No. 330834

COURT OF APPEALS, DIVISION III
STATE OF WASHINGTON

CITY OF AIRWAY HEIGHTS and BRIGITTA ARCHER,

Respondents,

vs.

SPOKANE COUNTY, CITY OF SPOKANE,
SPOKANE AIRPORT BOARD,
CITY OF AIRWAY HEIGHTS, and
EASTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD,

Appellants.

JOINT BRIEF OF APPELLANTS CITY OF SPOKANE, COUNTY OF SPOKANE & SPOKANE AIRPORT BOARD

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I. INTRODUCTION

This Court recently noted in a case involving the same property and very similar issues:

> The hearing examiner concluded that the approval of high density residential development on the site would weaken existing protection for the airport and Fairchild AFB, the flying public and future residents, by allowing incompatible development and potential hazards closer to the critical phases of aircraft approach and departure operations; and would jeopardize the future viability of such facilities.
>
> The unchallenged facts establish that the Deer Creek site will be subject to airport noise for the foreseeable future and that the noise impact zones for FAFB expand and contract as the mission of FAFB changes. Findings of fact also establish that a multifamily development on the Deer Creek site would adversely impact the layout, length, and orientation of a proposed runway for SIA and will jeopardize current and future SIA operations.
>
> The Federal Aviation Administration (FAA) expressed concern that the proposed development would be located within the "area of influence" of two major airports and a potential cumulative noise impact area for both airports. . . . According to the FAA, "permitting high density residential uses, or high concentrations of residential use, within the vicinity of the airport weakens the existing protection for the airport, the flying public and future residents; by allowing incompatible development and potential hazards closer to the critical phases of aircraft approach and departure operations." The FAA also contended that these actions "would violate written assurances and contractual commitments given by the City and County . . . to the federal government to protect the airport [and] could jeopardize the receipt of future federal grants."

> Based on the unchallenged findings, there are sufficient facts to support the hearing examiner's conclusion that the conditional use would be detrimental to the public health, safety, or general welfare.

Deer Creek Developers, LLC v. Spokane County, 157 Wn. App. 1, 17, 236 P.3d 906 (2010). Aside from Airway Heights' annexation of the property and the city's subsequent amendment of its development regulations to allow high density residential development on the property, the facts establishing the incompatibility of such development on the property have not changed since the *Deer Creek* case. In fact, several local communities, including Airway Heights, recently participated in the Fairchild Joint Land Use Study ("Fairchild JLUS") funded by the Department of Defense ("DOD"). That study notes:

> One particular development of concern approved prior to the [County's] moratorium is the Deer Creek Apartment complex (Factor 1A) located south of US Highway 2 to the east of Airway Heights. . . Development within Fairchild's critical operations area will limit the ability of the installation to adapt to new missions, to support new/different aircraft, and could jeopardize its long-term viability. . . The growth occurring within this area will continue to create compatibility concerns for Fairchild AFB unless a coordinated planning approach is taken.

Despite this Court's decision in the *Deer Creek* case and a subsequent DOD funded study finding that the Deer Creek Apartments are incompatible with Fairchild's mission and will limit the base's ability to

adapt to new missions following its annexation of the property, Airway Heights adopted ordinances that pave the way for the apartment project disapproved by this Court in the *Deer Creek* case and highlighted with concern in the Fairchild JLUS. The City adopted the ordinances over written objections from the Base Commander at Fairchild Air Force Base ("Fairchild") and the Airport Director at Spokane International Airport ("SIA"), which the city disregarded.

Washington law, however, recognizes that military bases are critical to local economies, generating thousands of jobs and millions of dollars in economic activity and tax revenue annually. In past instances, incompatible development like the Deer Creek apartments has been a factor in the curtailment of training operations and restructuring of mission critical components to other bases during the base realignment and closure process. To protect the missions of military bases and the health of the economies and industries that rely on them, encroachment of incompatible development must be addressed through collaboration and joint planning between bases and the local communities, typically through a JLUS process.

The Fairchild JLUS was a collaborative planning effort involving local stakeholders, including the military, to identify compatible land uses

and growth management guidelines near Fairchild. Two of the primary objectives of the Fairchild JLUS were/are (1) to manage development in the vicinity of Fairchild that would interfere with the continued operations of the base, and (2) to preserve the ability of the base to expand or adapt its mission to changing conditions.

By contrast, Airway Heights' ordinances under review in this appeal circumvent the primary objectives of the Fairchild JLUS by authorizing expansion of incompatible development. The ordinances favor poorly planned growth over protecting two of this region's most essential public facilities (and largest employer) from encroachment by incompatible development. In contrast to the region's efforts to protect Fairchild and SIA from incompatible development, the ordinances authorize development that is (1) incompatible with and will interfere with Fairchild's current operations, and (2) will limit the ability of both Fairchild and SIA to expand or adapt to changing conditions. By adopting the ordinances, Airway Heights unilaterally undermined this region's efforts to protect the future of Fairchild and SIA by authorizing approximately 29 acres of high-density residential housing in the area of influence of both major airports, a use that is incompatible with the missions of both airports.

In a thoughtful 37-page decision that is supported by abundant evidence, The Growth Management Hearings Board, Eastern Washington Region (the "Board") invalidated Airway Heights' ordinances, finding that the ordinances substantially interfere with the fulfillment of the goals of the Growth Management Act (the "Act"), and that Airway Heights was out of compliance with the Act. Without explanation, the Spokane County Superior Court reversed the Board's decision. In the instant appeal, however, this Court reviews the Board's decision, not the decision of the Superior Court, and review of the Board's decision is based on the record made before the Board. *King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000).

II. ASSIGNMENTS OF ERROR

A. The Superior Court erred in reversing the Final Decision and Order of the Eastern Washington Growth Management Hearings Board.

B. The Superior Court erred in affirming the adoption of City of Airway Heights Ordinance Nos. C-797 and C-798.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Washington law says that development regulations should not allow development in the vicinity of a military base that is incompatible

with the base's ability to carry out its mission requirements. Washington law also requires cities, through their land use regulations, to discourage the siting of incompatible land uses adjacent to general aviation airports.

Despite this Court's *Deer Creek* decision, which affirmed a hearing examiner's decision denying an application to build an apartment project on certain land (1) because of concerns about the project's impacts on the operations of Fairchild Air Force Base and (2) because development of the site would jeopardize current and future operations of Spokane International Airport, and despite findings in a Department of Defense funded Joint Land Use Study that additional multi-family residential housing on the site would be incompatible with Fairchild's current and future mission requirements, the City of Airway Heights still adopted ordinances that establish a process for obtaining permits to construct as many as 580 new residential apartments on the site (nearly quadrupling the number of apartments in phase one of the Deer Creek Apartments).

The Growth Management Hearings Board for Eastern Washington, which is charged with adjudicating compliance with the Growth Management Act and, when necessary, with invalidating noncompliant development regulations, invalidated the ordinances, finding that there was

clear, substantial, and compelling evidence that the ordinances violated several provisions of the GMA.

Without explanation, the Spokane County Superior Court reversed the Board's decision. The issue in this appeal is whether the Board properly invalidated Airway Heights' ordinances, and whether the Superior Court appeal erred in reversing the Board. Spokane requests that this Court find that the Board's decision was correct in all respects.

IV. STATEMENT OF THE CASE

A. The Ordinances.

On August 5, 2013, the City of Airway Heights ("Airway Heights") adopted Ordinance Nos. C-797 and C-798 (the "Ordinances"). AR 286-308. The Ordinances amended the City's zoning regulations and maps to authorize the development of approximately 29 acres[1] of additional multi-family residential housing near Airway Heights' southeastern boundary (the "Property"). AR[2] 286-308.

[1] The Ordinances authorize a density of 10-20 units per acre, potentially accommodating as many as 580 new apartments in this sensitive area. AR 13.

[2] AR refers to the Administrative Record that the Growth Management Hearings Board certified and filed with the Superior Court.

B. The Deer Creek Apartment Project.

Previously, and prior to Airway Heights' annexation of the Property,[3] the Spokane County Hearing Examiner denied an application for phase two[4] of a residential apartment project on a portion of the Property (hereinafter "Deer Creek Apartments"). AR 309-333.[5] Prior to the Deer Creek Apartments decision, the Hearing Examiner received comments from several agencies, including Fairchild:

> **1. Department of the Air Force:**
>
> Based on the 1995 Fairchild AFB Air Installation Compatible Use Zone (AICUZ) Study, the subject property is located in the 65-70 Ldn Noise Zone. Based on Fairchild's 2007 AICUZ study, the property is now outside the 65 Ldn contour line. This demonstrates that noise zones expand and contract as the mission changes at Fairchild AFB. Unfortunately, we cannot predict Fairchild's future noise zones; however, we do know that the subject property will be susceptible to aircraft noise for the foreseeable future. Therefore, we do not recommend the construction of additional apartments in this area.

AR 370-71.

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[3] Airway Heights annexed the Property in 2012, pursuant to an Interlocal Agreement between Airway Heights and the City and County of Spokane. AR 344-369.

[4] Phase one consists of 156 multi-family dwellings. AR 309.

[5] The Deer Creek Apartment development lies within the boundaries of the Property involved in this case. Phase 1 of Deer Creek was permitted due to an error in the County's zoning code which was corrected before the developer applied for Phase 2. A detailed history of zoning on the Property prior to Airway Heights' annexation is set forth in the Hearing Examiner's decision. AR 309-333.

2. **Federal Aviation Administration ("FAA"):**

[W]e consider the proposed apartment complex as an incompatible land use, because it is located within the "area of influence" of two major airports, and located in a potential cumulative noise impact area.

. . . .

As you are already aware, aircraft approaching either/both Spokane International Airport's future Runway 23 and Fairchild Air Force Base could be expected to fly over high-density residential development in this area at low altitudes in accordance with standard operating procedures, and in significant numbers. The proposed residential area could be subjected to considerable "single-event" noise impacts from aircraft over flight. These types of noise impacts are particularly annoying at nighttime, when residents are trying to sleep. Significant noise can also be expected from aircraft taking-off on proposed Runway 5-23, potentially over areas with large concentrations of people/residential areas.

In addition, there would also be visual (perceptual) impacts from aircraft operating into and out of the airport. While current operations are acceptable over the presently largely vacant land, it would be disconcerting to many people on the ground in this area of proposed residential development, due to a perceived hazard of low-flying aircraft.

That is one of the main reasons that residential developments, with large concentrations of people, are strongly discouraged under airport traffic pattern areas – "area of influence". Although the frequency of aircraft accidents is comparatively very low, the numbers of aircraft using the concentrated airspace of airport approach areas, together with the complexities of take-off and landing operations during various weather conditions, does mean that accidents are proportionately higher in those areas than in other locations further away from the airport.

> Permitting high density residential uses weakens existing protection for the airport, the flying public, and the future residents by allowing incompatible development and potential hazards closer to the critical phases of aircraft approach and departure operations. (Emphasis supplied.)

AR 372-75.

> **3. Greater Spokane Incorporated:**
>
> As Washington State's designated agent for economic development in Spokane County, we actively monitor and engage to provide comments for land use issues for our region and we pay particular attention to those that present potential issues for our two major flying installations.
>
> Fairchild Air Force Base and Spokane International Airport are critical assets for the economic growth of our region. Fairchild is our largest employer and represents an economic impact approaching $1 billion for our community. Spokane International Airport, too, is vital [to] our region and, perhaps, the single most important asset for continued economic growth. Both operations must be protected and strategically managed to ensure optimum flexibility in operations today and going forward.
>
> We are greatly concerned that isolated decisions, such as the one under consideration, are being made without adequate consideration of long term impacts. Just as was noted by Fairchild Air Force Base in their previously delivered comments, we believe this property "will be susceptible to aircraft noise for the foreseeable future." We also concur with Spokane International Airport, who has repeatedly voiced concern about the impact this project will have on both its current and future operations. . . . The FAA, too, has provided strong language citing its opinion that this project is "incompatible land use."
>
> We have seen too many examples of where the Air Force has curtailed flying operations at other bases simply due to

> volume of noise complaints from the community. For that reason, encroachment of residential development around flying operations is viewed by base closure and realignment commissions as a principal factor when considering closure of a facility.
>
> We believe that allowing this incompatible use to proceed will create a precedent that will significantly complicate future actions to prevent encroachment. Fairchild Air Force base and Spokane International Airport are simply too important to allow them to be "boxed in." (Emphasis supplied.) AR 376.

4. Hearing Examiner and Court of Appeals:

Based on these and other comments, the hearing examiner stated the following in denying phase 2 of the Deer Creek Apartments:

> As indicated by the FAA, Spokane International Airport, WSDOT-Aviation, the City of Spokane, and Greater Spokane Incorporated; and by the Board of County Commissioners in its recent amendments to the LI zone; the approval of high density residential development on the site would weaken existing protection for the airport and Fairchild AFB, the flying public and future residents, by allowing incompatible development and potential hazards closer to the critical phases of aircraft approach and departure operations; and would jeopardize the future viability of such facilities. . . . The application, even as conditioned [with sound attenuation mitigation required], is generally not compatible with other permitted uses in the area, and will be materially detrimental to the public welfare; and should be denied . . . (Emphasis supplied.)
>
> AR 332.

On appeal, this Court affirmed the hearing examiner:

> The unchallenged facts establish that the Deer Creek site will be subject to airport noise for the foreseeable future and that the noise impact zones for FAFB expand and contract as the mission of FAFB changes. Findings of fact also establish that a multifamily development on the Deer Creek site would adversely impact the layout, length, and orientation of a proposed runway for SIA and will jeopardize current and future SIA operations.
>
> . . . .
>
> According to the FAA, "permitting high density residential uses, or high concentrations of residential use, within the vicinity of the airport weakens the existing protection for the airport, the flying public and future residents; by allowing incompatible development and potential hazards closer to the critical phases of aircraft approach and departure operations." . . .
>
> Based on the unchallenged findings, there are sufficient facts to support the hearing examiner's conclusion that the conditional use would be detrimental to the public health, safety, or general welfare. (Emphasis supplied.)

Deer Creek Developers, LLC v. Spokane County, 157 Wn. App. 1, 17, 236 P.3d 906 (2010); AR 334.

C. The Fairchild JLUS.

1. Purpose.

While the Deer Creek Apartments case was making its way through the courts, Airway Heights (along with Fairchild, SIA, and the City and County of Spokane) participated in the development of the Fairchild JLUS. AR 377-645.

> A JLUS is a collaborative planning effort involving local communities, federal officials, residents, business owners, and the military to identify compatible land uses and growth management guidelines near active military installations, such as Fairchild AFB. The program establishes a mechanism for Fairchild AFB and the local jurisdictions to act as a team to prevent incompatible land uses. A JLUS is implemented, essentially, to protect the residents' quality of life, the property owners' rights, and the current and future mission of the base. . . . The goal of the Fairchild JLUS is to protect the viability of the current and future missions at Fairchild AFB while at the same time accommodating growth, sustaining the economic health of the region, and protecting the public health and safety. (Emphasis supplied.)

AR 417.

2. Noise Modeling.

The Fairchild JLUS identifies "aircraft noise [a]s the primary concern relative to compatibility planning." AR 518.

> The analysis of airborne noise varies based on the type of aircraft modeled, flight operations, training activities, flight frequency, and other aircraft using the airspace.

AR 518.

