council understood that the CDF would not be a “compelled” facility and that the residents were free to leave regardless of the depths of their then-current crisis. CP 1079 (Transcript of 4/12/2010 City Council Public Hearing). Graydon Andrus, the clinical programs director at the Downtown Emergency Services Center (“DESC”) (a respondent to King County’s RPF) was up front about this:

I, as I understand it, we would not be legally allowed to, um, to prevent them from leaving the facility [I]n the end, it is my understanding, we could not literally restrain them, or keep them incarcerated

* * *

I think, ultimately, if someone said let me out of here and we were unable to persuade them, and the police could not get them in time, or whoever brought them there . . . if they don’t get there in time, yah, [in] the worst case scenario they would walk out the door and we would be offering to take them home. So if they refuse to let them take them home, wherever their home community is, they would be on their own

CP 1077; 1079 (emphasis added). In short, CDF staff could not legally detain an unruly, violent, or psychotic individual – at best, CDF staff could call the police or offer the person a ride. But, the individual – fresh from

crisis *or still in crisis* – could refuse to stay in the CDF and be released to wander the community. *Id.*

The County’s CDF Planning Group² – particularly its law enforcement agency members – candidly discussed the CDF’s more problematic aspects. Prosecutors, including King County Prosecutor Dan Satterberg, were concerned with appropriately addressing public safety issues, especially cases where individuals diverted from jail to the CDF could choose to walk out of the CDF “in the same crisis situation the police were initially called about.” CP 1083 (4/21/2009 CDF Planning Group meeting notes). As Prosecutor Satterberg emphasized, “in order to satisfy police officers, there would need to be some rooms with locks on the outside of the door.” CP 1092-93 (2/10/2009 CDF Planning Group meeting notes).

Not surprisingly, in light of its unique and difficult aspects, the proposed CDF was to be the first of its kind in King County, modeled after a similar facility in San Antonio, Texas. CP 603 (RFP at 6); CP 1099. As such, it would be a regional facility serving all of King County, with an anticipated “client” load of 3,000 – 5,000 persons per year and an annual

² The CDF Planning Group was comprised of representatives from King County and City of Seattle law enforcement agencies, prosecuting attorneys, County mental health staff, and private health care providers. CP 1083, 1091 (CDF Planning Group meeting minutes listing participants).

budget of \$6.06 million, funded by the proceeds of a one-tenth of one percent countywide sales and use tax. CP 631, 636 (RFP at 7, 12); CP 445 (City staff report at 5).

The County decided to issue an RFP so that a private provider could construct and operate the CDF on the County's behalf. CP 625-75 (RFP). Due to its regional nature, the County's RFP did not prescribe a specific location (or "physical plant," as described in King County's RFP) for the CDF. CP 632 (RFP at 8). Instead, the County indicated that it would "consider any location" so long as it met a set of broad siting criteria related to access to freeways and/or major arterials, minimum square footage (7,200 square feet), accessibility to Metro bus routes, and access for law enforcement and ambulances. *Id.* After a particular location was selected, the County would reimburse the successful proponent for remodeling costs. CP 636.

B. King County's RFP for CDF.

The County issued its RFP in August, 2009. CP 625-75. In September 2009, the City's planning staff began to receive inquiries from interested property owners and non-profit organizations regarding possible locations for CDFs in Tukwila. CP 372 (letter from Tukwila Mayor Jim Haggerton to Sherriff Sue Rahr and Shirley Havenga). Given the novelty of the proposed CDF land use, City staff was unsure of its possible or likely

impacts to the community. The term was not defined in the Tukwila zoning code (which was not surprising given that no such facilities previously existed in King County), and very little information of any kind existed about this type of land use at all. Staff then reviewed the County's website, learned that the County had issued an RFP, and ultimately obtained a copy of the RFP. *Id.* It was then that the City learned of the County's geographic siting criteria for the CDF. *Id.*³

As the City learned, King County had already begun an extensive planning process for the CDF. The County had adopted a Mental Illness and Drug Dependency ("MIDD") Plan in October, 2007. CP 552. One of the 15 programs recommended by the MIDD Plan was the establishment of a CDF somewhere in King County. CP 557-58. For whatever reason, however, the County did not involve Tukwila (or other cities with the exception of Seattle) in the MIDD Plan process. In addition, King County had not identified a CDF as an "essential public facility" in its zoning code, on its website, or otherwise. Had the County done so, Tukwila would have had the

³ Sleeping Tiger takes issue with the precise date on which individual City staff members became aware of the details of King County's proposed CDF. Sleeping Tiger Brief at 15, n. 2. Sleeping Tiger's contentions have no merit, because Sleeping Tiger relies almost exclusively on citations only to its own briefs below (CP 174, 220), rather than to Clerk's Papers which include evidentiary facts. In other places, Sleeping Tiger's claims about what the record reflects (e.g., claimed actions of the City's police chief) are simply not supported by the page in the record (CP 372) to which Sleeping Tiger cites. And, in point of fact, until the County actually issued the RFP in August 2009, no party could have been aware of precisely what the County was proposing and what its implications might be.

opportunity to conform its zoning code in advance of the August, 2009 release of King County's RFP to site and operate the CDF. CP 625-75.

C. The City Enacts a Lawful Moratorium to Evaluate Its Zoning Code in Light of the New "Essential Public Facility".

Exercising its statutory authority under the express terms of the GMA (RCW 36.70A.390), the City Council adopted Tukwila Ordinance No. 2248 ("Ord. 2248"), establishing a temporary moratorium on CDFs. The understandable purpose of the moratorium was to provide time to study the impacts of this brand new land use and to draft appropriate development regulations. CP 269-70.

Sleeping Tiger never challenged the moratorium before the Growth Board. And, prior to the Board's decision, Sleeping Tiger never filed a permit application to locate a CDF on its Tukwila property. Report of Proceedings ("RP") at 4 ("[T]here never was any application in this case to process").⁴

During the eight months following the moratorium, the City worked diligently on development regulations designed to appropriately integrate a CDF into the City:

- The City obtained nearly 1,300 pages of documents from the County, which outlined the proposed uses and activities at a CDF, and the planning process undertaken by the County (CP 403-04) (recitals to Ord. 2287);

⁴ The Report of Proceedings is attached hereto as Appendix A.

- City Planning staff met with County staff charged with implementation of the Program (CP 404);
- The City attended numerous meetings of the MIDD Oversight Committee, the regional body tasked with developing and siting crisis facilities (*Id.*);
- The City met with other County staff, including the Prosecutor's Office, and other jurisdictions that would be impacted by the proposed facility (*Id.*);
- City staff met on several occasions with several of the RFP respondents, including DESC, to learn more about the facilities' needs (CP 405; 448 (City staff report)); and
- The City held four public hearings on this topic and solicited input from all stake-holders (CP 404).

Throughout its study and review process, the City regularly updated King County about the City's ongoing work and analysis. The County did not object. By design, the County had provided for open-ended locational siting criteria for the CDF and was willing to consider a CDF location anywhere in the County that satisfied those locational criteria. CP 631. In March, 2010, midway through the City's analysis, King County re-issued its RFP, with even broader siting criteria. CP 405 (recital in Ord. 2287); CP 836-92 (re-issued RFP).

In the first RFP, the County had included language stating that the "ideal location" was "South of downtown Seattle, North of Southcenter." CP 631. This encompassed Tukwila, Renton, Burien, Seattle, SeaTac, and part of unincorporated King County (Skyway). This location was initially

preferred by the County because it would facilitate the ability of police officers from various agencies to take detained persons to the CDF (the County was initially concerned that most police agencies, other than Seattle, would not utilize the CDF if it was located in downtown Seattle). CP 449 (City staff report). Nevertheless, “in order to improve the chances of finding an appropriate location that works for everyone,” the County expanded the geographic locational criteria by eliminating any reference to an “ideal location” in the re-issued RFP.⁵ After RFP re-issuance, DESC (not a party to this case) located a site in the City of Seattle and entered into a lease to site both CDF components there (the crisis diversion facility and the longer-term residential “interim service facility”). King County awarded the contract to DESC to locate the CDF at that site. CP 1219.⁶

The Tukwila City Council continued and completed its analysis regarding appropriate development regulations for a CDF. City staff individually evaluated each of the City’s zoning districts against the siting

⁵ Compare CP 631 (initial RFP) with CP 929 (re-issued RFP); *see also* CP 983 (County staff report explanation for re-issued RFP).

⁶ DESC determined that the Seattle site was better suited for CDF purposes than Sleeping Tiger’s site, because DESC could co-locate both CDF facilities there. CP 1219. Further, to the extent necessary, the City has moved to supplement the record with statements of DESC’s William Hobson, in which he indicates that DESC selected the Seattle site because Sleeping Tiger’s property was “an inappropriate location” that “was only selected initially because of geographic boundaries in the County’s first RFP that were later removed as the project changed.” To the extent that DESC’s move to Seattle is a relevant fact here (*see infra* pp. 45-46) the Court should supplement the record with and consider Mr. Hobson’s statements.

criteria established by the County. CP 450-64. Staff considered safety issues and compatibility with the surrounding areas. For example, the City learned that individuals in psychiatric crisis run a particularly high risk of victimization in high-crime zones. CP 450. Accordingly, the City took into account the crime rates in each of its zoning districts. *Id.*

The City ultimately generated a lengthy staff report, which was subject to public comment and input. CP 441-669. The staff report initially proposed a location in the Tukwila Urban Center (TUC) zone, in the vicinity of the Southcenter Mall, which had good access and appropriate facilities as described in the County's RFP. CP 465-67.

But several stakeholders -- including DESC, the entity ultimately selected by King County to operate the CDF -- raised objections. They suggested that the facility should be more isolated, and the commercial nature of the Southcenter zone would be a distraction. CP 405 (recitals in Ord. 2287); CP 989 (revised staff report); CP 1068-69 (DESC comment letter). After considering these comments, the City Council directed staff to formulate another proposal. CP 987-90.