> Differences in assumptions based on current mission factors, changes in aircraft type, and technical characteristics of the model have profound implications to the resulting noise contours. Much emphasis is placed on the delineation of these contours and land use policies or decisions are often based on the assumptions presented by these contours. AICUZ studies represent current conditions, should conditions change, a new AICUZ would have to be

> prepared. As a result, specific land use decisions should not be based solely on AICUZ boundaries.
>
> As a component of this JLUS, a study was conducted to assess potential noise related to four future mission scenarios. . . For each scenario, the operations at Fairchild AFB were combined with the 20-year operations forecast for SIA to provide an overall perspective on the effect of all aircraft operations within the region. For purposes of this analysis, the scenarios assumed operations at a new third runway at SIA.
>
> . . . .
>
> The noise modeling indicated that the scenarios including the KC-767 (Scenarios 1 and 3) would have a slightly larger noise signature than those including the A330 aircraft. To ensure Fairchild's . . . potential future aircraft and missions were properly reflected in this study, the JPSC decided to use Scenarios 3 as the basis for JLUS strategies development. (Emphasis supplied.)

AR 519.

3. Compatibility.

The Fairchild JLUS portrays the Deer Creek Apartments as the poster child of the type of development JLUS intends to prevent. Indeed, a photograph of phase 1 of the Deer Creek Apartments appears on the cover page of the "Compatibility" chapter of the Fairchild JLUS. AR 461.

The compatibility chapter utilizes three criteria to evaluate and score compatibility factors, using a scale ranging from "1" (most critical) to "3" (least critical). The three criteria are (i) current impact, (ii) location, and (iii) potential impact. AR 463.

> The three criteria presented above were averaged to determine the overall threat level for each factor. Factors ranking "1" are considered the most critical (designated in red) . . . A critical factor was defined as one where there was potential for impacts on current missions and where existing tools are not adequate to address the factor identified. . . .

AR 463. The Fairchild JLUS singles out high density residential housing on the Property, designating it a critical threat (Factor 1A) to Fairchild's mission. AR 464-75 (Fairchild JLUS, Tables 3-1 and 3-2, and Figure 3-1).

> One particular development of concern approved prior to the [County's] moratorium is the Deer Creek Apartment complex (Factor 1A) located south of US Highway 2 to the east of Airway Heights. . . Development within Fairchild's critical operations area will limit the ability of the installation to adapt to new missions, to support new/different aircraft, and could jeopardize its long-term viability. . . The growth occurring within this area will continue to create compatibility concerns for Fairchild AFB unless a coordinated planning approach is taken. (Emphasis supplied.)

AR 474-75.

4. Military Influence Area (MIA) 4.

The Fairchild JLUS also established four categories of Military Influence Areas ("MIA"), which are "formally designated geographic planning area[s] where military operations may impact local communities, and conversely, where local activities may affect the military's ability to carry out its mission." AR 592. Military Influence Area 4 (MIA 4) is

defined as "having a high potential for noise and safety impacts to which land use controls are appropriate." AR 593-95. The Property lies within MIA 4. AR 596, 1723-29.

The Fairchild JLUS also includes implementation strategies that were developed cooperatively with representatives from all jurisdictions participating in the Fairchild JLUS, including Airway Heights. AR 583.

> **Land Uses Allowed in MIA 4**
>
> Within MIA 4, land use designations (comprehensive plan or zoning code) in place as of May 2009 should be reviewed using the following criteria prior to any designation change:
>
> - Land currently designated for non-residential use shall not be redesignated to a residential use category. It may be redesignated to another non-residential use category (except for mixed use) as long as conditions of approval restrict the intensity of development allowed . . .
> - Land currently designated for a residential use shall not be modified to another residential designation that allows a higher density of use than allowed in the current designation. (Emphasis supplied.)

AR 641.

Prior to Airway Heights' annexation of the Property and adoption of the Ordinances, the Property was designated for non-residential uses. The Ordinances re-designate the Property for high density residential use, setting the stage for additional phases of the Deer Creek Apartments.

D. Airway Heights' Annexation of the Property.

After the hearing examiner denied phase 2 of the Deer Creek Apartments, the developer petitioned Airway Heights to have the property annexed. Based on this request, Airway Heights began to pursue annexation of the Deer Creek Apartments site as part of a larger annexation to the east of its corporate boundaries.

Airway Heights' annexation efforts prompted negotiations among Airway Heights, Spokane County, and the City of Spokane. AR 344-69. Fresh off the Deer Creek Apartments phase 2 crisis, and as one of the conditions of allowing Airway Heights to annex the area (which lies in the City of Spokane's utility service areas, AR 352), the parties agreed that the Fairchild JLUS provided a sound tool for determining whether development was compatible with Fairchild and SIA:

SECTION NO. 7: PROTECTION OF ESSENTIAL PUBLIC FACILITIES

> Spokane, Airway Heights and the County acknowledge and agree that the Spokane International Airport and Fairchild Air Force Base are two of the region's most essential public facilities and that neither of the parties should allow development in the vicinity of either facility that is incompatible with the facilities' operational needs and/or its ability to carry out its current and/or future missions ("incompatible development"). The term "incompatible development" means permitted land uses that are inconsistent with the Fairchild Air Force Base Joint Land

> Use Study ("JLUS"), WSDOT Aviation Division Regulations, FAA Regulations, state statutes or regulations. (Emphasis supplied.)

AR 352.

E. Airway Heights Adopts the Ordinances Over Objections from Fairchild's Base Commander and the Director of Spokane International Airport, and Uniform Opposition From Aviation Experts.

Shortly after it annexed the Property, Airway Heights began work on amendments to its comprehensive plan and zoning regulations to allow development of phase 2 of the Deer Creek Apartments as well as high density multi-family residential housing on all of the Property. Prior to adopting the ordinances, Airway Heights received evidence that the proposal was incompatible with the needs of both Fairchild and SIA. Here are several excerpts:

1. Base Commander, Fairchild Air Force Base Washington:

> Based on the 1995 Fairchild AFB (FAFB) Air Installation Compatible Use Zone (AICUZ) Study, the highlighted parcel on the attached C-2 map is located in the 65-70 Ldn Noise Zone. Based on our 2007 AICUZ study, the property is now outside of the 65 Ldn contour line. This change demonstrates that noise zones expand and contract as missions change. Unfortunately, we cannot predict future noise zones; however, we do know that the highlighted parcel will be susceptible to aircraft noise into the foreseeable future, from both FAFB and Spokane International Airport. This fact was highlighted in the 2009 Joint Land use Study (JLUS). As the JLUS Implementation

> Steering Committee collaborated with Airway Heights in the development of the C-2 map, these parcels were identified as potentially incompatible for high-density residential development. . . . [W]e renew our concerns originally expressed in 2008 regarding the 25302.xxxx series of parcels identified in the C-2 amendment and recommend they be removed from consideration for multi-family residential development. The highlighted area is within Military Influence Area ¾ of the JLUS and we are concerned about increasing the residential density in an area so close to where our military jet aircraft fly instrument approaches to our runway. The centerline of Fairchild's Runway 23 extends out to about 14 nautical miles from the base crossing overhead the intersection of Hayford Road and Route 2. The parcels to the east of Hayford and south of Route 2 are very close to that area. . . . Those parcels will be located between two major airport runways (Fairchild and SIA) with substantial jet aircraft operation. Noise will be a factor as both airports operate 24 hours a day. While sound mitigation techniques can be used during construction, we strongly do not recommend increasing residential development in that area. Safety is also a factor worth considering and the close proximity to the approaches of the two runways would increase the risk to the residents in the event of a catastrophic aircraft accident. (Emphasis supplied.)

AR 652-54 (Letter from USAF Colonel Brian Newberry, Fairchild Base Commander). According to a July 3, 2013 internal Airway Heights' memorandum, "FAFB's comments can be summed up as they would prefer that the City did not allow residential uses in the area . . ." AR 655. Airway Heights did not amend the Ordinances in response to Fairchild's concerns.

2. **Washington State Department of Transportation, Aviation Division:**

The following is a general summary of WSDOT's concerns and observations discussed during Airway Heights July 3, 2013 formal consultation meeting:

- For local military airport land use compatibility planning, WSDOT recommends that the City of Airway Heights refer to Fairchild's Joint Land use Study (JLUS), September 2009.

- For technical assistance regarding military airport land use compatibility planning, WSDOT strongly recommends staff refer to correspondence provided by USAF Colonel Brian Newberry.

- The Deer Creek site is in close proximity to SIA's planned parallel runway.

- WSDOT does not support the encroachment of residential development adjacent to Spokane International Airport (SIA).

- Residential development on the Deer Creek site will be impacted from a variety of aviation activities. Such activities may include, but are not limited to, noise, light, vibration, odors, hours of operation, low overhead flights and other associated activities.

The importance of SIA to the region and the state's transportation system and economy cannot be overstated. It is critical that every effort be made to discourage incompatible land uses that impair the airport's ability to operate as an essential public facility. (Emphasis supplied.)

AR 656-63. In an earlier email, WSDOT indicated "[m]ultifamily development would be inconsistent with WSDOT's Airports and Compatible Land use Guidebook . . ." AR 664-65.

3. **Spokane International Airport:**

> Adopting zoning that permits residential use within close proximity to the Airport may ultimately create situations requiring preventive or remedial mitigation actions to ensure that the ability of the Airport to develop and operate without limitations is not hindered. . . .
>
> The area of C-2 that is located in the vicinity of Deer Heights Road is cause for concern that this may present an incompatible land use related to the future parallel runway.
>
> A key component of the staff recommendation and Board approval of the JLUS relates to the measure calling for no new residential development within the 65 DNL contour or higher. The action that Airway Heights is proposing is inconsistent with JLUS. The proposed action disregards published guidance which identifies residential development as incompatible in areas of 65 DNL and higher which is inconsistent with appropriate land use planning doctrine.
>
> While there are provisions for noise attenuation called for to achieve compatibility in the 65 DNL to 70 DNL contour, it is important to note that sound attenuation is typically installed as a remedial mitigation measure to achieve some improved livability for persons located in established residential dwellings and is not generally recognized as an enabling mechanism to allow for encroachment of incompatible use in areas of 65 DNL and higher noise exposure. Sound insulation will not resolve complaints about other overflight impacts such as landing lights, vibration, dust, fumes and interference with

> electronic devices, etc. and will obviously not permit the enjoyment of outdoor activities in these areas by residents.

AR 666-68.

> [T]he City of Spokane last year adopted significant zoning protection around Spokane International Airport and Felts Field to address safety and noise compatibility objectives. . . . Airway Heights should consider adopting an overlay zone that is complimentary to this effort in order to continue to harmonize with the regional objective of protecting our air transportation system so that it may continue to serve as an important component of our economy without limitation.

AR 669-73.

The City of Spokane and Spokane County expressed similar compatibility concerns. AR 674-99. Ultimately, however, Airway Heights dismissed the compatibility concerns of Fairchild's Base Commander, SIA, WSDOT, and the City and County of Spokane, joint owners of SIA:

> These comments appear to be based on their adopted JLUS regulations, not ours. . . . [O]ur JLUS standards do not match with theirs . . . However, if a catastrophic event did occur, increased density could make such an event worse due to the increased number of people in the area.

AR 674. Thereafter, Spokane appealed.

F. Growth Management Hearings Board.

On June 6, 2014, after its review of the entire record, the Board issued its Final Decision and Order finding Airway Heights out of

compliance with the Growth Management Act (the "Act") and invalidating the Ordinances ("Final Decision"). The Board entered the following findings:

> The Growth Management Hearings Board finds clear, substantial, and compelling evidence in the record as follows:
>
> 1. Ordinance Nos. C-797 and C-798 modified the land use designations and development regulations affecting approximately 29-30 acres of land within the City of Airway Heights, Washington, located several hundred feet south of State Route Highway 2, east of Hayford Road, and west of Deer Heights Road.
>
> 2. The Airway Heights C-2 zone is a land use classification that allows for general commercial uses, as a conditional use, including inter alia Multi-Family Residential as part of an approved mixed-use development plan and Multi-Family Residential with a density range of 10-20 units per acre on the affected property.
>
> 3. The Multi-Family Residential development authorized by Ordinance Nos. C-797 and C-798 allows an increase in the number and density of residential uses in the vicinity of Fairchild Air Force Base and near Spokane International Airport.
>
> 4. An increase in the number and density of residential uses in the vicinity of Fairchild Air Force Base and near Spokane International Airport has a high potential for adverse noise and safety impacts.
>
> 5. High density residential development would be incompatible with aircraft approach and departure operations and would jeopardize the future viability of

Fairchild Air Force Base and Spokane International Airport.

6. The property affected by Ordinance Nos. C-797 and C-798 is located within Fairchild Air Force Base's critical operations area designated Military Influence Area 4.

7. The Multi-Family Residential development authorized by Ordinance Nos. C-797 and C-798 will affect current Air Force operations and will limit the ability of Fairchild Air Force Base to adapt to new missions, support new/different aircraft, and could jeopardize the Base's long-term viability.

8. The Multi-Family Residential development authorized by Ordinance Nos. C-797 and C-798 will limit the ability of Spokane International Airport to construct and operate a future parallel runway.

9. The Multi-Family Residential development authorized by Ordinance Nos. C-797 and C-798 is incompatible with current and future operations at Fairchild Air Force Base and Spokane International Airport.

10. Fairchild Air Force Base and Spokane International Airport are Essential Public Facilities.

AR 1771-72.

Based on these findings, the Board concluded that the Ordinances authorize development in the vicinity of Fairchild that is incompatible with the Base's ability to carry out its mission requirements, and that the Ordinances fail to discourage the siting of incompatible uses adjacent to SIA, in violation of state law. AR 1772-73.

Thereafter, the Spokane County Superior Court reversed the Board without explanation.

V. ARGUMENT

A. STANDARD OF REVIEW.

"The [Growth Management Hearings] Board is charged with adjudicating GMA compliance, and, when necessary, with invalidating noncompliant comprehensive plans and development regulations." *King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 552, 14 P.3d 133 (2000).

> On appeal, this court reviews the Board's decision, not the decision of the superior court, and "judicial review of the Board's decision is based on the record made before the Board." We apply the standards of RCW 34.05 directly to the record before the agency, sitting in the same position as the superior court.

King County, 142 Wn.2d at 553, *quoting Buechel v. Dep't of Ecology*, 125 Wn.2d 196, 202, 884 P.2d 910 (1994); *accord Spokane County v. E. Wash. Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 564, 309 P.3d 673 (2013).

> The burden of demonstrating that the Board erroneously interpreted or applied the law, or that the Board's order is not supported by substantial evidence, remains on the party asserting the error . . .[6]

[6] In the instant case, Respondents challenge the Board's decision and consequently have the burden of proving the decision invalid. *King*

> This court reviews the Board's legal conclusions de novo, giving substantial weight to the Board's interpretation of the statute it administers. In reviewing the agency's findings of fact under RCW 34.05.570(3)(e), the test of substantial evidence is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order. (Citations omitted.)

King County, 142 Wn.2d at 553; *accord, Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd.,* 172 Wn.2d 144, 154, 256 P.3d 1193 (2011) ("courts give substantial weight to a board's interpretation of the GMA").

In relation to the standard of review, it is also worth noting that the Board "must defer to a [local jurisdiction's] planning action *if* it is consistent with the GMA's goals and requirements." *Spokane County v. E. Wash. Growth Mgmt. Hearings Bd.,* 176 Wn. App. at 583 (emphasis supplied).