Staff then proposed the Commercial/Light Industry (C/LI) zone. CP 991-92. The C/LI zone has excellent access, and included a number of sites available for rent. It also permitted the inward-focus that DESC suggested. CP 989, 91. The CDF proponent, King County, was made aware of this

location, and did not object. CP 1194.

Staff also noted the potential impacts to the City's police department arising from the nature of the CDF facility, regardless of its location:

If the CDF is not a compelled facility, as DESC states, it will significantly impact the host City's police department, who may have to act as a taxi to transport police holds to jail. It's unlikely that wherever the CDF is located in Tukwila, that the arresting agency would be able to quickly get to the CDF and transport an individual to jail. It's important to remember that the people leaving the facility could be in mental and/or chemical dependency "crisis." In this crisis state these individuals could pose a risk to themselves, others or risk being victimized. It's paramount that police and EMS can respond quickly, locate the individual and quickly take the person to a compelled facility or a hospital. In addition, the fact that this is not a compelled facility for those who are taken to the program in lieu of jail, presents neighborhood compatibility issues which must be reviewed.

CP 987 (emphasis added).

After carefully considering this analysis, the Tukwila City Council adopted Ord. 2287. CP 403-40. The Council stated that it "desires to accommodate King County's Crisis Diversion Program," and its belief that "people with mental illness and/or chemical dependency issues should not be criminalized or stigmatized because of their current state." CP 404. At the same time, the Council also recognized that crisis diversion providers had testified that a CDF "should not be placed in crowded, commercial areas, [and] that the [CDF] would not be a compelled facility," and that "the 24-hour nature of crisis diversion facilities makes these facilities incompatible

with residentially-zoned neighborhoods.” CP 405. Based on these considerations, and its review of the staff analysis, the Council exercised its legislative judgment and provided for CDFs in the City’s C/LI zone, consistent with the analysis set forth in the revised staff report.⁷

D. Property Owner, Sleeping Tiger, Challenges the New Zoning.

Sleeping Tiger owns a parcel of property in the Manufacturing Industrial Center (MIC) zone, which it had hoped to lease to DESC for use as the crisis facility. Under Ord. 2287, however, CDFs were not permitted in the MIC zone. Sleeping Tiger appealed Ord. 2287 to the Growth Board. CP 85-135. Sleeping Tiger alleged that Tukwila adopted Ord. 2287 for the express purpose of preventing the location of a CDF at Sleeping Tiger’s property (CP 92), and that Ord. 2287 precluded an essential public facility, in violation of the GMA (CP 86 and 91).

At the hearing before the Board in November 2010, however, Sleeping Tiger conceded that Ord. 2287 does not actually preclude the siting of CDFs in the chosen zone, the Commercial/Light Industrial (C/LI) zone:

I mean, it’s [the C/LI zone] not a bad location. [The City will] present all this testimony, “this is the” — “this is where it should be. This is where” – you know, “meets all the criteria,” go through all the criteria

* * *

⁷ CP 422 (allowing diversion facilities and diversion interim service facilities as unclassified uses south of Strander Boulevard in the Commercial Light Industrial Zone).

So the — you can go through the criteria. *I'm not going to argue that it couldn't be located here. I'm not going to argue that these don't possibly meet the criteria.... [T]he best fit is not here.*

CP 25-26 (emphasis added). Sleeping Tiger's Petition for Review additionally alleged that none of the properties in the C/LI zone were available for sale or rental (CP 91). Evidence at the hearing, however, demonstrated otherwise, and specifically that seven parcels within the zone were available for sale or rent. CP 165-72. Nevertheless, Sleeping Tiger contended that the City had violated the GMA because Sleeping Tiger's property (located in the MIC zone, not the C/LI zone) was not included by the City Council as a permissible site for CDFs.

E. The Growth Board Invalidates Ordinance No. 2287.

Under the GMA, the Board was required to presume valid Ord. 2287, and the burden of proof was on Sleeping Tiger to prove otherwise. RCW 36.70A.320(1), (2). In its Decision, though, the Board impermissibly reversed the applicable legal standards and found instead that "*the City* had not proven" that a crisis facility could be sited in the C/LI zone.⁸

In an even more fundamental error, the Board concluded that the City Council's adoption of the moratorium in Ord. 2248 -- an ordinance never challenged by Sleeping Tiger and accordingly not even before the

⁸ CP 1232 – 1258, esp. 1250 (Decision at 19) (emphasis added).

Board -- also violated the GMA. Under the Board's erroneous and impermissible public policy reasoning, if moratoria were allowed to be used during the siting of EPFs "broadly applied across the state . . . public needs would be frustrated and the public would not be well served." CP 1246. The Board pointed to no legal or factual error in the moratorium, aside from its obvious temporary preventative function -- a function specifically conferred by the Legislature under RCW 36.70A.390 for use by elected city councils to establish public policy within their cities and towns.

The Board rejected the balance of Sleeping Tiger's arguments. The Board flatly disagreed that the City's actions were a "deliberate" attempt to evade the siting of a CDF. CP 1248. The Board also rejected Sleeping Tiger's claim that the City's actions were "arbitrary" or "discriminatory," noting the "broad, objective analysis in Tukwila's staff report." CP 1253-54. Despite these acknowledgements, the Board invalidated the City Council's duly-enacted zoning legislation, on the grounds that Ord. 2287 would somehow interfere with the timeliness and predictability of the City's permit process in substantial interference with GMA Goal 7 (RCW 36.70A.020(7)). Notably -- and wholly erroneously -- the Board's conclusion regarding Goal 7 was based on the Board's dislike for the City Council's proper and unchallenged moratorium. The Board's conclusion regarding GMA Goal 7 was not based on Ord. 2287, which in any event did not change the City's

existing permitting process. CP 1256-58. The City timely appealed under the Administrative Procedure Act to Superior Court.

F. King County Superior Court Reverses Board Decision.

Tukwila's appeal was assigned to the Hon. Jay White. Following argument on the merits, Judge White issued a well-considered oral opinion from the bench, detailing the myriad reasons why the Board's order should be reversed. RP (Appendix A hereto). Subsequently, he issued an 11-page order reversing and setting aside the Board's Decision. CP 1419-29 (Appendix B hereto). Judge White concluded first that the Board erred in determining that the City had not complied with RCW 36.70A.200(1), because: (a) that statute applies only to comprehensive plans (and not to a development regulation such as Ord. 2287); (b) Tukwila's Comprehensive Plan in fact does contain the necessary process for siting EPFs; and (c) Ord. 2287 did not change that process. CP 1420-21, ¶¶ 2-3. Judge White also concluded that the Board's Decision was substantially and improperly influenced in a number of different respects by the City's unchallenged adoption of a moratorium. CP 1421-26 at ¶¶ 5, 7, and 10-11. Judge White further concluded that the Board had improperly reversed the burden of proof, requiring the City and not Sleeping Tiger to demonstrate whether sufficient sites for CDFs were available in the C/LI zone, that the record nonetheless reflected the existence of sufficient sites in the C/LI zone, and

that Ord. 2287 did not preclude an essential public facility as a matter of law. CP 1424-25 at ¶¶ 8-9. Finally, Judge White concluded that Ord. 2287 did not violate GMA Goal 7 concerning the permit process, because the City engaged in an extensive public process following moratorium adoption, the moratorium fairly approximated the duration estimated by the City's adopted work plan, and Sleeping Tiger -- which had not filed or vested any permit application prior to the City Council's adoption of the moratorium -- knew that as a matter of law the City could change CDF zoning at the moratorium's conclusion. CP 1425-26 at ¶¶ 10-11. Sleeping Tiger appealed to this Court.

V. ARGUMENT

A. Standard of Review and Burden of Proof.

1. Standard of Review.

Judicial review of a Growth Board decision is governed by the Administrative Procedure Act ("APA"), Chapter 34.05 RCW. RCW 36.70A.300(5).⁹ One particular provision of the APA, RCW 34.05.570(3), sets forth the standard of review applicable to review of an "agency order in an adjudicative proceeding," and provides that "a court shall grant relief" where:

⁹ See also, e.g., *King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 552, 14 P.3d 133 (2000); RCW 36.70A.270(7) (RCW 34.05 "shall govern the practice and procedure of the board").

...

(b) The order is outside the statutory authority or jurisdiction of the agency conferred by any provision of law;

(c) The agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure;

(d) The agency has erroneously interpreted or applied the law;

(e) The order is not supported by evidence that is substantial when viewed in light of the whole record before the court;

* * * *

(h) The order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency; or

(i) The order is arbitrary or capricious.

RCW 34.05.570(3).

Issues of law under RCW 34.05.570(3)(d) are reviewed de novo.¹⁰

While courts accord weight to the Board's interpretation of the GMA, the Court is not bound by the Board's interpretation (*Id.*), and the GMA is not to be liberally construed.¹¹ The Board may not make or use bright-line rules. *Id.* at 159.

¹⁰ *City of Redmond v. Central Growth Board*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).

¹¹ *Kittitas County v. Eastern Growth Board*, 172 Wn.2d 144, 154, 256 P.3d 1193 (2011).

Courts review challenges under RCW 34.05.570(3)(e), that an order is not supported by substantial evidence, by determining whether there is “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *Id.*, quoting *City of Redmond v. Cent. Growth Bd.*, 136 Wn.2d at 46. The Board’s factual findings are properly vacated when they are not supported by substantial evidence.¹² Finally, courts review challenges that an order is arbitrary and capricious under RCW 34.05.570(3)(i) by determining whether the order represents “willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action.” *Id.*

2. Burden of Proof and Deference.

RCW 34.05.570(1)(a) provides that “the burden of demonstrating the invalidity of agency action is on the party asserting invalidity.” Here, the burden would ordinarily fall on the City, as the party asserting invalidity of the Board’s Decision. Because this is a GMA case, however, the City’s burden is nominal, in light of the GMA’s express requirement that the Board and reviewing courts defer to the City Council’s legislative, public policy decisions.

¹² *Stevens County v. Futurewise*, 146 Wn. App. 493, 192 P.3d 1 (2008), rev. denied 165 Wn.2d 1038 (2009).