> GMA deference to [local] planning actions supersedes APA deference to administrative adjudications. Thus, we will not defer to a hearings board if it fails to accord a county the required deference by properly applying the GMA's clearly erroneous standard.
>
> Here, the hearings board initially presumed the County's comprehensive plan and amendment and concurrent rezone were valid but ultimately found them clearly erroneous in light of the entire record and the GMA's goals and requirements. Again, the hearings board's decision is supported by substantial evidence in light of the whole

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County, 142 Wn.2d at 553; *Spokane County v. E. Washington Growth Mgmt. Hearings Board.,* 176 Wn. App. 555, 564, 309 P.3d 673

> record, does not erroneously interpret or apply the law, and is not arbitrary or capricious. Thus, the hearings board properly applied the GMA's clearly erroneous review standard. By doing so, the hearings board accorded the County's planning actions the required deference. (Emphasis supplied, citations omitted.)

Id., 176 Wn. App. at 583; *see also, Kittitas County v. E. Wash. Growth Mgmt. Hearings Bd.*, 172 Wn.2d at 154 (to overcome GMA's deference to local planning processes, the board must find that the local actions are clearly erroneous, meaning the board has a firm and definite conviction that a mistake has been committed).

Like the hearings board in the *Spokane County* case, the Board presumed Airway Heights' Ordinances were valid, AR 1744-45, but ultimately found them clearly erroneous in light of the entire record and GMA's goals and requirements relating to the protection of military bases and airports. AR 1760, 1764-65, and 1768-69. In doing so, the Board accorded Airway Heights' planning actions all the deference required by GMA. The superior court erred in reversing the Board's decision.

B. THE TRIAL COURT ERRED IN REVERSING THE BOARD'S FINAL DECISION AND ORDER.

1. The Board Correctly Found that the Ordinances, Which Airway Heights Adopted Over the Objection of Fairchild's Base Commander, Improperly Authorize Development in the Vicinity of Fairchild Air Force Base that is Incompatible with the Base's

Ability to Carry Out its Mission Requirements, in Violation of State law.

a. Airway Heights Violated State Law by Adopting the Ordinances Over the Objection of Fairchild's Base Commander.

Washington law acknowledges that cities are not regional decision-making bodies and are not free to make unilateral decisions that jeopardize the future of a region's essential public facilities, particularly military installations and airports. Indeed, when the legislature adopted GMA, it addressed with specificity the importance of the United States military and the need to protect military installations from incompatible development.

> The United States military is a vital component of the Washington state economy. The protection of military installations from incompatible development of land is essential to the health of Washington's economy and quality of life. Incompatible development of land close to a military installation reduces the ability of the military to complete its mission or to undertake new missions, and increases its cost of operating. The department of defense evaluates continued utilization of military installations based upon their operating costs, their ability to carry out missions, and their ability to undertake new missions. (Emphasis supplied.)

RCW 36.70A.530, Notes. In order to protect military installations from incompatible development,[7] RCW 36.70A.530 provides:

> (1) Military installations are of particular importance to the economic health of the state of Washington and it is a priority of the state to protect the land surrounding our military installations from incompatible development.
>
> (3) A comprehensive plan, amendment to a plan, a development regulation or amendment to a development regulation, should not allow development in the vicinity of a military installation that is incompatible with the installation's ability to carry out its mission requirements. . . (Emphasis supplied.)

RCW 36.70A.530.

In *McHugh, et al. v. Spokane County, et al.*, EWGMHB Case No. 05-1-0004, FDO (Dec. 16, 2005),[8] the Eastern Washington Growth Management Hearings Board indicated that failure to modify a proposal in

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[7] Airway Heights has suggested that some of the requirements in RCW 36.70A.530 do not apply to it because the city does not share a common border with Fairchild. This suggestion, however, ignores the evidence and the nature of the mission requirements of an air force base like Fairchild. Fairchild, and particularly its mission areas, are adjacent to (and even within) the City of Airway Heights within the meaning of RCW 36.70A.530. For example, the record establishes that Fairchild's Accident Potential Zones extend well within Airway Heights' corporate limits. AR 484-487, 1712, & 1723-29. Indeed, southwest areas within Airway Heights are burdened by easements owned by Fairchild. AR 494, 520-23, & 1723-29. Fairchild's noise contours also encompass much of Airway Heights. *Id.*

[8] A copy of this case is attached in the Appendix for the Court's Convenience.

response to an objection from a military base commander is a violation of RCW 36.70A.530. *Id.*, p. 14.

> The County did not comply with RCW 36.70A.530, which requires the County to protect the land surrounding our military installations from incompatible development. . . . The language specifies that amendments to a plan or regulations should not allow development in the vicinity of a military installation which are incompatible with the installation's ability to carry out its mission requirements. The representative of the military base objected to the location of the new urban development, but this did not change the County's action.

See also, Thurston County v. W. Wash. Growth Mgmt. Hearings Bd., 164 Wn.2d 329, 341, 190 P.3d 38 (2008) ("Substantial weight is accorded to a board's interpretation of the GMA.")

That is precisely what happened in this case. Prior to its adoption of the Ordinances, Airway Heights received a written objection from Fairchild's Base Commander (and others) indicating that the high density residential development authorized by the Ordinances would be incompatible with Fairchild's mission:

> [W]e renew our concerns originally expressed in 2008 regarding the 25302.xxxx series of parcels identified in the C-2 amendment and recommend they be removed from consideration for multi-family residential development. The highlighted area is within Military Influence Area 3/4 of the JLUS and we are concerned about increasing the residential density in an area so close to where our military jet aircraft fly instrument approaches to our runway. . . . While sound mitigation techniques can be used during construction, we

> strongly do not recommend increasing residential development in that area. Safety is also a factor worth considering and the close proximity to the approaches of the two runways would increase the risk to the residents in the event of a catastrophic aircraft accident. (Emphasis supplied.)

AR 652-54. Nonetheless, Airway Heights adopted the Ordinances over Fairchild's objections, in violation of RCW 36.70A.530.

b. The Board's Decision is Supported by Substantial Evidence, Does Not Erroneously Interpret or Apply the Law, and is Not Arbitrary or Capricious.

As outlined in pages 8 through 18 of the Board's decision (AR 1750-60) and in Section IV (Statement of the Case) above, there is *abundant* evidence in the record supporting the Board's decision that the Ordinances authorize development that is incompatible with Fairchild's mission, in violation of state law.

"Substantial evidence is a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *Thurston County v. Cooper Point Ass'n.* 148 Wn.2d 1, 57 P.3d 1156 (2002).

On mixed questions of law and fact, the Court determines the law independently and then applies it to the facts as found by the Board. *Id.*

> We view the evidence in the light most favorable to . . . the party who prevailed in the highest forum that exercised fact-finding authority. Doing so necessarily entails accepting the factfinder's views regarding the credibility of witnesses and the weight to be given reasonable but competing inferences. (Citations omitted.)

Spokane County v. E. Wash. Growth Mgmt. Hearings Bd., 176 Wn. App. 555,565,309 P.3d 673 (2013).

> It is not the province of the reviewing court to try facts de novo when presented with mixed questions of law and fact from judgments of the superior court, administrative tribunal, or administrative judge.

Franklin County Sheriff's Office v. Sellers, 97 Wn. 2d 317, 646 P.2d 113 (1983). Under these standards, there is no question the Board's decision is supported by substantial evidence (listed in Section IV herein above and outlined below) and that the superior court erred in reversing the Board's decision.

(1) Fairchild JLUS: The Fairchild JLUS, which was supported by noise modeling studies, AR 516-23, provides clear and substantial evidence that additional multi-family residential housing on the Property would be incompatible with Fairchild's current and future missions. AR 464-75.

> One particular development of concern approved prior to the [County's] moratorium is the Deer Creek Apartment complex (Factor 1A) located south of US Highway 2 to the east of Airway Heights. . . Development within Fairchild's critical operations area will limit the ability of the installation to adapt to new missions, to support new/different aircraft, and could jeopardize its long-term viability. . . The growth occurring within this area will continue to create compatibility concerns for Fairchild AFB unless a coordinated planning approach is taken.

AR 474-75. As the Board noted at page 15 of the Final Decision, the Fairchild JLUS "found that multi-family residential development at Deer Creek is within Fairchild's critical operations area and will limit adaption to new missions and support for new aircraft." AR 1757.

The Property lies within the Fairchild JLUS MIA 4, which is defined as "having a high potential for noise and safety impacts to which land use controls are appropriate. AR 595-96. Section 5 of the Fairchild JLUS recommends certain restrictions within MIA 4: "Land currently designated for non-residential use shall not be redesignated to a residential use category . . . Land currently designated for a residential use shall not be modified to another residential designation that allows a high density of use than allowed in the current designation." AR 641.

Airway Heights was an active participant in the Fairchild JLUS process, and that process, which was completed before Airway Heights annexed the Property, found that multi-family residential development on

the Property is "within Fairchild's critical operations area" and "will limit" adaptation to new missions and support for new aircraft. AR 474-75. In other words, before Airway Heights annexed the Property, it agreed that additional multi-family residential development on the Property would be incompatible with Fairchild's current and future mission requirements. Indeed, it agreed as much in the Annexation Interlocal. AR 352.

(2) Fairchild's Base Commander: "[T]hese parcels were identified as potentially incompatible for high-density residential development. Therefore, we do not recommend the construction of additional apartments in this area." AR 652-54.

(3) Federal Aviation Administration ("FAA"): "[W]e consider the proposed apartment complex as an incompatible land use, because it is located within the "area of influence" of two major airports, and located in a potential cumulative noise impact area . . . Permitting high density residential uses weakens existing protection for the airport, flying public, and the future residents by allowing incompatible development and potential hazards closer to the critical phases of aircraft approach and departure operations." AR 372-75.

(4) Spokane County Hearing Examiner: "[T]he approval of high density residential development on the site would weaken existing

protection for the airport and Fairchild AFB, the flying public and future residents, by allowing incompatible development and potential hazards closer to the critical phases of aircraft approach and departure operations; and would jeopardize the future viability of such facilities this application, even as conditioned, is generally not compatible with other permitted uses in the area, and will be materially detrimental to the public welfare . . . AR 309-32.

(5) Washington State Court of Appeals: "The unchallenged facts establish that the Deer Creek site will be subject to airport noise for the foreseeable future and that the noise impact zones for FAFB expand and contract as the mission of FAFB changes. Findings of fact also establish that a multifamily development on the Deer Creek site would adversely impact the layout, length, and orientation of a proposed runway for SIA and will jeopardize current and future SIA operations." *Deer Creek Developers, LLC v. Spokane County,* 157 Wn. App. at 17; AR 334-42.

(6) The Board's Decision. Here, the Board began its analysis by acknowledging that "GMA establishes three major precepts: a presumption of validity; a 'clearly erroneous' standard of review; and a requirement of deference to the decisions of local government." AR 1744.

> The burden is on the Petitioners to overcome the presumption of validity and demonstrate that any action taken by [Airway Heights] is clearly erroneous in light of the goals and requirements of Chapter 36.70A RCW (the GMA). Where not clearly erroneous, and thus within the framework of state goals and requirements, the planning choices of local government must be granted deference.

AR 1745. Although the Board initially presumed Airway Heights' Ordinances were valid, after reviewing the evidence in the record, the Board found the Ordinances clearly erroneous in light of the entire record and the GMA's goals and requirements:

> After reviewing all of evidence in the record, the Board finds there is clear, substantial, and compelling evidence that Ordinances C-797 and C-798 allow development in the vicinity of a military installation that is incompatible with the installation's ability to carry out its mission requirements. The Board is left with a firm and definite conviction that a mistake has been made. Airway Heights Ordinance Nos. C-797 and C-798 are clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act. Based on those findings, the Board concludes that Ordinances C-797 and C-798 do not comply with RCW 36.70A.530.

AR 1760. The trial court erred when it reversed the Board's decision.

2. The Board Correctly Found that the Ordinances Fail to Discourage the Siting of Incompatible Land Uses Adjacent to Spokane International Airport, in Violation of State Law.

"Adoption and amendment of comprehensive plan provisions and development regulations under this chapter affecting a general aviation airport are subject to RCW 36.70.547." Under RCW 36.70A.510

> [e]very . . . city . . . in which there is located[9] a general aviation airport that is operated for the benefit of the general public, whether publicly owned or privately owned public use, shall, through its comprehensive plan and development regulations, discourage the siting of incompatible uses adjacent to such general aviation airport. Such plans and regulations may only be adopted or amended after formal consultation with: Airport owners and managers, private airport operators, general aviation pilots, ports, and the aviation division of the department of transportation. . . . Each county, city, and town may obtain technical assistance from the aviation division of the department of transportation to develop plans and regulations consistent with this section. (Emphasis supplied.)

The Central Puget Sound Growth Management Hearings Board previously held:

> It is clear that the provisions of RCW 36.70A.510 and RCW 36.70.547 provide explicit statutory direction for local governments to give substantial weight to WSDOT Aviation Division's comments and concerns related to matters affecting safety at general aviation airports. . . . Likewise, the FAA's expertise and decades of experience, as reflected in FAR Part 77, cannot be summarily ignored.

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[9] To the extent Airway Heights may suggest that SIA is not located within the city, Spokane submits that the airport is within and adjacent to Airway Heights within the meaning of these statutes for the same reasons Fairchild is. Evidence in the record demonstrates that SIA's traffic patterns and area of influence is located in Airway Heights within the statutory meaning. *See* AR 372-75 (FAA Comments) and 1723-29.

> Both these agencies have statutory authority to inject their substantial experience and expertise into local governmental matters involving airport safety.

Pruitt v. Town of Eatonville, CPSGMHB Case No. 06-3-0016, FDO, at 10 (Dec. 18, 2006).[10] *See also, Thurston County v. W. Wash. Growth Mgmt. Hearings Bd.,* 164 Wn.2d 329, 341, 190 P.3d 38 (2008) ("Substantial weight is accorded to a board's interpretation of the GMA . . .") In *Pruitt,* and WSDOT Aviation Division commented on the Town's proposed development regulations, noting flaws which related to incompatible uses, and offered recommendations to correct the noted deficiencies. These comments were available to the Town Council prior to taking action on the development regulations; yet no changes were made to address the comments. Without any technical support in its record, the Town simply adopted the proposed regulations without further revision or amendment. *Id.,* at 16.

The present case was no different. Comments from FAA and WSDOT regarding additional residential housing on the Property are in the record. FAA's comments, provided in full in Section IV (Statement of the Case) herein above, identify apartment development as "an incompatible land use" to both SIA and Fairchild. AR 372-75. WSDOT

provided specific comments in a series of letters relating to compatibility issues, and encouraged Airway Heights to honor the request by Fairchild's Base Commander not to allow residential uses on the Property. AR 656-57. In addition, SIA's Airport Director outlined the Airport's compatibility concerns in a series of letters. AR 666-73.