The extent of the deference required by the GMA to a local legislative body's action "supersedes deference granted by the APA and courts to administrative bodies in general." *Quadrant v. Growth Management Hearings Board*, 154 Wn.2d 224, 238, 110 P.3d 1132 (2005). "Thus a board's ruling that fails to apply this 'more deferential standard of review' to a [city's] action is not entitled to deference from this court." *Id.* The superseding nature of the deference due to the local legislative body -- here, the Tukwila City Council, the body charged with setting public policy within Tukwila -- is difficult to overstate. As the Supreme Court unanimously emphasized:

[T]he GMA does not prescribe a single approach to growth management. [citation omitted.] Instead, the legislature specified that "*the ultimate burden and responsibility for planning, harmonizing the planning goals of [the GMA], and implementing a county's or city's future rests with that community.*" [Citations omitted.] *Thus, the GMA acts exclusively through local governments and is to be construed with the requisite flexibility to allow local governments to accommodate local needs.*

Phoenix Dev., Inc. v. City of Woodinville, 171 Wn.2d 820, 830-31, 256 P.3d 1150 (2011) (emphasis added). Under *Phoenix Dev.*, then, the Board must consider evidence presented by a city or county, and "defer to local planning decisions as between different planning choices that are compliant with the GMA." *Kittitas County v. Eastern Growth Board*, 172 Wn.2d at 157. Ultimately, after granting appropriate deference to a city's

decisions, a Board may make a finding of noncompliance with the GMA only if the city's actions are "clearly erroneous" as provided in RCW 36.70A.320(3) (*i.e.*, the Board has a "firm and definite conviction that a mistake has been committed.") *Id.* at 154.

B. The Board Erred in Concluding That the City Did Not Comply With RCW 36.70A.200(1).

The Board's most obvious error – one undefended here even by Sleeping Tiger – was its determination that the City did not comply with RCW 36.70A.200(1). CP 1242-48.¹³ That statute requires that "the comprehensive plan" of a city planning under the GMA "shall include a process for identifying and siting essential public facilities." RCW 36.70A.200(1). By its own terms, this statute speaks to the substantive content of a city's comprehensive plan; it imposes no requirements on a city's GMA development regulations like Ord. 2287.

The Board itself acknowledged, "Tukwila's Comprehensive Plan contains the necessary [essential public facility siting] process at Goal 15.2." CP 1242. Sleeping Tiger likewise admitted below, as it does here, that the City's Comprehensive Plan in fact contains the required policy. Judge White agreed. CP 1420-21 (Conclusions of Law and Order at ¶¶ 2-

¹³ *See esp.* CP 1248 ("the City's action . . . did not comply with the [sic] RCW 36.70A.200(1) requirement of 'a process for identifying and siting' EPFs.").

3); *see also* Petitioner’s Brief (“Sleeping Tiger Brief”) to this Court at 20, 22-23, 25.

Moreover, even under precedent cited in the Board’s Decision, any challenge asserting Tukwila’s noncompliance with RCW 36.70A.200(1) was required to have been brought within sixty days of the City’s publication of its adoption of Comprehensive Plan provisions. Any challenge brought after that date would be dismissed as untimely.¹⁴

No dispute exists that the Board’s determination (CP 1248) that the City failed to comply with RCW 36.70A.200(1) was an erroneous interpretation and/or application of the law to the facts, and was not supported by substantial evidence. Accordingly, relief to Tukwila is warranted under RCW 34.05.570(3)(d), (e), and (h). This Court should affirm Judge White’s reversal of the Board’s Decision in this regard.

C. The Board Erred in Relying Upon the City’s Proper Adoption of an Unchallenged Moratorium.

The Board’s next, and perhaps more egregious, error was its repeated reference to and reliance on the City’s proper adoption of an unchallenged moratorium as evidence of GMA noncompliance. Time and again throughout the Decision, the Board cites to the moratorium as

¹⁴ RCW 36.70A.290(2); *Cascade Bicycle Club v. City of Lake Forest Park*, CPSGMHB Case No. 07-3-0010c, Final Decision and Order (July 23, 2007), 2007 WL 2340878 at 5-6.

evidence in support of virtually all of its findings and conclusions of GMA noncompliance: that the City had violated RCW 36.70A.200(1) (CP 1246 and 48); that the City's process for siting CDFs was not consistent with the City's adopted policy for essential public facilities (CP 1245); that the City had rendered the siting of an EPF impracticable by imposing the moratorium (CP 1247); and that the City had not complied with GMA Goal 7 relating to permit processing (CP 1255).

In fact, the Board emphasized at length the importance of the City's moratorium to the Board's policy decision:

[I]nstead of reviewing DESC's proposal and allowing its application for crisis diversion facilities through the City's unclassified use permit process . . . , the City of Tukwila, *after a moratorium on applications and an eight-month delay*, adopted Ordinance No. 2287.

* * * *

The Board can readily see what would happen if such a process were found to comply with the GMA requirement for identifying and siting EPFs. *Any local jurisdiction, upon information that a previously-unidentified essential public facility was likely to locate in its boundaries, could declare a moratorium on project applications and undertake restrictive zoning Such a process would soon undermine the GMA requirement not to preclude the siting of essential public facilities.* Broadly applied across the state, the GMA goal of providing services to meet essential public needs would be frustrated and the public would not be well served.

CP 1245-46 (Decision at 14-15) (emphasis added). This was plainly error.

The Board may lawfully review and consider only those matters challenged in a timely-filed petition for review. RCW 36.70A.280(1). Given this limited jurisdiction, RCW 36.70A.290(1) goes on to prescribe the form of a petition for review to the Board, and expressly limits the Board's review to the issues raised in the petition:

The board shall not issue advisory opinions on issues not presented to the board in the statement of issues, as modified by any prehearing order. [Emphasis added.]

The Board itself acknowledged this limitation in its Decision, stating that “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.” CP 1233 (Decision at 2). Put another way, the Board is a creature of statute, without inherent or common-law powers and, as such, may exercise only those powers conferred by statute. *Skagit Surveyors & Eng’rs, LLC v. Friends of Skagit County*, 135 Wn.2d 542, 558, 958 P.2d 962 (1998).

Where a legislative enactment subject to Board review is not challenged before the Board, it may not be collaterally attacked in subsequent proceedings.¹⁵ In the recently-decided *BD Lawson*, this Court considered a neighborhood group’s challenge to two master planned

¹⁵ *Feil v. Eastern Growth Board*, 172 Wn.2d 367, 259 P.3d 227 (2011); *BD Lawson Partners, LP et al. v. Central Growth Board*, 165 Wn. App. 677, 689-90, 269 P.3d 300 (Div. I 2011).

development permits (“MPDs”). *BD Lawson*, 165 Wn. App. at 680-82. The group had not, however, challenged the development regulations that expressly provided for MPDs of the approved size and scale. This Court held that the neighborhood group’s challenge to the MPD permits was an “impermissible collateral attack” on the unchallenged MPD development regulations that preceded the permits by a full year. *Id.* at 690.

The rule of *Feil* and *BD Lawson* against collateral attacks bars any use of the City Council’s moratorium here as evidence of GMA *noncompliance*. To the contrary, the City Council’s use of an unchallenged moratorium adopted pursuant to the express terms of the GMA (as set forth in RCW 36.70A.390) constitutes clear evidence of GMA *compliance*. Put most clearly, the City Council’s use of a GMA compliance tool conferred upon it by the Legislature cannot be a violation of the GMA. The City urges this Court to make that point clear for the Board’s future guidance.

By concluding that adoption of the moratorium was inconsistent with the City’s adopted EPF siting policy, that it rendered EPF siting impracticable, and that it was inconsistent with GMA Goal 7’s instruction to have a predictable permit process, the Board impermissibly collaterally attacked Tukwila’s moratorium – a legislative enactment that Sleeping Tiger admittedly did not challenge and was not before the Board for

review. CP 1245; Petitioner's Brief at 38 ("Sleeping Tiger never challenged the moratorium.").

Sleeping Tiger nonetheless maintains that the "moratorium was never considered by the Board and its existence did not otherwise influence the Board's decision," and that "there is neither factual nor legal basis to support Tukwila's position" otherwise. Petitioner's Brief at 38, 39.

The Board's decision discusses the City's moratorium and/or moratoria generally no fewer than *16 times*. CP 1238-39 (three times); CP 1244 (five times); CP 1245 (three times); CP 1246; CP 1247 (two times); and CP 1255 (two times).

Despite Sleeping Tiger's protests about the moratorium's irrelevance, even Sleeping Tiger's brief *to this Court* emphasizes the moratorium's central role as evidence of alleged GMA noncompliance, quoting approvingly from the Board's "parade of horrors" argument that "any local jurisdiction . . . could declare a moratorium . . . and undertake restrictive zoning" Petitioner's Brief at 26-27. Sleeping Tiger cannot hide the plain fact that the Board relied primarily and often on the City Council's adoption of the moratorium as evidence of GMA noncompliance. In his oral decision, Judge White put it this way: "[T]he

board appeared to have been substantially influenced by the presence of the moratorium” RP at 6.

Not only was the Board “substantially influenced,” it based major portions of its finding of GMA noncompliance on the unchallenged and GMA-compliant moratorium. *Feil* and *BD Lawson* necessitate reversal of the Board’s Decision.

In addition to the legal impermissibility of the Board’s use of the moratorium as evidence of GMA noncompliance, the Court should also consider the practical impacts of the Board’s “bootstrap” of the moratorium into its review. The Board’s unilateral review deprived Tukwila of any meaningful opportunity to defend the moratorium. Moreover, Sleeping Tiger never “participated” before the City Council in its adoption of the moratorium, which deprives Sleeping Tiger of statutory standing to challenge. RCW 36.70A.280(2)(b).

More fundamentally, the Board’s impermissible foray into public policy-setting would render the use of moratoria impossible any time an essential public facility is involved.¹⁶ In RCW 36.70A.390, the Legislature has prescribed the permissible procedural and substantive

¹⁶ CP 1246 (“The Board can readily see what would happen Any local jurisdiction . . . could declare a moratorium on [EPF] project applications Such a process would soon undermine the GMA requirement not to preclude the siting of essential public facilities.”).

bounds applicable to the use of moratoria under the GMA. Unless and until the Legislature amends that section, the limitations set out by the Board simply do not exist.¹⁷

As Judge White initially noted, “[T]here does seem to be an implication from the Board’s decision that moratoriums are particularly improper when it is an essential public facility.” RP at 6. And, as Judge White then sensibly concluded, however, “[T]here is no such language in RCW 36.70A.390.” *Id.* Good reason exists for the Legislature’s omission in that regard. Moratoria are important, useful planning tools that allow cities, counties, and other public agencies to weigh complex considerations and refine public policy in light of contemporaneous developments.¹⁸ In expressly authorizing cities to enact moratoria, the Legislature recognized that local governments occasionally need breathing room to make weighty decisions -- particularly when those decisions involve the safety of their citizens and the institution of a previously unknown land use like a CDF. If moratoria were prohibited, “developers could frustrate effective long-term planning by obtaining vested rights to

¹⁷ “[G]rowth management hearings boards do not have authority to make “public policy” even within the limited scope of their jurisdictions, let alone to make statewide public policy.” *Thurston County v. Western Growth Board*, 164 Wn.2d 329, 353, 190 P.3d 38 (2008), quoting *Viking Props., Inc. v. Holm*, 155 Wn.2d 112, 129, 118 P.3d 322 (2005).

¹⁸ See, e.g., *Spring Spectrum, LP v. City of Medina*, 924 F.2d 1036, 1039 (W.D. Wa. 1996) (“Under Washington law, moratoria . . . are valid zoning tools”), citing *Matson v. Clark Board of Commissioners*, 79 Wn. App. 641, 644, 904 P.2d 317 (1995); *Jablinske v. Snohomish County*, 28 Wn. App. 848, 850-51, 626 P.2d 543 (1981).

develop their property” *Matson*, 79 Wn. App. at 647. Temporary delay as authorized by RCW 36.70A.390, while not always ideal, is sometimes necessary for local elected officials to determine the appropriate public policy course to follow – that is equally true when the subject of a moratorium is an essential public facility.

The policy considerations underlying the Legislature’s authorization of moratoria are especially implicated where, as here, a project sponsor like King County seeks to locate a potential use under open-ended RFP criteria that potentially apply to broad swaths of an entire region.¹⁹ This is not a case where a governmental agency seeks to locate or expand an EPF at a pre-selected or existing location (*e.g.*, Western State Hospital, or SeaTac Airport), where existing precedent already protects project sponsors.²⁰ And, contrary to Sleeping Tiger’s suggestions, there was no evidence that the City’s moratoria deliberately targeted Sleeping Tiger’s property. In findings unchallenged by Sleeping Tiger, the Board specifically cited the City’s “broad, objective analysis” and “public process framework” while rejecting any suggestion of foul play or discriminatory intent. CP 1253-54 (Decision at 22-23).

¹⁹ Compare CP 631 (initial RFP, calling for CDF siting “south of downtown, north of Southcenter”) with CP 929 (re-issued RFP, with no locational criteria).

²⁰ See, *e.g.*, *King County I v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order (2003) at 14 (siting of wastewater treatment plant); *DOC III/IV v. City of Lakewood*, CPSGMHB Case No. 05-3-0043c (Feb. 25, 2008) (Western State Hospital expansion).

The Board's reliance on the moratorium to justify its findings of GMA noncompliance was an impermissible collateral attack, and contrary to the plain language of RCW 36.70A.390 in any event. The Decision in this regard is outside the Board's statutory authority and/or constitutes an unlawful procedure, is an erroneous interpretation and/or application of the law, and is arbitrary and capricious, warranting reversal under RCW 34.05.570(3)(b), (c), (d), (h) and/or (i).

D. The Board Erred in Concluding That Ordinance No. 2287 Failed to Comply With RCW 36.70A.040 and .070 Because It Was Inconsistent With the City's Comprehensive Plan Policy for Siting Essential Public Facilities.

Aside from its improper reliance on the moratorium, the Board also erred by wrongly concluding that Ord. 2287 failed to comply with the City's Comprehensive Plan policy for siting EPFs, and that it therefore failed to comply with the GMA requirement in RCW 36.70A.040 and .070 that development regulations be consistent with and implement the Comprehensive Plan. CP 1245. Tukwila's Comprehensive Plan policy 15.2.3 states merely that "*Applications* for essential public facilities will be processed through the City's unclassified use permit process established in the City's development regulations." CP 1227 (emphasis added). This policy was never implicated by Ord. 2287. First, as Judge White observed, "There never was any application in this case to process .

. . .” RP at 4. Second, Ord. 2287 did not amend, adjust or alter Policy 15.3 in any way, and therefore could not be inconsistent with it. Both before and after adoption of Ord. 2287, applications for EPFs (including CDFs) are processed using the unclassified use permit process. CP 336 (Ord. 2287 at 20). As Judge White concluded, “There is nothing to suggest that 2287 is in any way inconsistent with [Policy 15.2.3] or does any violence to the process that is in existence.” RP at 2. Third, the policy itself expressly contemplates that permit processing will be in accordance with the City Council’s policy judgment expressed in development regulations, such as Ord. 2287. Nothing in Policy 15.2.3 sets EPF development regulations in stone or precludes the Council from clarifying them, as it did via Ord. 2287. The Board’s conclusion that Ord. 2287 was inconsistent with the City’s Comprehensive Plan, and therefore violated RCW 36.70A.040 and .070, was an erroneous interpretation and/or application of the law, and arbitrary and capricious.

E. The Board Erred in Concluding That Ordinance No. 2287 Effectively Precluded Essential Public Facilities In Violation of RCW 36.70A.200(5).

Ord. 2287, the adopted CDF zoning regulations, was properly before the Board. In considering that ordinance, the Board concluded that Ord. 2287 essentially prohibited the siting of a CDF in violation of the

GMA's mandate that a city not "preclude" the siting of an essential public facility.

Specifically, the Board found that Ord. 2287 constituted "restrictive zoning," rendering the siting of the CDF "impracticable" -- a term that, in the Board's view, equates to "precluding." CP 1252-53. To justify its conclusion, however, the Board erroneously shifted the burden of proof from Sleeping Tiger to the City, ruling that the City was required to affirmatively prove that siting a CDF was practicable under Ord. 2287. The Board here applied an incorrect legal standard, failed to defer to the City Council as required, and its factual findings were unsupported by substantial evidence in the record.

1. The Board Applied the Wrong Legal Standard.

The Board concluded that Ord. 2287 failed to comply with RCW 36.70A.200(5), which provides that, "No local comprehensive plan or development regulation may preclude the siting of essential public facilities." In so doing, the Board seized upon the word "practicability" to interpret the meaning of "preclude." CP 1252-53. The Board pointed to *City of Des Moines v. Puget Sound Regional Council*, 108 Wn. App. 836, 988 P.2d 27 (1999), as support for its contention that "preclude" is synonymous with "impracticable." The Board's analysis then jumps illogically to a conclusion that the City then had the burden to demonstrate

that siting a CDF was “practicable” under Ord. 2287. CP 1252. In so doing, the Board overlooked the core of the Court of Appeals’ holding in *Des Moines*, essentially converting the statutory mandate not to “preclude” into a new statutory mandate not to “make it inconvenient.” This was legal error. *Des Moines* held that, in order for a zoning ordinance to “preclude” an essential public facility, the ordinance must make EPF construction “incapable of being accomplished by the means at the [proponent’s] command,” after allowing for “reasonable permitting and mitigation requirements.” *Des Moines*, 108 Wn. App. at 847. The fact that such requirements may make an EPF more costly “does not relieve the [EPF proponent] of these obligations.” *Id.*

This is the legal standard the Board was required to apply. It did not do so. Instead, the Board merely labeled Ord. 2287 “restrictive” (CP 1252), and looked to whether the City had proven that CDFs were “practicable.” The Board plainly applied the wrong legal standard.²¹ The appropriate standard was whether Ord. 2287 was proven to have made CDFs “incapable of being accomplished by the means at” King County’s

²¹ Sleeping Tiger’s statutory interpretation effort is more flawed than the Board’s. Sleeping Tiger asserts that RCW 36.70A.200(5) bars ordinances with the mere potential to preclude an EPF: “Zoning regulations which ‘may preclude’ the siting of an Essential Public Facility are prohibited by the Act.” Sleeping Tiger Brief at 34. This reading is nullified by this Court’s holding in *Des Moines*, which stands as the applicable law on RCW 36.70A.200(5).

command, after allowing for “reasonable permitting and mitigation requirements.” *Des Moines*, 108 Wn. App. at 847.

2. The Board Erred by Reversing the Burden of Proof.

The Board compounded its legal error by reversing the statutory burden of proof, placing it on the City rather than on Sleeping Tiger. RCW 36.70A.320(2) (“the burden is on the petitioner to demonstrate that any action taken . . . is not in compliance with the requirements of this chapter.”). The Board’s impermissible reversal of the burden of proof is readily apparent from the Board’s own words:

The City provided no evidence that . . . a crisis facility . . . in the [MIC] zone would in any way interfere with manufacturing activities. [CP 1250 (emphasis added).]

The City provided documentation of 7 parcels available for purchase or lease . . . [but] [n]o information as to which, if any, of these individual properties is a viable site for crisis diversion services. [CP 1251 (emphasis added).]

It appears that the buildings in the area – including the 7 properties on the market – are industrial/warehouse buildings that would need to be retrofitted to meet the residential nature of the treatment facilities required by the RFP. *We have only speculative evidence whether any of them could have been purchased/leased and rebuilt for DESC’s purposes at a reasonable price or on the County’s timeline. [CP 1251-52 (emphasis added).]*

The Board is not persuaded *Here the City’s restrictive zoning is simply not supported by substantial evidence indicating that siting a crisis diversion facility in the limited area is practicable. [CP 1252 (emphasis added)].*

The Board erroneously insisted on examining only what *the City* had offered, rather than the evidence offered by Sleeping Tiger.