Previous correspondence from Greater Spokane Incorporated, Washington State's designated agent for economic development in Spokane County, summarizes the foregoing concerns:

> Just as was noted by Fairchild Air Force Base in their previously delivered comments, we believe this property "will be susceptible to aircraft noise for the foreseeable future." We also concur with Spokane International Airport, who has repeatedly voiced concern about the impact this project will have on both its current and future operations. . . . The FAA, too, has provided strong language citing its opinion that this project is "incompatible land use."
>
> We have seen too many examples of where the Air Force has curtailed flying operations at other bases simply due to volume of noise complaints from the community. For that reason, encroachment of residential development around flying operations is viewed by base closure and realignment commissions as a principal factor when considering closure of a facility. . . . We believe that allowing this incompatible use to proceed will create a precedent that will significantly complicate future actions to prevent encroachment. Fairchild Air Force base and Spokane International Airport

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[10] A copy of this decision is attached in the appendix for the Court's convenience.

> are simply too important to allow them to be "boxed in." (Emphasis supplied.)

AR 376.

This Court previously underscored these same concerns:

> Findings of fact also establish that a multifamily development on the Deer Creek site would adversely impact the layout, length, and orientation of a proposed runway for SIA and will jeopardize current and future SIA operations. (Emphasis supplied.)

Deer Creek, 157 Wn. App. at 17.

All of this evidence was available to the Airway Heights City Council prior to taking action on the Ordinances; yet no changes were made to address the evidence. Without any technical support in the record, and in the face compatibility objections from all of the aviation experts, Airway Heights adopted the Ordinances without revision or amendment. After reviewing the evidence, the Board concluded there "is clear, substantial, and compelling evidence that Ordinances C-797 and C-798 allow the siting of incompatible development adjacent to a general aviation airport." AR 1764.

> The Board is left with a firm and definite conviction that a mistake has been made. Airway Heights Ordinance Nos. C-797 and C-798 are clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of the Growth Management Act.

AR 1765. The Ordinances violate RCW 36.70A.510 and RCW 36.70.547, and the trial court erred in reversing the Board's decision.

3. The Board Correctly Found that the Ordinances Preclude the Siting and/or Expansion of Essential Public Facilities.

As indicated above, Washington law restricts cities from making unilateral decisions that place the future of a region's essential public facilities in jeopardy, particularly military installations and airports. More specifically, Washington law prohibits the adoption of a comprehensive plan or development regulation that precludes expansion of an essential public facility. RCW 36.70A.200(5); *City of Des Moines v. Puget Sound Regional Council,* 98 Wn. App. 23, 988 P.2d 27 (1999) and *Concerned Citizens Against Runaway Expansion, et al. v. City of Anacortes* 01-2-0019 WWGMHB (Final Decision and Order, December 12, 2001), both of which interpret RCW 36.70A.200(5) to apply to expansions of essential public facilities.

> [A] local government plan may not . . . effectively preclude the siting or *expansion* of an [essential public facility], including its necessary support activities.

Port of Seattle v. City of Des Moines 97-3-0014 (CPSGMHB Final Decision and Order, August 13, 1997). As our Supreme Court has observed, "land use decisions affect not only the individual property owner

or developer, but also entire communities." *Erickson & Assoc. v. McLerran,* 123 Wn.2d 864, 876, 872 P.2d 1090 (1994) (emphasis supplied).

There is no disputing that both Fairchild and SIA are essential public facilities within the meaning of GMA. The parties previously stipulated to this fact:

> The parties acknowledge and agree that the Base and Spokane International Airport ("SIA") are two of the region's most essential public facilities and that the parties should cooperate to discourage development that is incompatible with either facilities' operational needs and/or its ability to carry out its current and/or future missions ("incompatible development").

AR 1121; *see also* AR 352 which repeats this stipulation.

Nevertheless, comments from Fairchild, WSDOT, and SIA, which are consistent with the Fairchild JLUS, indicate that the Ordinances authorize development that will limit the ability of both essential public facilities to adapt to future needs and missions. If the Ordinances are allowed to stand, the entire region's efforts to protect these essential public facilities will be jeopardized in violation of RCW 36.70A.200(5). The Board agreed, concluding that there is clear, substantial, and compelling evidence that the Ordinances preclude the siting of two essential public facilities by jeopardizing their future operations and expansion. AR 1768.

4. The Board Properly Invalidated the Ordinances.

The Board properly invalidated the Ordinances. RCW 36.70A.302(1) provides:

> The board may determine that part or all of a comprehensive plan or development regulations are invalid if the board:
>
> (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
>
> (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
>
> (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

RCW 36.70A.302(1).

As the Board notes at AR 1774, there is ample evidence in the record to support the Board's determination of invalidity. Specifically, the Board found that the Ordinances will substantially interfere with a number of GMA's goals. In particular, the Board found that the Ordinances authorize development that is incompatible with regional transportation priorities and will interfere with GMA's transportation goals (RCW 36.70A.020(3)). AR 1775-76. In addition, the Board found that Fairchild and SIA are essential to the economic development and growth of Eastern

Washington, and that the Ordinances authorize development that will jeopardize the long-term viability of both facilities, in violation of GMA's economic development goal (RCW 36.70A.020(5). AR 1776-77. Finally, the Board found that by authorizing high-density residential development in MIA 4, which JLUS clearly identifies as incompatible with Fairchild, Airway Heights frustrated and interfered with the fulfillment of cooperative regional planning intended to protect the operations of Fairchild and SIA, in violation of GMA's goal of coordination between jurisdiction (RCW 36.70A.020(11)). AR 1777-78. Spokane submits there is abundant evidence in the administrative record to support the Board's determination, requiring dismissal of Airway Heights' appeal.

CONCLUSION

The Superior Court erred in reversing the Board's decision. The Board's decision is articulate and well supported by substantial evidence and does not erroneously interpret or apply the law. The evidence clearly demonstrates that the Ordinances jeopardize the efforts of this entire region to protect Fairchild and SIA from encroachment by incompatible development by establishing a process that paves the way for development that is incompatible with the missions of both airports. For these reasons,

Spokane respectfully asks the Court to reverse the Superior Court's decision and reinstate the Board's decision invalidating the Ordinances.

Respectfully submitted this 8th day of April, 2015.

SPOKANE AIRPORT BOARD

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CERTIFICATE OF SERVICE

I, Rebecca Riedinger certify that on April 6th, 2015, I caused a true and correct copy of the foregoing to be delivered to the following parties via electronic transmission and printed copy via either U.S. Mail / Delivery service to the following parties:

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APPENDIX

Concerned Citizens Against Runaway Expansion, et al. v. City of Anacortes Before WWGMHB Case No. 01-2-0019

Julie McHugh, Palisades Neighborhood, Alliance of Spokane v. Spokane County & Greg and Kim Jeffreys, Before EWGMHB Case No. 05-1-0004

Port of Seattle v. City of Des Moines.,
Before CPSGMHB Case No. 97-3-0014

Stephen Pruitt and Steven Van Cleve, v. Town of Eatonville,
Before CPSGMHB Case No. 06-3-0016

BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

CONCERNED CITIZENS AGAINST RUNAWAY EXPANSION (CCARE, INC.), et al.,	)	
	)	No. 01-2-0019c
Petitioners,	)	FINAL DECISION AND ORDER
v.	)	
CITY OF ANACORTES,	)	
Respondent,	)	

The fundamental issue in this case is whether Ordinance #2557, adopted by the City of Anacortes, complies with the GMA requirements for essential public facilities (EPFs) as applied to a 10-acre parcel located on airport property owned and operated by the Port of Anacortes (Port). Pursuant to City direction, the Port applied for a comprehensive plan (CP) amendment and rezone of its 10-acre parcel from a residential zoning (R2) to a light manufacturing (LM) designation and zoning. The City ultimately decided that a 6-acre portion of the property, denominated as P #32356 (hereinafter 6-acre) was appropriate for a CP amendment and rezone to the LM category subject to a conditional use (CU) process for siting of buildings and uses within the 6 acres. The City further determined that the remaining 4-acre parcel, identified as P #106729 (hereinafter 4-acre), would remain in the R2 category.

Subsequent to the decision by the City, the Port timely filed a petition for review (PFR) challenging the failure to rezone the 4-acre parcel, and alleging noncompliance for the 6-acre parcel on the basis of the CU process and the City's failure to specify whether certain airport-related expansions were permitted uses under the LM category. A citizen's group, Concerned Citizens Against Runaway Expansion (CCARE), timely filed a petition challenging the City's rezoning of the 6-acre parcel from R2 to LM.

A hearing on the merits (HOM) was held in Anacortes on November 20, 2001. William H. Nielsen and Les Eldridge represented the Board at the hearing and Nan A. Henriksen subsequently listened

to the audiotape of the hearing.

The current Hatfield/McCoy-like feud between the City and the Port had its genesis in the 1960s when the Port approved a resolution establishing the airport and the City approved a major residential subdivision near the airport within hours of each other. Over the years, various neighbors and owners of residences in the area have contributed to the ongoing feud when expanded use of the airport became an issue. The City continued to approve major residential subdivisions on the surrounding property. As noted by the City, during that same period of time the Port was more than willing to sell surplus land adjoining Port property to developers for increased residential uses. Located in the west Anacortes area, the property is aesthetically desirable for upscale single-family residences, with water on three sides. By the time this matter came on for decision by the City of Anacortes, as noted by CCARE, the airport was surrounded by a "dense residential area."

During the time this matter was in preparation for the HOM, the parties pursued a Superior Court case which lead to an oral opinion by the Court on competing summary judgment motions. That decision issued on October 2, 2001 (Ex. 1901). Part of the decision, p. 27-30, deals with the Court's finding relating to the CU restrictions imposed in Ordinance #2557. Those findings were based upon the

preemptive nature of the Federal Government's requirements for use and operation of the airport. At the HOM and in its reply brief, the Port voluntarily withdrew those issues from this case. The Port also withdrew other issues where the Superior Court had issued rulings. Neither the City nor CCARE objected to withdrawal of those issues.

Pursuant to RCW 36.70A.320(1), Ordinance #2557 is presumed valid upon adoption.
The burden is on Petitioners to demonstrate that the action taken by the City is not in compliance with the requirements of the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), we shall find compliance unless we determine that the action by Anacortes is clearly erroneous in view of the entire record and in light of the goals and requirements of the GMA. In order to find the City's action clearly erroneous, we must be left with the firm and

definite conviction that a mistake has been made. *Department of Ecology v. PUD 1,* 121 Wn.2d 179, 201 (1993).

The basic GMA requirement for EPFs is found in RCW 36.70A.200. Subsection (1) imposes a requirement that a local government include a "process for identifying and siting" EPFs in its CP. EPFs are specifically defined in that subsection to include "airports." Subsection (5) prohibits local government authority in either a CP or DR to "preclude the siting of" EPFs. In *Des Moines v. GPSGMHB* 98 Wn. App. 23, 33 (1999) (*Des Moines*) the Court held that under this section "siting" included use, or expansion, of airport facilities for airport uses.

The Port cited to RCW 36.70A.510 providing that adoption or amendment of CPs and/or DRs that affect a "general aviation airport" are subject to RCW 36.70.547.

That statute requires that any city in which a "general aviation airport" is operated **shall** discourage siting of incompatible uses **adjacent** to such airport. Since the issue in this case relates to property that is within, rather than adjacent to, the airport those two statutes are not relevant to this case except insofar as they set forth legislative intent.

In its PFR, CCARE challenged the rezoning of the 6-acre parcel as failing to comply with RCW 36.70A.010, .020(6), and/or .020(10) and parts of the City's CP. Virtually all of CCARE's argument was premised upon the assertion that the airport had never been classified as an EPF by the City or any other appropriate governmental agency. CCARE also argued, as did the City, that much more planning within the airport property was needed prior to any expansion of airport uses or services.

We can succinctly answer CCARE's EPF argument by reading RCW 36.70A.200(1). The Legislature has specifically defined an airport as an EPF. It is not up to a local government, us, or the courts, to rule other than an airport equals an EPF.[1] CCARE has failed to carry its burden of proof that the rezone of the 6-acre parcel failed to comply with the GMA.

We turn to the issues raised by the Port. The Port contended that the failure to redesignate the 4-acre

parcel from R2 to LM zoning failed to comply with the Act. We agree in concept.

RCW 36.70A.200(5), as interpreted in the *Des Moines* case, establishes that a local government may not preclude expansion of airport-related uses. The R2 zoning on the 4-acre parcel prohibits any use of the Port property except as a buffer for surrounding residential homes. It is hard to imagine a more restrictive preclusion to airport uses than residential zoning.

The City, supported by CCARE, defended its action as necessary to protect the neighborhood residential uses, or at the very least to encourage the Port to update its 1994 Airport Master Plan. The City wanted greater specificity as to Port uses within the 4-acre site. CCARE also pointed out that other locations within Port property were zoned for airport uses and thus the Port had not complied with a GMA requirement and a City CP goal of using existing commercial and manufacturing areas before establishing new areas.

The Port responded by pointing out the economic hardship inherent in use of this other area. The Port also cited many of the Central Puget Sound Growth Management Hearings Board (CPSGMHB) cases dealing with EPFs, and specifically the SeaTac third runway issue, in support of all of the Port's contentions.

We have reviewed the CPSGMHB cases cited by the Port and find that they are all analytically supported by the requirements established by the Legislature in the GMA for EPFs. It may well be time for the Port to update its Airport Master Plan, but under the GMA we reject the City's and CCARE's contention that, under this record, the Port is **required** to do that before any further expansion of use occurs on airport property. The GMA is specific that a local government may not preclude siting or expansion of airport-related uses or facilities. Under this record, the City's action in failing to rezone the 4-acres property from an R2 designation effectively precludes airport operations and uses and therefore does not comply with the GMA.

The Port also asks that we remand this case to the City with directions for "expeditious" redesignation to an LM zone. We do not have the authority under the GMA to take such action. Rather, the Legislature clearly established that a GMHB has authority to find noncompliance and to remand that determination to a local government for action to achieve compliance with the GMA. RCW 36.70A.300(3)(b). We do not have authority to direct the City to adopt a specific LM

designation.

In our view, the City cannot comply with the Act by designating the area as a residential and/or buffer zone. Nonetheless, the City has a myriad of options that may or may not include a LM designation. The City is also aware that its authority over the Port property is constrained by the Superior Court ruling noted in Ex. 1901.

Both the Superior Court ruling and our decision above make it unnecessary for us to address the issues of the State Environmental Policy Act (SEPA) compliance and the issue of whether the City is required to include airport hangars as part of a permitted use within the LM zone. We remind the City, however, that at least with regard to this record, hangars are airport-related uses and the City's authority is constrained by RCW 36.70A.200(5).

The SEPA issues presented to us are not properly before us to address under the facts of this case. The Port assumed lead agency status that ultimately lead to a determination of non-significance. At the time of adopting Ordinance #2557, the City imposed some further SEPA mitigating requirements. Some of those additional requirements were struck down by the Superior Court. If there are others yet remaining that the Port finds objectionable, we presume that the City will appropriately address them during the remand period. We do note that the City never attempted to acquire lead agency status for any SEPA determinations as to the Port's request for a CP amendment and rezone.

ORDER

We find that the City has complied with the Act in its rezone of the 6-acre parcel. The City has failed to comply with the Act by failing to adopt a different zone than residential for the 4-acre piece of property and also by imposing requirements that preclude airport or airport-related uses on the 10 acres in question here.

In order to comply with the Act, the City must adopt an appropriate use designation for the 4-acre parcel and an appropriate process that does not preclude airport uses, all within 120 days of the date of this order.

Findings of Fact pursuant to RCW 36.70A.270(6) are adopted and attached as Appendix I and

incorporated herein by reference.