The Board's only attempt in this record to evaluate Sleeping Tiger's evidence is found in a cursory reference embedded in a footnote. CP 1252, n. 83. The Board's Decision reflects no effort to evaluate Sleeping Tiger's exhibits, which are nothing more than photographs of buildings in the Tukwila C/LI zone, or to determine whether they supported Sleeping Tiger's claim that the identified buildings would not meet King County's RFP requirements. In fact, the office and warehouse buildings shown in Sleeping Tiger's exhibits were actually *more* suited to the requirements in the RFP for the CDF to include larger scale, modular living requirements.²² The RFP further provided for reimbursement for building remodeling costs of up to \$500,000 in the first six months, and a higher amount with justification. CP 1007.²³ The Board's single, footnoted reference to Sleeping Tiger's photographs of building exteriors

²² CP 1003 (RFP's "physical plant" required at least 7,200 square feet, with beds "arranged in single cubicles allowing for some privacy but allowing for line of sight monitoring by staff members.").

²³ The Board admitted that there were "no facts in the record to support the adequacy or inadequacy of the renovation allowance" but, nevertheless, "assume[d]" that it would be more economical and quicker to renovate Sleeping Tiger's old hotel than an office or warehouse building. CP 1249, n. 68. The Board erred by "assuming." The revised RFP allowed a remodeling reimbursement in excess of the \$500,000 allowance "with justification and a detailed budget." CP 1047. And, DESC ultimately located its facility in what is clearly an office/warehouse building. CP 1331 (photos attached to City's Motion to Supplement).

falls far, far short of holding Sleeping Tiger to its statutory burden of proof,²⁴ and constitutes error.

Reduced to basics, the Board committed a fundamental legal error by shifting the burden to the City to prove that a CDF could and would be located in a particular zone. The burden was on Sleeping Tiger to prove under the “clearly erroneous” standard that the City Council’s zoning ordinance precluded the siting of an EPF. RCW 36.70A.320(2). No legal burden exists for the City to “disprove” Sleeping Tiger’s accusation.

3. The Board Failed to Grant the Required Deference to Tukwila’s Legislative Discretion.

The Board committed a third fundamental error when it failed to defer to the City Council’s determination that the C/LI zone was the appropriate zone for CDFs, and failed to find that the City Council’s considered zoning decision did not “preclude” those facilities. As discussed above, deference to the City Council is expressly required by the GMA. Under RCW 36.70A.3201, “[T]he legislature intends for the board to grant deference to counties and cities in how they plan for growth” (Emphasis added.) This deference supersedes that normally granted to administrative tribunals such as the Board. *Quadrant*, 154 Wn.2d at 238.

²⁴ Merely reciting the contentions of the parties cannot constitute a legally sufficient finding of fact or conclusion. See, e.g., *Weyerhaeuser v. Pierce County*, 124 Wn.2d 26, 36, 873 P.2d 498 (1994).

The Board itself recognized its obligation, stating that “the Board must defer to the City” CP 1252. The Board then failed to do so, and impermissibly substituted its own public policy judgment that Ord. 2287 did not make it “practicable” for CDFs to locate in the C/LI zone. This was error.

The Board’s rationale for declining to defer to the City Council is found in its contention that it “must find credible evidence in the record to support that deference,” implying no such evidence existed. CP 1235, n.8; CP 1252. Yet, without explanation, the Board overlooked its own acknowledgement that the County’s RPF locational criteria were in fact satisfied in the C/LI zone, as well as Sleeping Tiger’s admission at the Board’s hearing that CDFs could in fact be located there. For example, “The Board agrees that the County’s locational criteria [from the RFP] are met in the limited area of the C/LI zone” CP 1250. The Board found that there were at least 40 parcels in the C/LI zone south of Strander Boulevard, of which at least seven were available for sale or lease at the time of the hearing. CP 1251. Sleeping Tiger’s William Summers said that the C/LI zone was “not a bad location,” and “*I’m not going to argue that it couldn’t be located here. I’m not going to argue that these don’t possibly meet the criteria.*” CP 25-26 (emphasis added). Instead, he maintained merely that “[T]he best fit is not here.” *Id.* In other words,

even petitioner Sleeping Tiger -- who had the burden of proof -- admitted that Ord. 2287 did not actually “preclude” CDFs in the C/LI zone.

After acknowledging that “there is, of course, no ‘bright-line’ number of possible parcels that constitute compliance with the GMA mandate not to preclude EPFs,” the Board chose to weigh the evidence and decide, on balance, that it was “not persuaded” by the evidence supporting Tukwila’s position. The Board never weighed evidence from Sleeping Tiger, who bore the burden of proof -- of Sleeping Tiger’s 13 exhibits attached to its opening brief to the Board, *none* addressed (let alone proved) the impracticability of locating CDFs in the City’s C/LI zone. CP 215-16 (Sleeping Tiger’s Pre-Hearing Brief at Table of Contents). Instead, the Board identified as the “salient fact in the record” a single piece of circumstantial evidence that showed that RFP responder DESC had selected a site in Seattle, and had discontinued its review of Sleeping Tiger and other Tukwila real estate. CP 1252. In other words, the Board assumed without substantial evidence that DESC sited in Seattle due to “preclusive” zoning in Tukwila.

The Board was wrong, both legally and factually, and its decision was unsupported by any evidence, let alone the required quantum of substantial evidence. First, as Judge White concluded, “As a matter of law, the assertion that . . . a different potential provider of crisis diversion

services selected a site in another city does not amount to preclusion of an essential public facility” CP 1425 (Conclusions, Order and Judgment at Concl. 9). Second, as to the facts, once King County re-issued its RFP with new locational criteria, DESC affirmatively *chose* the site in Seattle because it could co-locate both the CDF and Crisis Interim Service Facilities there. CP 1219. The staff report by King County Director of Mental Health Amnon Shoenfeld, which demonstrates this fact, was wrongly rejected by the Board.²⁵ The Board also introduced and admitted exhibits of its own at the hearing (CP 1218-26), upon which it then relied to characterize DESC’s move to Seattle as the single, “salient fact in the record.” CP 1252.²⁶

In weighing the evidence, deciding it was “not persuaded,” and making a call contrary to the legislative judgment of the Tukwila City Council, the Board clearly did not defer to the City Council, and instead substituted its own judgment as to the appropriate CDF site. Substantial evidence does not support the Board’s determination that Ord. 2287

²⁵ CP 1235. The Board denied admission for lack of authentication (CP 1235), but the Board itself acknowledged that it knew the document’s preparer, Amnon Shoenfeld, was the Director of King County Mental Health, Chemical Abuse and Dependency Services. CP 1235, n.11.

²⁶ To the extent that King County’s selection of DESC for a site in Seattle is relevant, this Court should reverse the Board and admit the report of Amnon Shoenfeld (CP 1181-82), which is self-authenticating. The Court should also grant the City’s motion to supplement the record, and admit DESC’s William Hobson’s statements that Sleeping Tiger’s property was “an inappropriate location” first selected only due to the County’s initial (later revised) siting criteria.

precluded the location of a CDF in Tukwila; rather, substantial evidence proves the opposite, that a CDF *could* be located in the C/LI zone in Tukwila.

F. The Board Erred By Concluding That Ordinance No. 2287 Was Inconsistent With GMA Goal 7, RCW 36.70A.020(7).

The Board compounded the errors described above when it concluded that the City's adoption of moratoria followed by Ord. 2287 did not comply with GMA Goal 7, in RCW 36.70A.020(7). CP 1255-56. Goal 7 states merely that "local government permits should be processed in a timely and fair manner to ensure predictability." First – and most fundamentally here -- neither Sleeping Tiger nor any other party had ever applied for a permit to locate a CDF in Tukwila. Without a permit, or at least a permit application, Goal 7 by its very terms cannot be implicated.

Second, the Board's conclusion regarding Goal 7 was one of many that were improperly based on the City's adoption of unchallenged moratoria.²⁷ Third, the substance of Ordinance 2287 did not change the permit process in any way. Both before and after adoption of Ord. 2287, essential public facilities in Tukwila are processed using an unclassified use permit process. CP 336 (Ord. 2287 at 20) (allowing EPFs and

²⁷ CP 1255 ("[W]hen the City learned of DESC's interest in siting crisis diversion services . . . the City launched an ad hoc process starting with moratoriums and resulting in changed zoning regulations."). Strict adherence to the terms of the GMA in adopting first the moratoria and then zoning regulations cannot be considered an "ad hoc process."

diversion facilities specifically through UUP process). The only difference is that CDFs are allowed in one zone and Sleeping Tiger's property is located in another. This sole difference affects neither the timeliness nor predictability of Tukwila's permit process.

In addition, there is no evidence, let alone the required substantial evidence, to support the Board's conclusion that the City engaged in undue delay, implicating Goal 7, or that (as the Board asserted) "there was no way for DESC as a potential applicant, or Sleeping Tiger as a property owner, to know what the process would be, how long it would take, or what requirements or restrictions might ultimately be imposed." CP 1255.

The City's unchallenged moratoria were adopted pursuant to RCW 36.70A.390. Under that section, the Legislature expressly set forth the maximum duration of an initial moratorium as six months, or one year with the adoption of a related work plan, along with the authority to adopt one or more moratorium renewals after a public hearing and adoption of findings of fact.

Here, and even though the City had adopted a work plan and could have established a one-year initial moratorium, the City Council only did so for six months. CP 269-70 (Ord. 2248, adopting moratorium). The moratorium was a total of only eight months (a six-month initial period and a renewal of only two months, both as expressly authorized by RCW

36.70A.390). CP 132 at third recital, citing Ord. 2278 (moratorium extension); CP 132-35 (Ord. 2288 repealing moratoria).

Tukwila engaged in a considerable public process following adoption of the moratorium. CP 441-467 and 980-992 (City staff report and addendum thereto). Both Sleeping Tiger and DESC were involved in this process.²⁸ The statutory limitations on moratoria, combined with the statements in the City's work plan, provided Sleeping Tiger and others sufficient notice of the potential duration of the moratorium. Substantial evidence demonstrates that the City's process – even considering the moratorium, which was not before the Board – was both timely and predictable, and fully consistent with Goal 7. The Board's decision to the contrary was not supported by substantial evidence, and must be reversed.

The upshot of the Board's decision is to nullify the use of moratoria under any circumstance, because any moratorium necessarily involves some delay. During any delay, a potential applicant may not know exactly how long the moratorium will last, or what new requirements or restrictions may result. The GMA itself, however, expressly authorizes the use of moratoria, and the multiple renewals of

²⁸ See, e.g., CP 1192 (documenting comments by Sleeping Tiger's William Summers and DESC attorney Cynthia Kennedy); CP 1075-81 (testimony at City Council public hearing by DESC program director Graydon Andrus); CP 145 (record index documenting Summers' multiple comment letters); CP 1239 (Board Decision) ("DESC and Sleeping Tiger engaged in active advocacy with city staff").

moratoria. Here, the Tukwila City Council adopted an initial moratorium, and the single renewal (not multiple renewals, as authorized by statute) and lasted only two months (not six months, as authorized by statute). Under these facts, use of the GMA's moratorium tool cannot violate the GMA.

The conclusion that Ordinance 2287 did not comply with RCW 36.70A.020(7) was not supported by substantial evidence, was an error of law, and must be reversed pursuant to RCW 34.05.570(3)(d) and (e).

G. The Determination of Invalidity Was Erroneous and Unsupported by Substantial Evidence.

The Board's determination that Ord. 2287 was invalid was also an erroneous interpretation and/or application of the law, and unsupported by substantial evidence. Under RCW 36.70A.302(1), the Board may rule an ordinance "invalid" only if the Board finds noncompliance with the GMA, orders a remand, and finds "that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the [GMA's] goals" Here, the Board's findings of GMA noncompliance were completely erroneous, for all of the reasons detailed above. Second, even assuming *arguendo* that even one of the Board's conclusions was correct, the Board's finding that continued validity of Ord. 2287 would "substantially interfere" with GMA Goal 7 (permit

process timeliness and predictability) is utterly unsupported by any evidence or analysis. CP 1256-67. Ord. 2287 did not affect any permit applications. As Judge White observed “There never was any application in this case to process” RP at 4. Ord. 2287 also does not affect the permit process’ timeliness or predictability, because it changes only the permissible zone for CDFs, not the permit process. CP 422.

VI. CONCLUSION

The Board overstepped its authority, impermissibly intruded upon the City’s Council’s legislative policy discretion and, in the course of its Decision, committed numerous procedural and substantive legal errors. Sleeping Tiger’s airy generalizations aside, the GMA simply does not require an EPF to be located anywhere a commercial property owner would like, nor endow the Board the power to override an elected legislative body’s policy determinations -- moratoria or otherwise. For all of the foregoing reasons, this Court should affirm Judge White’s decision reversing and setting aside the Board’s Decision in its entirety.

RESPECTFULLY SUBMITTED this 2nd day of April, 2012.

KENYON DISEND, PLLC

By 

Bob C. Sterbank, WSBA #19514
Shelley M. Kerslake, WSBA #21820
Attorneys for City of Tukwila

APPENDIX A

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SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CITY OF TUKWILA, a Municipal Corporation)

Plaintiff,)

No. 11-2-05739-9

vs.)

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, an environmental hearings board)

Defendant)

COURT'S ORAL OPINION

September 16, 2011

HELD BEFORE THE HONORABLE JAY WHITE

Maleng Regional Justice Center
Kent, Washington

APPEARANCES:

BOB STERBANK, Attorney at Law, Representing the Plaintiff;

WILLIAM SUMMERS, Attorneys at Law, representing Sleeping Tiger.

BRANDON MILES, Senior Planner, City of Tukwila

WHEREUPON, the following proceedings were had and done, to wit:

Sheri Lenn Runnels, Official Court Reporter

1 Sub (5), the board found also that the ordinance
2 violates 200(5) that states, "No local comprehensive plan or
3 development regulation may preclude the siting of essential
4 public facilities." It appeared that the board analysis of
5 that was incorrect, not supported by substantial evidence in
6 the record, and did to a degree improperly shift the burden
7 of proof to the City of Tukwila. But not only is the court
8 satisfied that, where even looking at it from the board's
9 standpoint that there may be as few as seven sites, there is
10 nothing that -- the court disagrees basically, doesn't find
11 that it is supported by substantial evidence this legal
12 conclusion by the board that the siting of a crisis
13 diversion facility is not precluded in the CLI zoning
14 district, and the record reflects that Sleeping Tiger has
15 conceded otherwise, that although it might be more
16 expensive, that maybe the site that Sleeping Tiger has might
17 more readily and with less expense be converted to the
18 purposes intended to be served by the crisis diversion
19 facility, it does not appear to the court that that amounts
20 to preclusion as a matter of law. As the court determined,
21 the court does not find a violation of RCW
22 36.70A.200(5). The court from the beginning of this hearing
23 has questioned why goal 7 was somehow violated. And this is
24 RCW 36.70A.020, planning goals. Goal seven, "Permit
25 application for both state and local government permits

1 should be processed in a timely and fair manner to ensure
2 predictability." There never was any application in this
3 case to process, and accordingly, the court does not find
4 that as a matter-- the court believes as a matter of law
5 that goal seven is not applicable here because there was
6 never any pending application.

7 Looking at some of maybe the overarching reasoning of
8 the board, the board states, and certainly in respect to the
9 board, the court did read the entire final decision of the
10 board, and it does appear that it was thoughtful,
11 comprehensive. I think the board did make a good effort to
12 explain its reasoning, but the court believes that, at least
13 in terms of what is relevant in the decision before the
14 court here today, that the board decision cannot be upheld
15 under RCW 34.055.703, which sets forth the circumstances
16 under which the court is required to grant relief from the
17 growth board decision, and the court is satisfied that there
18 has been a violation of at least C, D and E, and that there
19 has been an unlawful procedure in the decision making
20 process, that the agency has erroneously interpreted or
21 applied the law in an order not supported by evidence that
22 is substantial.

23 There may be arguments, consistent with what Tukwila
24 made as well, regarding A and B dealing with
25 constitutionality or inconsistent prior rulings or decisions

1 of the agency. The court will not reach those issues. The
2 court's oral remarks will fall short of being comprehensive
3 here, but what I wanted to focus in, just to try to indicate
4 what I think in many ways is the heart of the board's
5 decision with which this court disagrees, is the statements
6 of the board on page 24 of its order, stating, "In the
7 record before the board in the present case, when the city
8 learned of DESC's interest in siting crisis diversion
9 services at Riverside Residences, the city launched an ad
10 hoc process starting with moratoriums and resulting in
11 changed zoning regulation. There was no way for DESC as a
12 potential applicant, or Sleeping Tiger as a property owner,
13 can know what the process would be, how long it would take,
14 or what requirements or restrictions might ultimately be
15 imposed. In connection with EPS findings such action by a
16 city, results in an unfair and unpredictable permitting
17 process contrary to RCW 36.70A.020 (7)" which is the goal
18 seven the court previously was referencing, "and is clearly
19 erroneous. The board concludes that the City's action was
20 not guided by a substantial interference with the Growth
21 Management Act goal seven, the permits." On this record it
22 appears there was nothing illegal about the City of Tukwila
23 enacting an ordinance establishing a moratorium under RCW
24 36.70A.390. That action was taken before any application
25 was made. The board seems to imply even though the

1 moratorium was not before the board, was not in issue, no
2 challenge to its validity was made. I think it is fair to
3 say the City, as the City argues, that the board appeared to
4 be substantially influenced by the presence of the
5 moratorium and appears to read into RCW 36.70A.390 that
6 somehow a city cannot have a moratorium once it hears that
7 somebody may be interested in siting a particular facility
8 within the city. And moreover, there does seem to be an
9 implication from the board's decision that moratoriums are
10 particularly improper when it is an essential public
11 facility. And there is no such language in RCW 36.70A.390.
12 And so this notion that the city somehow launched an ad hoc
13 process starting with the moratorium and resulting in
14 changed zoning regulations, it appears to this court that
15 the moratorium was legal and, therefore, certainly there is
16 considerable process that the board itself recognized that
17 the City of Tukwila had engaged in that resulted in the
18 adoption of 2287, which did change the zoning regulation.
19 The court does not believe that the board's view is
20 supported by the evidence to suggest that there was no way
21 for DESC as a potential applicant, or Sleeping Tiger as a
22 property owner, to know what the process would be, how long
23 it would take, or what requirements or restrictions might
24 ultimately be imposed.

25 The statute itself discusses, puts limits on the

1 length of time that moratoriums may exist, and provides that
2 they can be extended; I believe from going from memory, up
3 to a year. The court's understanding in this case that the
4 moratorium was eight months, there was an extension, but
5 that does provide knowledge as to how long the process would
6 be, and I really don't think there is any mystery that as
7 part of that process the city potentially could, and in this
8 case did, engage in a process that resulted in a decision to
9 enact 2287.

10 So I think that's the best the Court can do here,
11 trying to marshal everything together. But the Court will
12 agree to the relief requested by the City of Tukwila.

13 Now , Mr. Sterbank, I don't know if you have an
14 appropriate order now. I think it might be important to
15 include some of the arguments, legal arguments, that Tukwila
16 has made the court is prepared to adopt as part of the
17 order.

18 MR. STERBANK: Thank you, your Honor. We do not have
19 an order at this point. I think what would be appropriate
20 given the court's remarks would be for us to prepare
21 Conclusions of Law and an order and present that at a
22 subsequent date.