This is a Final Order under RCW 36.70A.300(5) for purposes of appeal.

Pursuant to WAC 242-02-832(1), a motion for reconsideration may be filed within ten days of issuance of this final decision.

So ORDERED this 12th day of December, 2001.

WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____

William H. Nielsen
Board Member

_____

Les Eldridge
Board Member

_____

Nan A. Henriksen
Board Member

Appendix I
Findings of Fact
Pursuant to RCW 36.70A.270(6)

1. Pursuant to RCW 36.70A.200(1), the Anacortes airport is an EPF.

2. CCARE did not carry its burden of showing the 6-acre rezone failed to comply with the GMA under the clearly erroneous standard.

3. A residential zone within airport property does not comply with RCW 36.70A.200(5).

4. Anacortes does not have the authority to require a 4-acre buffer or an update to the Airport Master Plan prior to airport-related expansion because of RCW 36.70A.200(5).

5. A remand may not include GMHB direction to adopt a specific zone.

6. Anacortes has failed to comply with the GMA as to the zoning designation of the 4-acre parcel.

7. Anacortes has failed to comply with the GMA by imposing restrictions on airport-related uses on the 10 acres.

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[1] We are aware that some commentators believe the Supreme Court GMA decisions over the last four years have failed to follow **any** legislative direction embodied in the GMA. We do not necessarily agree with that position.

State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

JULIA McHUGH, PALISADES NEIGHBORHOOD, and NEIGHBORHOOD ALLIANCE OF SPOKANE, Petitioner, v. SPOKANE COUNTY, Respondent, GREG and KIM JEFFREYS, GJ L.L.C., and G.J. GENERAL CONTRATORS, Intervenors.	Case No. 05-1-0004 FINAL DECISION AND ORDER

I. SYNOPSIS

On April 25, 2005, Spokane County adopted Resolution No. 2005-0365, which amended the Spokane County Comprehensive Plan for 2004. The Petitioners object particularly to Amendment 04-CPA-01, which changed the designation of approximately 80 acres of land abutting the West Plains Urban Growth Area (UGA) from existing Rural Traditional (RT) to Low Density Residential (LDR), and expanded the Urban Growth Boundary (UGA) specifically to encompass this parcel.

The Hearings Board found the County clearly erroneous on three Issues:

First, enlargement of its UGA requires more than an attractive proposal from a developer to add urban densities to a certain part of the County. The Growth Management Act (GMA) requires the UGA to be sized sufficient to permit the urban growth that is

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projected to occur in the County for the succeeding twenty-year period. RCW36.70A.110(2). GMA cases have found that such a requirement limits the size of the UGA and requires a showing of work demonstrating how they arrived at such the size of the UGA or its expansion. The County has only the proponent's arguments that an expansion in this area is needed. This is not enough.

Second, the County failed to formally consult with airport owners and managers, private airport operators, general aviation pilots, ports, and the Aviation Division of the Department of Transportation as is required by the GMA.

Finally, the County's Capital Facilities Plan (CFP) covers only 2000-2006 and does not include the area which is the subject of this change. The Board finds the Petitioners have carried their burden of proof in Legal Issues #1, #4, #5, #6, and #8, and have shown the action taken by the County in adopting Resolution 2005-0365 is clearly erroneous. Spokane County failed to adequately plan for capital facilities, utilities and transportation facilities for the UGA expansion and, in addition, failed to follow the OFM population allocation guidelines when determining the final size of the UGA expansion. The County further failed to show their work as to how they arrived at the need for enlarging the UGA to accommodate the population given to them by the OFM estimates.

II. PROCEDURAL HISTORY

On June 24, 2005, JULIA McHUGH, PALISADES NEIGHBORHOOD, and NEIGHBORHOOD ALLIANCE OF SPOKANE, by and through their representatives, Julia McHugh, Robbi Castleberry, and Bonnie Mager, filed a Petition for Review.

On July 18, 2005, the Board received Greg and Kim Jeffreys, GJ L.L.C. and G.J. General Contractors, Inc.'s Motion and Memorandum in Support of Motion to Intervene.

On July 22, 2005, the Board heard the Motion to Intervene before the Prehearing conference. The Respondent did not object to the intervention. The Petitioner objected, contending Greg and Kim Jeffreys, GJ L.L.C., and G.J. General Contractors, should not be allowed, as they did not own the property in the area. This being deemed by the Board as

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not a requirement, allowed, the intervention, there being not evidence that it will disrupt the management of the case.

On July 22, 2005, the Board held the Prehearing conference. Present were, Dennis Dellwo, Presiding Officer, and Board Members Judy Wall and John Roskelley. Present for Petitioners were Julia McHugh, Robbi Castleberry, and Bonnie Mager. Present for Respondent was Martin Rollins. Present for Intervenors was Stacy Bjordahl.

On July 26, 2005, the Board issued its Prehearing Order.

On August 12, 2005, the Board received Petitioner's Motions listing nine motions.

On August 12, 2005, the Board received Intervenors' Motion and Memorandum in Support of Motion for Partial Dismissal of Issues.

On August 12, 2005, the Board received Respondent Spokane County's Motion to Join Intervenors' Motion for Partial Dismissal of Issues.

On August 26, 2005, the Board received Respondent and Intervenors' Response to Petitioners' Motions.

On September 2, 2005, the Board received Petitioners' Request for Expedited Review and Rebuttal.

On September 9, 2005, the Board held a telephonic Motion Hearing. Present were, Dennis Dellwo, Presiding Officer, and Board Members Judy Wall and John Roskelley. Present for Petitioners were Julia McHugh and Bonnie Mager. Present for Respondent was Martin Rollins. Present for Intervenors was Stacy Bjordahl.

On September 16, 2005, the Board issued its Order on Motions.

On September 16, 2005, the Board issued its Amended Prehearing Order.

On October 7, 2005, the Board received Petitioners' Hearing on the Merits Brief.

On October 27, 2005, the Board received Respondents' Hearing on the Merits Brief.

On October 28, 2005, the Board received Intervenors' Hearing on the Merits Brief.

On November 4, 2005, the Board received Petitioners' Hearing on the Merits Reply Brief.

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On November 16, 2005, the Board held the Hearing on the Merits. Present were, Dennis Dellwo, Presiding Officer, and Board Members Judy Wall and John Roskelley. Present for Petitioners were Julia McHugh, Robbi Castleberry, and Bonnie Mager. Present for Respondent was Martin Rollins. Present for Intervenors was Stacy Bjordahl.

III. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF REVIEW

Comprehensive plans and development regulations (and amendments thereto) adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon adoption by the local government. RCW 36.70A.320. The burden is on the Petitioners to demonstrate that any action taken by the respondent jurisdiction is not in compliance with the Act.

The Hearings Board will grant deference to counties and cities in how they plan under Growth Management Act (GMA). RCW 36.70A.3201. But, as the Court has stated, "local discretion is bounded, however, by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearings Board,* 142 Wn.2d 543, 561, 14 P.2d 133 (2000). It has been further recognized that "[c]onsistent with *King County,* and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent with the requirements and goals of the GMA." *Thurston County v. Cooper Point Association,* 108 Wn. App. 429, 444, 31 P.3d 28 (2001).

Pursuant to RCW 36.70A.320(3) we "shall find compliance unless [we] determine that the action by [Jefferson County] is clearly erroneous in view of the entire record before the Board and in light of the goals and requirements of [the GMA]." In order to find the County's action clearly erroneous, we must be "left with the firm and definite conviction that a mistake has been made." *Department of Ecology v. Public Utility Dist. 1,* 121 Wn.2d 179, 201, 849 P.2d 646 (1993).

The Hearings Board has jurisdiction over the subject matter of the Petition for Review. RCW 36.70A.280(1)(a).

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IV. ISSUES AND DISCUSSION

Issue No. 1:

Has Spokane County violated the fundamental planning goals of RCW 36.70A.020(1)(2)(5)(10) by approval of Comprehensive Plan amendment 04-CPA-1 to convert 80 acres of Rural Traditional farm land, one dwelling per 10 acres, into urban residential development supporting a minimum of 320 single family residences, with a maximum allowable density of 480 dwelling units, as listed on the application, and in placing this development site within the West Plains Urban Growth Area – Joint Planning Area without adequate public facilities and services. Further, did Spokane County disregard its Comprehensive Plan Goals and Policies to protect the rural character and lifestyles of its rural Palisades residents by approving conversion of this site to urban and including it within the West Plains Urban Growth Area – Joint Planning Area (Goal RL.1 UL.18, Policies RL.1.1 UL.181 – UL.18.4)?

The Parties' Position:

Petitioners:

The Petitioners state that on April 25, 2005, Spokane County adopted Resolution No. 2005-0365, which amended the Spokane County Comprehensive Plan for 2004. The Petitioners object to a portion of that Resolution, Amendment 04-CPA-01, which changed the designation of approximately 80 acres of land abutting the West Plains Urban Growth Area (UGA), from existing Rural Traditional (RT) to Low Density Residential (LDR), and expanded the Urban Growth Boundary (UGA) specifically to encompass this parcel.

The Petitioners contend that RCW 36.70A.110(1) prohibits urban growth outside urban growth areas. They believe the County's actions make it possible to have urban growth where no public facilities or services exist. It hastens the inappropriate conversion of undeveloped land into sprawling, low-density development.

Further, the Petitioners contend that GMA goals 2, 5, and 10 discourage sprawl unequivocally. They contend the County Commissioners (BOCC) for Spokane ignored these goals and achieve the absolute opposite. They contend that the introduction of 320 to 480 homes into any rural neighborhood is devastation to all things "rural". These are contrary to Spokane County's Goals RL.1 and UL.18 which require a distinct boundary between urban

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and rural land uses and provide adequate land to accommodate anticipated growth. The County is claimed to have placed urban density development in the middle of rural land.

The reply brief of the Petitioners contends that the actions of the County have allowed a sixty-fold increase in dwelling units on the property. They state that, if the UGA had not been moved, the Rural Traditional zoning would still be intact, one dwelling unit per 10-acres. They further point out that all existing residences surrounding the property and most of the Palisades Neighborhood, are on individual wells and septic systems – no sewer or water services for such development exist at the property.

The Petitioners contend that Spokane County has not updated its Capital Facilities Plan since 2000; that the subject property is not within the CFP area; and the County action makes possible urban development where no public facilities or services exist. The Petitioners state that the County's action places urban density development in the middle of rural land; that this is spot zoning and an extension of the UGA specifically to accommodate such.

Respondent Spokane County:

The County believes the Petitioners arguments and analysis are at best insufficient for the Board to reverse the County's actions, and at worst, an attempt to shift the burden of proof to the County by providing virtually no argument and only partial as well as insufficient citation to the record. The County contends that the Petitioners provide no analysis or citation to the record to support their conclusions. The County believes that the Petitioners rely on bald assertions. They say that the Petitioners do not show in the record where no public facilities or services exist, much less identify which public facilities or services are lacking or how this amendment results in inappropriate conversion to sprawl.

The County contends that they do not permit urban growth outside the UGA but changed the UGA boundary and thus is not in violation of that provision of the GMA. Further, they claim the record shows that public services either are or will be available when needed. The County's Plan and its amendment does not require concurrency until the time of development. (SCC 13.650.104 and .112).

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The County points out that the SEPA checklist from the applicant addresses transportation and public services issues. The City of Spokane has indicated that water and sewer are available and that transportation impacts should be studied further as well as coordinated with the DOT. The County admitted that additional traffic studies would be required upon application for specific projects. Spokane County sewer and water concurrency requirements would be met at the time of development.

The County further contends that the Petitioners provided little analysis to support their claims that these changes encourage sprawl and discourage economic development and environmental protection. This area is not now considered rural lands and so the arguments claiming such densities would violate the nature of rural areas is baseless.

The County finally contends that the GMA does not prohibit the annual amendment of the UGA boundary rather than limited to a five-year review. This amendment is claimed to provide much needed land to accommodate growth in an area where adequate land for housing is sorely lacking, especially in close proximity to jobs.

Board Analysis:

The GMA requires urban growth to be located within urban growth areas. Urban growth is permitted within the County's UGA. Under the GMA, if land is properly included within a UGA, urban growth may be allowed upon such lands. Here, the Petitioners are contending that the County is placing urban growth outside UGAs. This, of course, is not the case. The County has included these lands within its UGA and, if such change were compliant, any growth occurring thereon would be within such UGA.

The Petitioners further contend that the County disregarded the Goals and Policies of its Comprehensive Plan to protect rural character and lifestyles of the rural Palisades residents. Here again the Petitioners are arguing for the protection of Rural Character while the land is expected to now be within the newly enlarged UGA. These arguments of the Petitioners are objecting to the nature of the development when and if it is built upon the land within the UGA.

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In their other arguments on this issue, the Petitioners object to the enlargement of the UGA to include the subject land. A key argument here contends that there was no Capital Facilities Plan update prior to the enlargement of the UGA. As this Board has held before, (*Roberts & Taylor v. Benton County* EWGMHB, 05-1-0003, FDO 10/19/05) the amendment of the Comprehensive Plan to expand the UGA requires a new review of the Capital Facilities Plan (CFP) so the County would see that services are available for the area added to the UGA and how they would be paid for. This was not done here. The Record shows that Spokane County prepared a 6 year CFP approximately 6 years ago and it does not cover the area that is the subject of this enlargement of the UGA. One of the primary tenants in the GMA is RCW36.70A.020-Planning Goals. Under that statute, subsection (12) Public facilities and services, it provides:

> "Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards."

A county cannot fulfill the requirements of Planning Goal #12 without a futuristic look at its community using a detailed capital facilities plan element, among the other elements of its comprehensive plan. A county must have a forecast of future capital facilities needs. A new CFP needs to make the corresponding population revisions, if they exist, to the CFP whose present analytical foundations are derived from the old population allocations. Then there must be an analysis of the adequacy of capital facilities in the area.

The GMA, under RCW 36.70A.070(3), requires a capital facilities plan element in the City or County's Comprehensive Plan. The Legislature recognized that planning is forward looking, so mandated at a minimum a six-year Capital Facilities Element (CFE), to ensure financing of projected capital facilities and sources of public money were clearly identified. They also required a forecast of future needs for such capital facilities. The County has a six-year CFP, for the period of 2000-2006.

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The reference in the record, that the City of Spokane will be able to provide services to the area, does not eliminate the need to develop a CFP that determines what is needed, how much the infrastructure is going to cost and a financial mechanism to fund it. For the County to know if they can provide services at the time of development without the reduction of services to others they need to plan ahead and this has not been done for this expansion of the UGA.

In *Bremerton, et al., v. Kitsap County*, CPSGMHB 95-3-0039c (FDO, Oct. 6, 1995), the Central Board determined that,

> "[Although] the GMA does not designate a specific six-year period for Capital Facilities Element planning, it is illogical, and contrary to one of the bedrock purposes of the GMA – planning to manage future growth – to suggest that the Capital Facilities Element's six-year financing plan can be, in whole or in part, an historical report of capital facility financing for prior years."

The minimum six-year CFP is a living document. It is supposed to help cities and counties understand their current and future financial capabilities as they grow, how to pay for that growth and, in some respects, how to grow. They may find it is more cost-effective to increase density within their present UGA to absorb their population allocation, rather than run expensive utilities into expanding territory. An up-to-date CFE is a tool that can do this.