23 THE COURT: In coordination, of course, with
24 Mr. Summers.

25 MR. STERBANK: Of course.

1 THE COURT: For presentation. The court would just
2 say, it would not involve oral argument, but Mr. Summers
3 would have a chance to indicate whether he has any
4 objections to the proposed order as being inconsistent with
5 the ruling of the court or inconsistent with. I don't want
6 to reargue what we've already argued.

7 MR. STERBANK: I don't, and I'm sure neither does
8 Mr. Summers.

9 THE COURT: And for the record, Mr. Summers, I'm just
10 saying, when we are not signing something here, you are
11 entitled to see what is going to be submitted to the Court.
12 And if you believe there are errors, things that are
13 inconsistent with the intention the court expressed in the
14 ruling, then the court would certainly entertain reasonable
15 and appropriate changes to that order. However, dealing
16 with the entry of the order, it is not an occasion to make
17 some sort of argument for reconsideration, we have to just
18 simply get the order placed, then Sleeping Tiger is in a
19 position to determine what further steps it may wish to
20 take. But by agreeing to the form of the order, which
21 sometimes happens, it may be that you are able to agree to
22 the entry of the order after it has been presented to you,
23 without the need of a further process with this court. But
24 certainly by agreeing to the form of the order, and it can
25 so state, the court understands and the record will reflect

1 that Sleeping Tiger is preserving any and all objections it
2 may have to the ruling today, and certainly agreeing to the
3 form of the order would not in any way jeopardize Sleeping
4 Tiger's ability to either request reconsideration or to
5 appeal.

6 All right. I thank you all for your presentation and
7 your courtesies. That will conclude the hearing.

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APPENDIX B

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SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CITY OF TUKWILA, a municipal corporation,

Petitioner,

vs.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, an environmental board,

Respondent

NO. 11-2-05739-9KNT

CONCLUSIONS OF LAW, ORDER AND JUDGMENT ON CITY OF TUKWILA'S PETITION FOR REVIEW

Appeal of
CPSGMHB No. 10-3-0008

Clerk's Action Required

I. JUDGMENT SUMMARY

- | | |
|-------------------------------------|------------------------------------------------------------------------------------|
| 1. Judgment Creditor: | City of Tukwila |
| 2. Judgment Debtor: | Sleeping Tiger, LLC; |
| 3. Total Judgment: | \$1,732.04 |
| 4. Judgment Interest Rate: | 12 percent per annum |
| 5. Attorneys for Judgment Creditor: | Shelley M. Kerslake, Bob Sterbank,
Michael R. Kenyon and Kenyon
Disend, PLLC |
| 6. Attorneys for Judgment Debtor: | William Summers |

This matter came before the Court on the City of Tukwila's Petition for Judicial Review filed pursuant to RCW 36.70A.300(5) and RCW 34.05.514. The Petition for Judicial Review challenged the Central Puget Sound Growth Management Hearings Board's ("Growth Board's") Final Decision and Order issued on January 4, 2011 in Case No. 10-3-008 entitled *Sleeping Tiger, LLC v. City of Tukwila* ("Decision") R. 1145 -

CONCLUSIONS OF LAW, ORDER AND JUDGMENT ON CITY OF TUKWILA'S PETITION FOR REVIEW- 1

ORIGINAL



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1 1173. The Court reviewed the pleadings and court files in this matter, the record and
2 transcript certified by the Growth Board, Petitioner City of Tukwila's Opening and Reply
3 Briefs, and Sleeping Tiger's Brief in Support of Denying Tukwila's Petition for Review;
4 *Tukwila's Memorandum in Support of Proposed Findings*
heard oral argument of the parties on September 16, 2011; and being fully advised in the
5 premises, does hereby enter the following: ** conclusions, Declaration*
of Bob Starhawk, Sleeping Tiger's Objections, & Tukwila Reply

6 II. CONCLUSIONS OF LAW

7 1. The Growth Board's Decision was not challenged by Respondent Sleeping
8 Tiger. Therefore, any findings of fact made by the Board against Sleeping Tiger are
9 accepted as verities on appeal to this Court.

10 RCW 36.70A.200(1).

11 2. The Decision's conclusion at pages 12 – 17, that Tukwila Ordinance No.
12 2287 violated RCW 36.70A.200(1), was an erroneous interpretation and/or application of
13 the law, and was inconsistent with a rule of the Board, meriting relief pursuant to RCW
14 34.05.570(3)(d) and (h). RCW 36.70A.200(1) requires that a city's comprehensive plan
15 "shall include a process for identifying and siting essential public facilities." By its
16 terms, RCW 36.70A.200(1) applies only to a "comprehensive plan," and does not apply
17 to a "development regulation" such as Tukwila Ordinance No. 2287.

18 3. The Decision's conclusion at pages 16 – 17, that Tukwila's adoption of
19 Ordinance No. 2287 did not comply with the requirement of RCW 36.70A.200(1) that the
20 City's Comprehensive Plan contain a process for identifying and siting essential public
21 facilities, was also not supported by substantial evidence, warranting relief under RCW
22 34.05.570(3)(e). The Decision concluded at page 11 that "Tukwila's Comprehensive
23 Plan contains the necessary process [for identifying and siting essential public facilities]
24
25

CONCLUSIONS OF LAW, ORDER AND
JUDGMENT ON CITY OF TUKWILA'S PETITION
FOR REVIEW- 2

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1 at Goal 15.2.” Sleeping Tiger also conceded this fact in its brief to this Court at page 15.
2 Further, as a matter of law, there is nothing to suggest that Ordinance No. 2287 is in any
3 way inconsistent with, or modifies, the Comprehensive Plan process for identifying or
4 siting essential public facilities. Given the foregoing, the Board’s conclusion that
5 Ordinance No. 2287 violated the requirement of RCW 36.70A.200(1) that the City’s
6 Comprehensive Plan include a process for identifying and siting essential public facilities
7 was not supported by evidence that is substantial when viewed in light of the whole
8 record before the court.

9 4. Under the Board’s prior precedents cited in the Decision, any challenge
10 asserting Tukwila’s noncompliance with RCW 36.70A.200(1) was required to have been
11 brought within sixty (60) days of the City’s publication of its adoption of Comprehensive
12 Plan provisions containing the process for identifying and siting essential public facilities,
13 and any challenge brought after that date was required to have been dismissed as
14 untimely. RCW 36.70A.290(2); *Cascade Bicycle Club v. City of Lake Forest Park*,
15 CPSGMHB Case No. 07-3-0010c, Final Decision and Order (July 23, 2007), 2007 WL
16 2340878 at 5 – 6. To the extent that Sleeping Tiger’s Petition for Review may be read as
17 asserting that the City of Tukwila’s Comprehensive Plan provisions for identifying and
18 siting essential public facilities fail to comply with RCW 36.70A.200(1), the Petition for
19 Review was untimely because it was not brought within sixty (60) days of the City’s
20 publication of its adoption of the Comprehensive Plan provisions containing the process
21 for identifying and siting essential public facilities.
22

23 5. The Decision’s conclusion at pages 12 – 17, that Tukwila Ordinance No.
24 2287 violated RCW 36.70A.200(1), was the result of an unlawful procedure and/or was
25

CONCLUSIONS OF LAW, ORDER AND
JUDGMENT ON CITY OF TUKWILA’S PETITION
FOR REVIEW- 3

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1 an erroneous interpretation and/or application of the law, meriting relief pursuant to
2 RCW 34.05.570(3)(c) and (d), for the additional reason that the Board's Decision was
3 improperly and substantially influenced by the City's adoption of a moratorium via
4 ordinances (Nos. 2248 and 2277) that were not before the Board. As the Board itself
5 acknowledged at page 2 of the Final Decision and Order, under RCW 36.70A.290(1),
6 "the scope of the Board's review is limited to determining whether a jurisdiction has
7 achieved compliance with the GMA only with respect to those issues presented in a
8 timely petition for review." The Board also acknowledged at page 8 that, although the
9 City's moratorium ordinances had been challenged by a third party (not Sleeping Tiger),
10 those appeals had been "voluntarily dismissed." The Board further noted at page 14 that
11 "the Board is not being asked to rule here on the validity of the moratoriums [sic]."
12 Sleeping Tiger also concedes, at pages 7 – 8 of its brief to this Court, that Sleeping Tiger
13 never challenged the moratorium (including extensions) Nevertheless, the
14 Decision reflects that the Board was substantially influenced by the City's adoption of the
15 moratorium in concluding that Ordinance No. 2287 did not comply with RCW
16 36.70A.200(1). Because the moratorium was not before the Board pursuant to a timely-
17 filed petition for review, the Board engaged in an unlawful procedure, and erroneously
18 interpreted and/or applied the law, when the Board was improperly and substantially
19 influenced by the City's moratorium to conclude that the Ordinance No. 2287 did not
20 comply with RCW 36.70A.200(1).