Spokane County has not updated its plans in anticipation of adopting Resolution: 2005-0365. The County believes that the services will be provided at the time a specific development is proposed. That is certainly when they can be provided, but planning for those services has to take place much earlier. RCW 36.70A.070(3)(b).

> "The purpose of the capital facilities element of a comprehensive plan is to see what is available, determine what is going to be needed, figure out what that will cost, and determine how the expense will be paid." *Achen v. Clark County* 95-1-0067 (FDO, Sept. 20, 1995).

Under *Bremerton/Port Gamble v. Kitsap County*, CPSGMHB Case No. 95-3-0039c, Order Dismissing Port Gamble at p. 41 (Sept. 8, 1997), the Central Board determined,

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> "If a county designates a UGA that is to be served by a provider (other than the county), the county should at least cite, reference or otherwise indicate where locational and financing information can be found that supports the UGA designations and GMA duty to ensure that adequate public facilities will be available within the area during the twenty-year planning period."

The County did not update its CFE (RCW 36.70A.070(3), its utilities element (RCW 36.70A.070(4), or its transportation element (36.70A.070(6) prior to adopting Resolution 2005-0365. Considering the impacts this amendment will have to the citizens of Spokane County, an update of these comprehensive plan elements was essential to good planning required by the GMA.

Conclusions:

The Board finds the Petitioners have carried their burden of proof and that the County's actions are clearly erroneous. The County failed to adequately plan for capital facilities, utilities and transportation within the land adopted by Resolution 05-057 and thus did not comply with RCW 36.70A.070(3), (4) & (6).

Issue No. 2:

Did Spokane County abandon its own Statement of Principles within its Countywide Planning Policies (as required by RCW 36.70A.210), for "Urban and Rural Character" by not protecting the rural character and avoiding the need for extensive government services and facilities in the Palisades rural area by approving 04-CPA-1. Further, did Spokane County violate its Countywide Planning Policy Topic 1(5) by not initiating an amendment to the Urban Growth Area (UGA) and Joint Planning Area (JPA) boundary to the Spokane County Steering Committee of Elected Officials for its review, analysis, consideration of the merits of this UGA request, and consideration of public participation through a public hearing on the need to amend the West Plains UGA/JPA?

The Parties' Position:

Petitioners:

The Petitioners believe that while meeting the letter of the GMA by establishing countywide planning policies, the County ignores the intent by approving this amendment. The County is claimed to be dismantling the neighborhood's rural character. They contend

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the development will require numerous urban infrastructure services in a traditionally rural neighborhood.

The Petitioners further believe the County ignored RCW 36.70A.210(3)(b)(f)(h). They believe that there is no record of the County reaching out to or providing opportunity for the Spokane County Steering Committee of Elected Officials to consider changing the UGA boundary for this Comprehensive Plan amendment, or any analysis of the fiscal impact to its planning partners.

The Petitioners' reply brief argues that the County ignores the Countywide Planning Policies, (CPP) and contend the County violated its CPP Topic 1(5) by not sending this amendment of the UGA and JPA boundary to the Spokane County Steering Committee of Elected Officials for its review, analysis, consideration of the merits of this request and consideration of public participation through a public hearing. The Petitioners contend that there is nothing in the record reflecting the involvement of the Steering Committee.

Respondent Spokane County

The County contends that Policy Topic 2, which states that UGA proposals outside a city must be based on the jurisdiction's ability to provide urban governmental services at a minimum level of services, is addressed in its response to Issue 1. Services are available or will be available for any development, which will occur in the added area.

Public Topic 8 is further addressed in issue 1. However, the Countywide Planning Polices requirement for outreach to the Spokane County Steering Committee of Elected Officials (Steering committee) needs to be addressed. The County claims the Petitioners' argument is misplaced.

Policy 2 was amended after the subject application was received and does not apply. Policies 5 and 6, now numbered 4 and 5, were amended after the application and require the revisions to the existing UGA must go through the Steering Committee process. This section was not in effect at the time of the application and was not required to be followed.

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The County further contends that, while it must review and evaluate the UGA boundaries every five years, there is nothing in the language to suggest that it may not be amended annually like any other Comprehensive Plan amendment.

Finally, the County contends that the Petitioners' claim that there is no analysis of the fiscal impacts to the County's planning partners is false. They state that the claim does not reflect any requirement of the GMA, any CWPP or of any of the Goals and policies of the Comprehensive Plan. They contend the statement is meaningless. They contend the County did have interjurisdictional coordination.

Board Analysis:

The Petitioners have not carried their burden of proof on this issue. If the County amendment were found in compliance, this land would be within the UGA and would be allowed to have urban growth.

While it is unclear, the Board need not find the County out of compliance on this issue for the County's failure to provide an opportunity for the Spokane County Steering Committee of Elected Officials to consider changing the UGA boundary by this amendment. The CPP requirement for submittal for review to the Steering Committee came into effect after the application was filed. The fact that when the application was received, the Countywide Planning Policy requiring submittal to the Steering Committee was not in affect, does not necessarily mean that the old policy prevails throughout the consideration. This is a GMA amendment to the UGA. Whether policies existing at the time an application were made for a Plan change remain in effect throughout the consideration of such an amendment is not clear and we need not decide this issue at this time. It is hoped that upon remand, the County will do as the GMA requires in RCW 36.70A.100 and 210 and involve the representatives of the jurisdictions within the County and the established Steering Committee.

Conclusion:

The Hearings Board need not determine the present effect of the Countywide Planning Policy requiring submission of such an amendment to the Steering Committee. The

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County has been found out of compliance in other areas. It is, however, important that the members represented in the Steering Committee of Elected Officials be included in the consideration of changes in a UGA border. The County is not found out of compliance on this issue.

Issue No. 3:

Has Spokane County violated RCW 36.70A.100 by approving conversion of this rural land to urban land, by altering the West Plains UGA-JPA to include this parcel only, and not coordinating this with the City of Spokane, the City of Airway Heights, Spokane International Airport, Fairchild Air Force Base, or other urban service providers in this area, as evidenced by agency letters and a SEPA appeal by the City of Spokane, contained within the staff report, discouraging approval of this amendment?

The Parties' Position:

Petitioners:

The Petitioners contend there is no record of County outreach or coordination with any other jurisdiction with which the County has "common boarders or related regional issues" regarding 04-CPA-1. The SEPA appeal by the City of Spokane was rejected by the County's Hearing Examiner. Further the Petitioners contend that the County failed to consider the objections of the representatives of the Fairchild Air Force Base, a Federal facility.

Respondent: Spokane County

The County contends that it has engaged in intergovernmental coordination and consistency with other comprehensive plans pursuant to RCW 36.70A100. Twenty-five agencies were notified of the amendment and were requested to provide comments. Many agencies provided comments to the County. Ample notice was given to surrounding property owners and members of the public in general.

Board Analysis:

RCW 36.70A.100 requires the coordination of comprehensive plans and their amendments with the plans adopted by other counties and cities that share common borders. Here, the County shows that it has contacted 25 agencies and the surrounding

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property owners and interested public. The Petitioners have not carried their burden of showing that the County has, in fact, failed to comply with RCW36.70A.100. Mere statements of their failure to coordinate with other jurisdictions are not enough.

The County did not comply with RCW 36.70A.530, which requires the County to protect the land surrounding our military installations from incompatible development. This statute also requires the County to notify the commander of the military installation of the County's intent to amend its Comprehensive Plan or development regulations to address lands adjacent to military installations to ensure those lands are protected from incompatible development. While the statute provides that amendments adopted under that section shall be adopted concurrent with the scheduled updates provided in RCW 36.70A.130, the statute could be interpreted still as requiring counties to recognize the State of Washington's priority to protect the land surrounding our military installations from incompatible development. The language specifies that amendments to a plan or regulations should not allow development in the vicinity of a military installation which are incompatible with the installation's ability to carry out its mission requirements. The representative of the military base objected to the location of the new urban development, but this did not change the County's action.

While we are surprised the County Commissioners ignored the legislative intent and the priority of the State, this Board need not determine if the legislation could be interpreted as a current requirement of the GMA. This is true because we have otherwise found the actions of the County out of compliance. However, we would recommend that the County honor the priority voiced by the Legislature and consider the objections of the representatives of Fairchild Air Force Base.

Conclusion:

The Board does not find that the County is out of compliance in its failure to consult with local governments and its failure to consult with military base representatives and limit development incompatible with the installations' ability to carry out its mission requirements. The Board does not need to determine whether certain provisions of RCW

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36.70A.530 need be implemented at this time. The Resolution is remanded for other reasons.

Issue No. 4:

Did Spokane County violate RCW 36.70A.110(1)(2)(3)(4) and RCW 36.70A.130(1)(3) by approving urban growth in a distinctly rural character neighborhood, by failing to show their work with a State of Washington Office of Financial Management population projection or by demonstrating support through a land quantity analysis report consistent with the adopted Steering Committee land quantity methodology, to determine the appropriate amount and location of additional land to add to County UGAs or JPAs, as established in the County Comprehensive Plan, Urban Reserve Areas (Policies RL.1.11 RL.1.12 RL.13(a)-(e), Goal CF.5), enunciating analysis of capacity within it's adopted Urban Reserve areas prior to approving urban development in long-standing rural areas; by approving urban growth without provision for greenbelt and open space areas; by not coordinating this work with other jurisdictions and agencies?

The Parties' Position:

Petitioners:

The Petitioners contend that the applicant submitted a population allocation statement with the Comprehensive Plan amendment applications without a land quantity analysis consistent with the methodology adopted by the Steering Committee of Elected Officials, which determined the amount of vacant and partially used land to accommodate the populations assigned to the West Plains UGA/JPA when adopted in 2001. The Petitioners contend there are no changes in the OFM projection for Spokane County's 20-year planning horizon. The Petitioners further contend that the County did not show their work through an updated land quantity analysis which would show the current inventory of vacant and partially used land, along with the recent rate of land consumption and population growth, to justify the need to include additional Low Density Residential land in the West Plains UGA/JPA.

The Petitioners also point out that there are no provisions for greenbelt or open space within the amendment application approved by the BOCC. There was also no letter of agreement to provide infrastructure utilities or services to this project at the time of approval.

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The Petitioners cited *Port Townsend v. Jefferson County*, 94-2-0006 (FDO) 8-10-94) where the County was found out of compliance with the GMA for inappropriately extending an urban growth boundary, without first conducting an analysis of, and having available for elected officials and members of the public, information on land capacity, fiscal impacts and Capital Facilities Plans. The Petitioners contend that there is no evidence in the file or the Staff report on 04-CPA-1 that could be construed as a land quantity analysis, or an assessment or citation of any OFM population projections. The Petitioners say that the "Land Quantity & Population Allocation" cited by the County has no date and was not referred to in the Staff Report or in public deliberations on the amendment.

Further the Petitioners fault the inadequate population allocation statement submitted with the amendment application. They contend this is inadequate and does not justify the need to enlarge the UGA.

Respondent Spokane County:

The County contends that the Petitioners bear the burden of proof in showing the County did not comply with the GMA. They claim the Petitioners continue tossing out bald assertions without any arguments or reference to the record to support their position. However, the County cites that the applicants supplied additional data and gave additional justification for the increased need for housing in the West Plains area. The County further states that there is no GMA requirement or CWPP requirement that the individual property owner must adopt the exact methodology of the Steering Committee's land quantity analysis when proposing an addition to the UGA. The County was satisfied with the analysis of the applicant. The County thought that the analysis was sufficient and to require more would be difficult burden.

The claimed lack of a greenbelt or open spaces is claimed to be unsupported. The County contends that the Petitioners gave no rationale why the addition of this land to the UGA will not have greenbelt or open space or whether any particular level of service will be decreased.

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The County does not understand the assertion that the Petitioners contend that there is no agreement to provide infrastructure or service to the project. There is no analysis by the Petitioners and it is difficult to respond. Services are available and this was addressed in issue 1.

Board Analysis:

Spokane County is required to plan under RCW 36.70.040. As such, RCW 36.70A.110 requires the County to designate an Urban Growth Area or Areas. Under RCW 36.70A.110(2), the County must "include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period." The projected growth is "based upon the growth management population projection made for the county by the Office of Financial Management" (OFM). "The Office of Financial Management projection places a cap on the amount of land a county may allocate to UGAs" [*Diehl v. Mason County*, 94 Wn. App. 645, 654, 972 P.2d 543 (1999)].

36.70A.110 provides in relevant part:

> (1) Each county that is required or chooses to plan under RCW 36.70A.040 shall designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature. Each city that is located in such a county shall be included within an urban growth area. An urban growth area may include more than a single city. An urban growth area may include territory that is located outside of a city only if such territory already is characterized by urban growth whether or not the urban growth area includes a city, or is adjacent to territory already characterized by urban growth, or is a designated new fully contained community as defined by RCW 36.70A.350.
>
> (2) Based upon the growth management population projection made for the county by the office of financial management, the county and each city within the county shall include areas and densities sufficient to permit the urban growth that is projected to occur in the county or city for the succeeding twenty-year period, except for those urban growth areas contained totally within a national historical reserve. Each urban growth area shall permit urban densities and shall include greenbelt and open space areas. In the case of urban growth areas contained totally within a national historical reserve, the city may restrict densities, intensities, and forms of urban growth as

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> determined to be necessary and appropriate to protect the physical, cultural, or historic integrity of the reserve. An urban growth area determination may include a reasonable land market supply factor and shall permit a range of urban densities and uses. In determining this market factor, cities and counties may consider local circumstances. Cities and counties have discretion in their comprehensive plans to make many choices about accommodating growth.
>
> . . .
>
> (3) Urban growth should be located first in areas already characterized by urban growth that have adequate existing public facility and service capacities to serve such development, second in areas already characterized by urban growth that will be served adequately by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources, and third in the remaining portions of the urban growth areas. Urban growth may also be located in designated new fully contained communities as defined by RCW 36.70A.350.
>
> (6) Each county shall include designations of urban growth areas in its comprehensive plan.
>
> . . .
>
> 36.70A.210 provides in relevant part:
>
> (1) The legislature recognizes that counties are regional governments within their boundaries, and cities are primary providers of urban governmental services within urban growth areas. For the purposes of this section, a "county-wide planning policy" is a written policy statement or statements used solely for establishing a countywide framework from which county and city comprehensive plans are developed and adopted pursuant to this chapter. This framework shall ensure that city and county comprehensive plans are consistent as required in RCW 36.70A.100.
>
> Nothing in this section shall be construed to alter the land-use powers of cities.

The sizing requirements and locational criteria in RCW 36.70A.110 apply to UGA expansion as well as to the initial UGA designation. (*Bremerton v. Kitsap County,* CPSGMHB, 04-3-0009c, FDO August 9, 2004). RCW 36.70A.110(1) specifically contemplates that UGA boundaries may expand over time to allow for additional urban development, and it

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specifies the locational criteria that limit that expansion. A UGA may include an area not in a city only if that area already is characterized by urban growth, is adjacent to an area characterized by urban growth, or is a designated fully-contained community. *See Ass'n of Rural Residents v. Kitsap County*, CPSGMHB Case No. 93-3-0010, Final Decision and Order, (June 3, 1994), at 48.

A UGA must provide for sufficient area and densities to accommodate the urban growth that is projected for the succeeding 20-year period. RCW 36.70A.110(2). This subsection specifically expects that UGA boundaries may expand over time as necessary to meet population projections, imposing another limitation on their expansion. Counties must review, and if necessary, revise their UGAs at least every ten years to accommodate urban growth projected for the succeeding 20 years. RCW 36.70A.130(3). A countywide land capacity analysis must accompany these statutorily mandated periodic revisions of UGAs. *Master Builders Ass'n v. Snohomish County*, CPSGMHB Case No. 01-3-016, Final Decision and Order, (Dec. 13, 2001), at 9.

An expansion of a UGA is essentially a redesignation. Such expansion must be consistent with the requirements of RCW 36.70A.110. Changes in the size of UGAs must be supported by land use capacity analysis and the County must "show its work:" "If UGAs are altered and challenged...this Board requires an accounting to support the alteration." *Id, at 12*. "The Board has been clear that Counties must show their work when *altering* UGA boundaries." *Id.*, at 22 (emphasis in original). *See: Kitsap Citizens, et al. v. Kitsap County* ***(Kitsap Citizens)***, CPSGMHB Case No. 00-3- 0019c, Final Decision and Order, (May 29, 2001), at 12-16; and *Hensley (IV) v. Snohomish County*, CPSGMHB Case No. 01-3-0004c, Final Decision and Order, (Aug. 15, 2001), at 29-34.

When UGA expansions are made, the record must provide support for the actions the jurisdiction has taken; otherwise the actions may have been determined to have been taken in error – i.e., clearly erroneous. Accordingly, counties must "show their work" when a UGA is expanded. *Kitsap Citizens*, FDO, *supra* at 12-16. To find that the record does not support a County's action, does not amount to "burden shifting." It is also extremely important, in

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managing growth, for the public to understand the basis for legislative policy decisions and how they relate to the jurisdiction's goals and policies as articulated in its adopted plans and regulations. Even with the requirement that the County show its work, the burden of proof remains with Petitioners.

The land capacity analysis required in RCW 36.70A.110(1) and (2) is a vital component of the work that must be shown. *Director of the State Department of Community, Trade and Economic Development v. Snohomish County,* ***(CTED I)***, CPSGMHB Case No. 03-3-0017, Final Decision and Order, (Mar. 8, 2004), at 20-22.

The record before the Hearings Board clearly shows that the County did not perform any land quantity analysis. Resolution No. 2005-0365 makes no mention of an analysis or review of land quantity in its findings or decision. The County also conceded in the Hearing on the Merits that the County did no land quantity review. The developers/Intervenors supplied the only analysis alleging a need for additional land within the UGA for Spokane. This report was included in the Record without any verification of the claims contained therein. This is not enough.

The County did nothing to verify whether or not the present UGA is sufficient for the existing or future population growth since it designated its original UGAs. The records reflect only the unverified contentions of the developer that additional lands are needed. The County did not show their work and in fact does not claim to have done anything itself to ascertain the need to expand the County's UGA.

Conclusion:

The Petitioners have carried their burden of proof and have shown that the actions of the County are clearly erroneous in its failure to perform a population and land quantity analysis showing that an expansion of the UGA is needed. The record clearly reflects that the County did not show its work, if any was performed.

Issue No. 5:

Is the County out of compliance with RCW 36.70A.070(1)(3) by not providing for protection of quality of domestic wells in the Palisades Neighborhood; by not updating its

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Capital Facilities Plan and Capital Facilities Plan Element (Chapter 7) of its Comprehensive Plan, nor demonstrating the ability to provide the development approved in 04-CPA-1 with adequate capacities for the requisite urban services consistent with adopted Levels of Services in the Countywide Planning Policies, along with a financial plan that clearly provides storm and sanitary sewer systems, domestic water systems, roadway upgrade and maintenance services, fire and police protection services, public transit service, library, school, and other public utilities associated with urban areas and normally not associated with rural areas as described in RCW 36.70A.030(19) and stated in the Spokane County Comprehensive Plan (Goal UL.7 CF.3, Policies UL.7.1 UL.7.12)?

The Parties' Position:

Petitioners:

The Petitioners contend that the subject land is assigned a "High Susceptibility" rating as part of the West Plains Critical Aquifer Recharge Area. They point out that the County Storm Water Management Plan indicated "high groundwater levels, shallow depth to bedrock and low permeability soils... not conductive to on-site infiltration of storm water and can cause flooding and failed drainage facilities." The Petitioners contend that the Comprehensive Plan policy RL1.13A provides that sensitive environmental features should not be included in Urban Reserve Areas outside Urban growth Areas.

The Petitioners contend that 280 to 480 homes and septic systems will endanger all wells down gradient to the site by septic seepage and cumulative storm water runoff, which is contrary to RCW 36.70A.172. The vast majority of the homes in this area draw their drinking water from the Grand Rounde-Wanapum Aquifers.

The County has not updated its County Capital Facilities Plan since the 2000 draft and there was nothing on file as to the provision of services and financing of said services for the development, including storm and sanitary sewer systems, domestic water systems, roadway upgrade and maintenance services, fire and police protection, etc.

In their reply brief, the Petitioners reemphasize their contention that the source of drinking water in the area is vital and the property is in the "High" Susceptibility area and there were no geotechnical reports or indication of sewer and storm water runoff disposal methods available from the file or County staff at the time of this appeal.

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Intervenor: Greg and Kim Jeffreys, G.J.L.L.C and G.J. General Contractors

The Intervenors contend that the Petitioners fail to offer any agreement or evidence related to the High Susceptibility rating and fail to meet the burden of proof.

Further, the property is not in an Urban Reserve Area and the Petitioners are wrong to assume that the project will use septic systems. The property is to be connected to public sewer when developed. Therefore the claimed damage is unsupported.

The Intervenors further contend that there is no development proposal before the Hearings Board and the Board has no jurisdiction or authority to review a specific development proposal. The Intervenors contend that public services either are or will be available when needed. They contend that the GMA does not require public facilities and services to be available at the time of application. Impact and available services will be reviewed at the time a specific development project is proposed for the property.

Board Analysis:

The Board has already addressed the Capital Facilities Plan (CFP) in Issue 1.

Conclusion:

To the extent this issue is resolved in Issue 1, the question of compliance is answered therein. To other issues raised in No. 5, the Board does not find the County out of compliance.

Issue No. 6:

Is Spokane County committing a breach of RCW 36.70A.070(5.c.i-iv) by propagating rather than controlling development within and adjacent to a traditionally rural area; by approving development density incompatible with existing rural conditions; by inappropriately converting undeveloped land into urban residential development in the rural neighborhood; by not protecting a critical groundwater recharge area for domestic neighborhood wells designated as medium susceptibility in the County Critical Areas Ordinance?

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The Parties' Position:

Petitioners:

The Petitioners contend that the County failed to protect the rural character of the area surrounding the subject parcel of land. They contend it serves to spread growth in an area without the requisite urban services and does so in a manner that will engender additional low-density sprawl as the development strives to recoup investment through additional housing units.

The Petitioners contend further that the County's action is negligent in protecting this highly susceptible critical ground water recharge area designated by the County. They contend that once designated they must protect these areas.

In their reply brief, the Petitioners cite *Butler v. Lewis County*, WWGMHB 97-2-0027c (FDO 6-30-00) as holding that "the County may not determine that water quality and quantity issues will be resolved in the permit process."

Intervenor: Greg and Kim Jeffreys, G.J.L.L.C and G.J. General Contractors

The Intervenors contend that the Petitioners' statements are conclusory and only their opinion. The Petitioners claim the County failed to protect groundwater. Yet, the Intervenors claim, no evidence is cited by Petitioners to support their conclusions. Residential development is not even a regulated activity in a High Susceptibility rated area. Petitioners are claimed to fail to offer any argument or evidence related to the High Susceptibility rated areas.

The Intervenors contend that the Petitioners failed to provide briefing concerning the alleged breach of RCW 36.70A.070, by inappropriately converting undeveloped land into urban residential development in the rural neighborhood.

Board Analysis:

The County will be required to complete a current CFP for this area. Within that Plan will be a discussion of the ability to provide the needed services to this area. The claimed failure of the County to protect critical areas and the provision of services will be considered

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at that time. The key reason for the preparation of a CFP is to insure that sewer, water, police, etc. services are available or will be available for the UGA. See Issue 1.

Conclusion:

To the extent this issue is resolved in Issue 1, the question of compliance is answered therein. To other issues raised in No. 6, the Board does not find the County out of compliance.

Issue No. 7:

Did the Board of County Commissioners, as representatives of Spokane County, disregard RCW 36.70A.035 and its own adopted Public Participation Program BOCC Resolution 1998-0144) for public by neglecting to notify affected jurisdictions and agencies of its hearing on 04-CPA-1 on April 25, 2005. Further, after rejecting the unanimous decision of denial of 04-CPA-1 by the Spokane County Planning Commission, did the County Commissioners Spokane County fail to provide notification of its public hearing, make it known to the public on its website, in press releases or public service announcements, as hard copies available for public review in County Libraries, as a display advertisement in the local newspaper of circulation, or hold a public meeting at a facility within close proximity of the area affected by 04-CPA-1 to inform or involve Palisades citizens in the decision making process as stated in its Public Participation Program? Did Spokane County further fail the Palisades Neighborhood and other concerned citizens by atypically holding the hearing in the middle of a workday?

The Parties' Position:

Petitioners:

The Petitioners contend the County has not complied with the Public Participation Program of the County and the requirements of the GMA. The Petitioners point out that the County published one legal notice in the Spokesman Review. There was nothing on the County's website, libraries or other places indicating notification of this action.

The Spokane County Planning Commission unanimously rejected the application and the County failed to provide notification to the public or have a public meeting to inform or involve Palisades citizens in the decision making process as required by its own Public Participation Program. The Petitioners again cite *Butler v. Lewis County, supra*, as stating "the public participation goals and requirements of the GMA impose a duty on a local

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government to provide effective notice and early and continuous public participation." The Petitioners contend that there was no notice of the Planning Commission hearing on the amendment or the County Commissioners hearing where they reversed the unanimous planning Commission decision and approved the amendment. They contend that there is no record of public notification. None were claimed to be held in the Palisades neighborhood.

Intervenor: Greg and Kim Jeffreys, G.J.L.L.C and G.J. General Contractors

The Intervenors contend that the Petitioners failed to carry their burden of proof. There was basically no briefing of the GMA, County regulations or case law. It is merely an expression of their opinion and dissatisfaction that the County declined to accept the recommendation of the Planning Commission. This is not required by the GMA.

The Intervenors point out that the Planning Commission was not unanimous, it was a recommendation formed by only 3 members of a 7-member board.

The Public Participation Plan (PPP) of Spokane County was complied with according to the Intervenors. They listed the numerous public participation opportunities available and not mentioned by the Petitioners. The Intervenors contend that there was clearly sufficient notice of the Amendment and opportunity to comment.

The Intervenors contend that the Petitioners failed to brief a portion of the issue, the holding of the hearings in the middle of a workday. They believe that this was abandoned.

Board Analysis:

The County has a compliant Public Participation Program (PPP) and is required to follow it. The Petitioners have not shown where the County failed to comply with their own PPP. In fact, the Petitioners admit that the Planning Commission had adequate public participation and complain that there was inadequate public participation before the County Commissioners. This objection is understandable where the County Commissioners did not follow the recommendations of the Planning Commission. However, public participation includes both that before the Commission and the County Commissioners. The Petitioners have failed to carry their burden of proof. They have failed to show where the County failed to follow its own PPP.

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Conclusion:

The County is not found out of compliance on this issue.

Issue No. 8:

By approving 04-CPA-01, has Spokane County violated RCW 36.70A.547 for incompatible uses near Spokane International Airport (SIA) and its flight path and Accident Potential Zone 'B' (APZ-B) illustrated in SIA's master plan for an additional runway, which crosses a portion of the amendment site as depicted on the public hearing notice map? Further, has Spokane County violated its own Comprehensive Plan Goals and Policies (air Transportation T.3g, T.3g1 – T.3g6) which discourages new residential development near airports and by having ignored SIA comment letters discouraging 04-CPA-01, as included in the staff report and County Planning Commission recommendation of denial?

The Parties' Position:

Petitioners:

The Petitioners contend that RCW 36.70.547, General aviation airports – Siting of incompatible uses, requires the discouragement of siting of incompatible uses adjacent to such general aviation airport. The Comprehensive Plan and development regulations may only be adopted or amended after formal consultation with: Airport owners and managers, private airport operators, general aviation pilots, ports, and the aviation division of the department of transportation. The proposed and adopted plans and regulations shall be filed with the aviation division within a reasonable time after release for public comment. The Petitioners contend that the County did not do this.

Intervenor: Greg and Kim Jeffreys, G.J.L.L.C and G.J. General Contractors

The Intervenors contend that the Petitioners failed to meet their burden of proof on Issue 8. They contend that the Petitioners spent their entire argument for this issue to a verbatim restatement of RCW 36.70A.547. However, the County is claimed to have addressed any impacts to the Spokane International Airport (SIA). The Airport manager sent a memo, which states, "...with the exception of a small corner of the parcel, the area in question is outside the airport's APZB for the proposed runway." It was recommended by SIA that a notice be sent to homebuyers that the homes are in areas within proximity of the

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airport and the associated noise of aircraft. The Intervenors contend that the record clearly demonstrates that any impacts associated with the Airport have been addressed.

The Intervenors further contend that the Petitioners abandoned part of the issue by failing to brief it. This portion of the issue was dealing with the discouragement of new residential development near airports.

Board Analysis:

The GMA was amended in 1996, to recognize the inherent social and economic benefits of aviation and require that land use planning include consideration of general aviation airports. RCW 36.70A.510 provides:

> Adoption and amendment of comprehensive plan provisions and development regulations under this chapter affecting general aviation airports are subject to RCW 36.70.547.

RCW 3670.547 provides as follows:

> Every county, city, and town I which there is located a general aviation airport that is operated for the benefit of the general public,... shall, through its comprehensive plan and development regulations, discourage the siting of incompatible uses adjacent to such general aviation airport. Such plans and regulations may only be adopted after formal consultation with: airport owners and managers, private airport operators, general aviation pilots, ports, and the Aviation Division of the Department of Transportation. All proposed and adopted plans and regulations shall be filed with the aviation division of the department of transportation within a reasonable time after release for public consideration and comment.... (emphasis added).

It is contended that the County notified the Spokane International Airport of the subject application and received a letter back, which is part of the Record. That letter made some suggestions regarding the handling of the development regarding the noise level. The County further stated that a letter was sent to the Department of Transportation, when asked if the Aviation Division of the DOT was contacted. The Record does not reflect other formal consultation with the Airport or the Aviation Division. The Record also reflects representatives of the developer meeting with a Spokane International Airport

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representative, together with a County planning staff. This is not enough. The Statute above requires formal consultation with airport owners and managers, operators, pilots and the Aviation Division of DOT. This was not done. The limited contact did reflect that the change in designation would affect a general aviation airport. The record clearly shows that the Petitioners carried their burden of proof and that the actions of the County are clearly erroneous in this portion of Issue 8.

Conclusion:

The Petitioners have carried their burden of proof and shown that the actions of the County were clearly erroneous due to their failure to formally consult with the airport owners, managers, operators, pilots and Aviation Division of DOT as required under RCW36.70.547.