21
22 **RCW 36.70A.040 and .070 (preamble).**

23 6. The Decision's conclusion (at pages 11 – 17) that Ordinance No. 2287
24 was inconsistent with the policy for identifying and siting essential public facilities
25

CONCLUSIONS OF LAW, ORDER AND
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1 contained in Tukwila's Comprehensive Plan, and that therefore Ordinance No. 2287 did
2 not comply with the requirements of RCW 36.70A040 and .070 that development
3 regulations be consistent with and implement a comprehensive plan, was an erroneous
4 interpretation and/or application of the law and was not supported by substantial
5 evidence, meriting relief to Tukwila under RCW 34.05.570(3)(d) and (e). The City's
6 Comprehensive Plan Policy 15.2.3, which addresses the siting of essential public
7 facilities, states that, "Applications for essential public facilities will be processed
8 through the unclassified use permit process established in the City's development
9 regulations." Ordinance No. 2287 does not change this process and is therefore not
10 inconsistent with it. As a matter of law, there is nothing to suggest that Ordinance No.
11 2287 is in any way inconsistent with, or modifies, the City's Comprehensive Plan process
12 for identifying or siting essential public facilities. Therefore, the Board committed an
13 erroneous interpretation and/or application of law when it concluded that Ordinance No.
14 2287 did not comply with RCW 36.70A.040 and .070 on the grounds that it was
15 inconsistent with the City's Comprehensive Plan.
16

17 7. The Decision's conclusion (at pages 11 – 17) that Ordinance No. 2287
18 was inconsistent with the policy for identifying and siting essential public facilities
19 contained in Tukwila's Comprehensive Plan, was the result of an unlawful procedure and
20 was an erroneous interpretation and/or application of the law warranting reversal
21 pursuant to RCW 34.05.570(c) and (d), for the additional reason that the Board's
22 Decision was inappropriately and substantially influenced by the City's adoption of an
23 unchallenged moratorium. The moratorium was not before the Board, making the
24 Board's consideration of the moratorium improper (see Conclusion No. 5 above).
25

CONCLUSIONS OF LAW, ORDER AND
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1 Moreover, a moratorium is expressly authorized by the Growth Management Act, in
2 RCW 36.70A.390. The City's adoption of a moratorium under the express terms of the
3 Growth Management Act did not in this case violate the Growth Management Act. The
4 Decision erroneously assumes that a city may not enact a moratorium concerning
5 applications for essential public facilities, and/or may not enact a moratorium after a city
6 learns of potential interest in locating such a facility within that city. There is no such
7 language in RCW 36.70A.390.

8 **RCW 36.70A.200(5).**

9 8. The Decision's conclusion (at pages 17 – 21) that Ordinance No. 2287 did
10 not comply with the requirement of RCW 36.70A.200(5) that no development regulation
11 may preclude the siting of essential public facilities, was the result of the Board's failure
12 to follow a prescribed procedure and/or was an erroneous interpretation or application of
13 the law, requiring relief to Tukwila under RCW 34.05.570(c) and (d). To conclude that
14 Ordinance No. 2287 did not comply with RCW 36.70A.200(5), the Board improperly
15 reversed the burden of proof by requiring the City of Tukwila to demonstrate that
16 Ordinance No. 2287 did not unlawfully preclude the siting of essential public facilities.
17 Under RCW 36.70A.320(2), the burden of proof is on the petitioner – here, Sleeping
18 Tiger – “to demonstrate that any action taken . . . is not in compliance with the
19 requirements of” the GMA. The Decision at pages 18 – 21 reflects that the Board
20 focused on what the City had documented, rather than whether the petitioner, Sleeping
21 Tiger, had satisfied its statutory burden of proof to demonstrate that Ordinance No. 2287
22 had effectively precluded essential public facilities by making it impracticable to site
23 crisis diversion facilities in the Commercial/Light Industrial zone. By improperly
24
25

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1 reversing the burden of proof, the Board failed to follow a prescribed procedure and/or
2 committed an erroneous interpretation or application of the law.

3 9. The Decision's conclusion at pages 18 – 21 that Ordinance No. 2287 was
4 inconsistent with RCW 36.70A.200(5) because it effectively precluded the siting of crisis
5 diversion facilities (a type of essential public facility) within the City of Tukwila, was not
6 supported by substantial evidence, thus warranting relief to Tukwila under RCW
7 34.05.570(3)(e). The Decision concedes (on page 19) that King County, the essential
8 public facility sponsor, had adopted locational criteria for crisis diversion facilities, and
9 that multiple properties within Tukwila's Commercial/Light Industrial zone in fact
10 satisfied these locational criteria. Under Ordinance No. 2287, crisis diversion facilities
11 are permitted in the Commercial/Light Industrial zone. The record establishes that at
12 least seven different sites were available for purchase or lease at the time of the Growth
13 Board hearing. Sleeping Tiger provided no evidence that any of these sites could not be
14 used as crisis diversion facilities and, in its presentation to the Growth Board, Sleeping
15 Tiger conceded that crisis diversion facilities can in fact be located in the
16 Commercial/Light Industrial zone. (Tr. at 22 – 23). As a matter of law, the assertion that
17 Sleeping Tiger's site might also be suitable for use as a crisis diversion facility, or that a
18 different potential provider of crisis diversion services selected a site in another city, does
19 not amount to preclusion of an essential public facility in violation of RCW
20 36.70A.200(5). The Board's conclusion otherwise was not supported by substantial
21 evidence, requiring relief under RCW 34.05.570(3)(e).
22

23 **RCW 36.70A.020(7).**

24 10. The Decision's conclusion at pages 23 – 25 that Ordinance No. 2287 was
25

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1 not guided by, and substantially interferes with, RCW 36.70A.020(7) (GMA Planning
2 Goal 7, "Permits"), was an erroneous interpretation and/or application of the law,
3 warranting relief under RCW 34.05.570(3)(d). The Board Decision with respect to Goal
4 7 was improperly and substantially influenced by the fact that the City had adopted a
5 moratorium (via Ordinances 2248 and 2227). As set forth above, the moratorium was not
6 properly before the Board pursuant to a timely-filed petition for review. Further,
7 Tukwila's moratorium was a proper exercise of its express authority under the GMA,
8 RCW 36.70A.390 (See Conclusions 5 and 7 above), and was adopted prior to submission
9 of any permit application. A moratorium adopted consistent with RCW 36.70A.390 and
10 prior to submission of any permit application does not violate RCW 36.70A.020(7) as a
11 matter of law.

12
13 11. The Decision's conclusion at pages 23 – 25 that Ordinance No. 2287 was
14 not guided by, and substantially interferes with, GMA Planning Goal 7, "Permits," was
15 also not supported by substantial evidence, requiring relief under RCW 34.05.570(3)(e).
16 The Decision states that there was no way for DESC as a potential applicant, or Sleeping
17 Tiger as a property owner, to know what the process would be, how long it would take, or
18 what requirements or restrictions might ultimately be imposed. Under RCW 36.70A.390,
19 however, the maximum duration of a moratorium is expressly set forth as either six
20 months or one year (depending on the adoption of a work plan), with the additional
21 express statutory authority to adopt one or more extensions after conducting a public
22 hearing and adopting findings of fact. In this case, as the Board acknowledged, the City
23 of Tukwila engaged in a considerable process following adoption of the moratorium.
24 This process resulted in the adoption of Ordinance No. 2287, which did change the pre-
25

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1 existing zoning regulations. The duration of the moratorium was eight months,
2 consisting of a six-month initial period and a renewal of only two months, both as
3 expressly authorized under RCW 36.70A.390. The record further reflects that the City's
4 adopted work plan identified the potential timing and duration of the moratorium, which
5 fairly approximated the actual duration of the moratorium. The statutory limitations on
6 moratoria, combined with the statements in the City's work plan, provided Sleeping Tiger
7 and others sufficient notice of the potential duration of the moratorium. While the City of
8 Tukwila could and did change its zoning ordinance following the moratorium, this was
9 also known by Sleeping Tiger and others, as a matter of law. Given these facts, the
10 Decision's conclusion that the moratorium prevented Sleeping Tiger from knowing what
11 the process might be, and that therefore the City had not complied with RCW
12 36.70A.020(7), was not supported by substantial evidence.

13
14 **Declaration of Invalidity.**

15 12. In light of the foregoing Conclusions of Law, the Decision's findings and
16 conclusions regarding Invalidity (at pages 25 – 26) were an erroneous interpretation
17 and/or application of the law, and were not supported by substantial evidence, requiring
18 relief to Tukwila under RCW 34.05.570(3)(d) and (e). RCW 36.70A.302(1) authorizes a
19 determination of invalidity only where noncompliance with the GMA is properly found.
20 Because the Board erred for the reasons explained above in finding and concluding that
21 Ordinance No. 2287 did not comply with the GMA, the Decision's determination of
22 invalidity is likewise an erroneous interpretation and/or application of the law, and not
23 supported by substantial evidence.
24

25
CONCLUSIONS OF LAW, ORDER AND
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1
2 Based on the foregoing Conclusions of Law, it is hereby ORDERED as follows:

3 III. ORDER

4 1. The City of Tukwila's Petition for Judicial Review is granted, and the
5 Central Puget Sound Growth Management Hearings Board's Final Decision and Order
6 issued on January 4, 2011 in Case No. 10-3-008 entitled *Sleeping Tiger, LLC v. City of*
7 *Tukwila*, shall be and hereby is REVERSED and SET ASIDE, with the exception of
8 Order, Paragraphs V(1) – (2) which were not challenged by any party;

9 2. The City of Tukwila shall transmit a copy of this Order and Judgment to
10 the Presiding Officer at the Central Puget Sound Growth Management Hearings Board;

11 3. Pursuant to RCW 34.05.566(5)(b), 4.84.030, and 4.84.080, the City of
12 Tukwila is hereby awarded its record preparation and statutory costs in the amount of
13 \$1,532.04, (itemized as follows: \$818.44 for the original and a copy of the certified
14 record, \$483.60 for the original and a copy of the official transcript and \$230.00 for the
15 petition filing fee) plus statutory attorney fees in the amount of \$200.00, for a total
16 money judgment of \$1,732.04; and
17

18 4. Judgment shall be entered in favor of the City of Tukwila and against
19 *Sleeping Tiger, LLC* consistent with the foregoing Conclusions of Law and this Order.

20 IV. JUDGMENT

21 Based on the foregoing Conclusions of Law and Order, it is hereby ADJUDGED
22 AND DECREED as follows:

23 1. Judgment is hereby entered in favor of the City of Tukwila and against
24 *Sleeping Tiger, LLC*, REVERSING and SETTING ASIDE the Central Puget Sound
25

CONCLUSIONS OF LAW, ORDER AND
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1 Growth Management Hearings Board's Final Decision and Order issued on January 4,
2 2011 in Case No. 10-3-008; and

3 2. Respondents Sleeping Tiger, LLC shall pay to the City of Tukwila the
4 amount of \$1,732.04 within ten days of the date of this Judgment, after which statutory
5 interest shall begin to accrue.

6 DONE IN OPEN COURT this 9th day of December, 2011.

7
8 
9 Honorable Jay White

10 Presented by:

11 KENYON DISEND, PLLC

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