V. FINDINGS OF FACT

1. Spokane County is a county located East of the crest of the Cascade Mountains and is required to plan pursuant to RCW 36.70A.040.
2. Petitioners are citizens of Spokane County that participated in the adoption of Resolution No. 2005-0365 in writing and through testimony.
3. The County adopted Resolution No. 2005-0365 on April 25, 2005.
4. Petitioners filed their petition herein on Resolution No. 2005-0365 on June 24, 2005.
5. Spokane County enlarged its Urban Growth Area (UGA) in proximity to the Spokane International Airport, a general aviation airport, and Fairchild Air Force Base, a military airport.
6. The amendment enlarging the UGA was done without the County performing a land quantity analysis or verifying the one prepared by the Intervenor, the potential developer of this property.
7. Spokane County Board of County Commissioners included no findings of fact or conclusions in Resolution No. 2005-0365 referencing an

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analysis or review of land quantity supporting such expansion of the UGA.

8. The County did not have formal consultation with airport owners and management, general aviation pilots, and the aviation division of the department of transportation.

9. The present Capital Facilities Plan was based on a 2006 population countywide of 459,929. (Spokane County Capital Facilities Plan). There is nothing in the record reflecting an increase in the population of Spokane County higher than that planed for when sizing the original UGA.

10. Notices of the application to change the designation of the subject property were sent to the Spokane International Airport, the Department of Transportation and Fairchild Air force Base.

VI. CONCLUSIONS OF LAW

1. This Board has jurisdiction over the parties to this action.
2. This Board has jurisdiction over the subject matter of this action.
3. Petitioners have standing to raise the issues listed in the Prehearing Order.
4. The Petition for Review in this case was timely filed.
5. Spokane County is required to update its Capital Facilities Plan before a UGA is created or modified to include additional lands not covered by the previous CFP.
6. Spokane County is required to have formal consultation with airport owners and managers, private airport operators, general aviation pilots, and the aviation division of the department of transportation, prior to adoption or amendment of the Comprehensive Plan or its regulations affecting such airports.

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Yakima, WA 98902
Phone: 509-574-6960
Fax: 509-574-6964

7. Spokane County is required to perform a land and population analysis prior to an enlargement of a UGA within the county.

VII. ORDER

1. The County is found out of compliance on Issue 1 due to its failure to review and amend the existing Capital Facilities Plan prior to the expansion of the UGA, which extends into areas not covered by the existing CFP.
2. Spokane County is found out of compliance on Issue 4 because the actions of the County are clearly erroneous in the County's failure to perform a population and land quantity analysis showing that an expansion of the UGA is needed. The record clearly demonstrates the County did not show its work, if any was performed.
3. The County is out of compliance on Issue 8 and the Petitioners have carried their burden of proof and shown that the actions of the County were clearly erroneous due to its failure to formally consult with the airport owners, managers, operators, pilots and Aviation Division of DOT as required under RCW36.70.547.
4. To the extent that the County has been found out of compliance on issue 1, Spokane County is found out of compliance on Issues 5 and 6.
5. Spokane County must take the appropriate legislative action to bring itself into compliance with this Order by **March 16, 2006, 90 days** from the date issued. The following schedule for compliance, briefing and hearing shall apply:

Compliance Due	**March 16, 2006**
Statement of Action Taken to Comply (County to file and serve on all parties)	**March 30, 2006**

Eastern Washington
Growth Management Hearings Board
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Yakima, WA 98902
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Petitioners' Objections to a Finding of Compliance Due	**April 13, 2006**
County's Response Due	**April 27, 2006**
Petitioners' Optional Reply Brief Due	**May 4, 2006**
Telephonic Compliance Hearing. Parties will call: **360-709-4803 followed by 524313 and the # sign. Ports are reserved for Ms. McHugh, Ms. Castleberry, Ms. Mager, Mr. Rollins, and Ms. Bjordahl**	**May 9, 2006, 10:00 a.m.**

If the County takes legislative compliance actions prior to the date set forth in this Order, it may file a motion with the Board requesting an adjustment to this compliance schedule.

Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration: Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and four (4) copies of the petition for reconsideration, together with any argument in support thereof, should be filed by mailing, faxing or delivering the document directly to the Board, with a copy to all other parties of record and their representatives. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review: Any party aggrieved by a final decision of the Board may appeal the decision to superior court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil.

Enforcement: The petition for judicial review of this Order shall be filed with the appropriate court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail.

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Service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order.

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

SO ORDERED this 16th day of December 2005.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____

Dennis Dellwo, Board Member

_____

John Roskelley, Board Member

_____

Judy Wall, Board Member

Eastern Washington
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CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

PORT OF SEATTLE, Petitioner, v. CITY OF DES MOINES, Respondent.	))))))))))	**Case No. 97-3-0014** **FINAL DECISION AND ORDER**

I. Procedural history

On February 14, 1997, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the Port of Seattle (the **Port**) challenging the comprehensive plan (the **Plan**) of the City of Des Moines (**Des Moines** or the **City**).The Port alleged that the Plan is not in compliance with the Growth Management Act (**GMA** or the **Act**) because it purports to preclude the expansion of an essential public facility; violates the property rights goal of the Act; is internally inconsistent; and is also inconsistent with the King County Comprehensive Plan (**County Plan**), the County-wide Planning Policies (**KCCPPs**) and Multi-County Planning Policies (**MPPs**).

On May 5, 1997, the Board received the "Brief of Amicus Puget Sound Regional Council Regarding Certain Multi-County Planning Policy Issues."

On May 30, 1997, the Board issued an "Order on Motions to Supplement" and an "Order on Dispositive Motions," in which the Board ruled on the motions to supplement, but declined to rule on the dispositive motions.

On June 4, 1997, the Board received the "City of Des Moines' Motion for Reconsideration of Board's Order on Motions to Supplement" (**City's Motion for Reconsideration**).On the same date, the Board received the "City of Des Moines Motion to Supplement the Record with Rebuttal Exhibits" (**City's Motion to Supplement the Record with Rebuttal Exhibits**).

On June 5, 1997, the Board received from the Port a "Motion to Strike City of Des Moines' Motion for Reconsideration and Motion to Supplement the Record with Rebuttal

Exhibits" (**Port's Motion to Strike**).

On June 6, 1997, the Board issued an "Order Granting Port's Motions to Strike" which granted the Port's Motion to Strike the City's Motion for Reconsideration and Motion to Supplement with Rebuttal Exhibits.

On June 16, 1997, the Board received "Petitioner Port of Seattle's Prehearing Opening Memorandum" (**Port's Prehearing Memorandum**).

On June 30, 1997, the Board received the "Brief of Amicus Puget Sound Regional Council Regarding Port of Seattle's Pre-Hearing Opening Memorandum."

Also on June 30, 1997, the Board received "Respondent City of Des Moines' Prehearing Brief" (**City's Response Brief**).

On July 7, 1997, the Board received the "Reply Brief of Amicus PSRC."

On July 8, 1997, the Board received "Respondent City of Des Moines' Motion To Strike 'Reply Brief Of Amicus PSRC,'" (**City's Motion to Strike Reply Brief of PSRC**).On the same date the Board received from the PSRC a "Response To Des Moines' Motion To Strike Reply Brief Of Amicus PSRC," and later that same day the Board received "Port Of Seattle's Opposition To City Of Des Moines' Motion To Strike Reply Brief Of Amicus PSRC."

On July 9, 1997, the Board held a hearing on the merits in room 5500 of Two Union Square in Seattle, Washington.Board members Joseph W. Tovar, Presiding Officer, and Chris Smith Towne were present for the Board.[1] The Port was represented by J. Tayloe Washburn and the City was represented by John W. Hempelmann.The PSRC was represented by David A. Bricklin.Court reporting services were provided by Jean M. Ericksen, RPR, of Robert H. Lewis & Associates, Tacoma.No witnesses testified.As a preliminary matter, the presiding officer heard argument regarding the City's Motion to Strike Reply Brief of PSRC, after which he orally **denied** the motion.[2] The presiding officer orally granted leave to the City to file a post-hearing brief, by no latter than July 18, 1997, to respond to issues addressed by PSRC in its "Reply Brief of Amicus PSRC" and "Brief of Amicus PSRC Regarding Opening Memorandum."

On July 18, 1997, the Board received "Respondent City of Des Moines' Post-Hearing Brief In Response To Reply Brief Of Amicus PSRC And Brief Of Amicus PSRC Regarding Port's Pre-Hearing Opening Memorandum."

On July 28, 1997, the Board received from the Port a copy of Exhibit 163 (PSRC Resolution A-91-01), which was inadvertently omitted from the exhibits filed with the Board.

On July 29, 1997, the Board received Amicus PSRC's "Motion to Strike" portions of the City's July 18 memorandum (**PSRC Motion to Strike**).

On July 31, 1997, the Board received "Respondent City of Des Moines' Memorandum in Opposition to Amicus PSRC's Motion to Strike."

II. FINDINGS OF FACT

1.On October 25, 1990, the Puget Sound Council of Governments (**PSCOG**) passed Resolution A-90-01, adopting VISION 2020:Growth and Transportation Strategy for the Central Puget Sound Region.Ex. 133.

2.On October 24, 1991, the City passed Resolution 667, authorizing execution of the "Interlocal Agreement for the Regional Planning of the Central Puget Sound Area," including the creation of a regional planning agency, the Puget Sound Regional Council (**PSRC**).The PSRC is to "ensure implementation in the [central Puget Sound] region of the provisions of state and federal law which pertain to regional transportation planning and regional growth management."Ex. 162.

3.On October 21, 1992, the Executive Board of the PSRC adopted a PSRC Action Item affirming that the PSRC "is the governmental agency responsible for meeting the requirement in the [GMA] for multicounty planning policies."Ex. 160(a).

4.On March 11, 1993, the PSRC General Assembly passed Resolution A-93-02, amending VISION 2020 to include MPPs for King, Kitsap, Pierce, and Snohomish Counties.Ex. 174.

5.On May 25, 1995, the PSRC passed Resolution A-95-02, adopting the 1995 update to VISION 2020 and the Metropolitan Transportation Plan (**MTP**).Ex. 136.

6.On December 7, 1995, the City adopted the Greater Des Moines Comprehensive Plan.Ex. 160.

7.On July 11, 1996, the PSRC passed Resolution A-96-02, amending the 1995 MTP to include a third runway at Sea-Tac International Airport (**STIA**).Ex. 138.

8.On August 1, 1996, the Port passed Resolution 3212, adopting the Airport Master Plan Update for STIA, including the development of a third runway, and noise reduction measures in accordance with PSRC Resolution A-96-02.Ex. 140, at 3-4.

9.An L_{dn} is a unit of measure representing an average day-night noise level typically used for airport-related noise measurements.*See* Port's Prehearing Brief, at 40 n.21.

10.The expansion of STIA requires the use of fill dirt.The borrow site for this fill dirt is within Des Moines.Consequently, trucks hauling fill dirt from the borrow site to STIA must drive through the City.*See* Ex. 148 *and* City's Response Brief, at 16.

11.The City's development code requires trucks used to haul fill dirt through the City to obtain permits pursuant to local regulations (Chapter 12.04 DMMC).Ex. 148.

iII. rulings on motions

Since they went to the heart of the case, the Board took no action on the two dispositive motions. Because the Board now addresses the substance of the dispositive motions , the Board will not rule on these motions.

The City's Motion to Dismiss the Reply Brief of PSRC is **denied**.PSRC's motion for leave to submit additional briefing is **granted**.

PSRC's Motion to Strike is **denied**.

IV. STANDARD OF REVIEW

The City urged the Board to apply Engrossed Senate Bill (**ESB**) 6094, specifically Section 20. ESB 6094, Chapter 429, Laws of 1997.Section 20 changes the standard of review to be used by the Boards.The Board takes official notice of ESB 6094, which became effective on July 27, 1997.Section 53 expressly provides that this new law is prospective in effect, except for Section 22, which is explicitly retroactive.In other words, the 1997 amendments to the Growth Management Act became effective on July 27, 1997.

The Board obtained jurisdiction to review this dispute when the PFR was filed on February 14, 1997.Briefing, pursuant to the Board's Rules of Practice and Procedure, was received from April 21, 1997, through July 8, 1997.[3] The hearing on the merits was held on July 9, 1997.But for the issuance of this final decision and order, all events in this proceeding occurred prior to July 27, 1997 -- the effective date of ESB 6094.

If, as the City suggests, the date of issuance of the Board's decision is determinative as to the law to be applied, the Board could select the law to apply based upon its desire and ability to accelerate or delay the issuance of its decision.This is an outcome the Board cannot reach, nor can the Board conclude that it is a result the legislature intended.[4] Consequently, to give effect to the legislature's clear direction, as contained in Section 53, the Board has a duty to apply the provisions of the GMA as they existed at the time the PFR was filed.[5]

RCW 36.70A.320(1) provides that:

> Except as provided in subsection (2) of this section, comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.In any petition under this chapter, the board, after full consideration of the petition, shall determine whether there is compliance with the requirements of this chapter. In making its determination, the board shall consider the criteria adopted by the department under RCW 36.70A.190(4).The board shall find compliance unless it finds by a preponderance of the evidence that the state agency, county, or city erroneously interpreted or applied this chapter. (Emphasis supplied.)

The Port must show, by a preponderance of the evidence, that the City erroneously interpreted or applied the provisions of the GMA.

V. DISCUSSION AND CONCLUSIONS

The Board's Prehearing Order set forth five Legal Issues.While several of these legal issues raise significant issues of first impression, the Board finds that, after answering Legal Issue 2, it need not, and will not, reach the remaining issues.[6] For the reasons presented below, the Board concludes that Des Moines' comprehensive plan is not in compliance with RCW 36.70A.200, and it will therefore be remanded and invalidated in part.

Legal Issue 2

Does the City's Plan fail to comply with RCW 36.70A.200 by containing policies and strategies which purport to preclude the expansion of Seattle-Tacoma International Airport (STIA) based on the City Plan policies cited above in Legal Issue No. 1 and CP 5-04-04, 6-04-09(4), 6-04-09 (5), 8-04-01(1)(b), and 8-04-02(1)(d)?

Discussion

RCW 36.70A.200 provides:

> (1) The comprehensive plan of each county and city that is planning under this chapter shall include a process for identifying and siting essential public facilities.Essential public facilities include those facilities that are typically difficult to site, such as airports, state education facilities and state or regional transportation facilities, state and local correctional facilities, solid waste handling facilities, and in-patient facilities including substance abuse facilities, mental health facilities, and group homes.
> (2) The office of financial management shall maintain a list of those essential state public facilities that are required or likely to be built within the next six years.The office of

financial management may at any time add facilities to the list.No local comprehensive plan or development regulation may preclude the siting of essential public facilities.
[7]
(Emphasis added.)

There are two duties imposed on the City under RCW 36.70A.200:a duty to adopt in its Plan a process to site essential public facilities (**EPFs**), and a duty not to preclude their siting in its Plan or implementing development regulations.In this case, the question is whether Des Moines' failure to amend its Plan in recognition of the third runway at STIA, and thereby retaining certain Plan policies, precludes the siting of an EPF.But first, the Board must determine whether the expansion of an existing EPF is protected by RCW 36.70A.200.

Airports are specifically identified as EPFs.There is no credible argument that an existing EPF, such as STIA, is not an EPF, even though it predates the GMA.In addition, there is no credible argument that expansion of an existing EPF is not within the scope of RCW 36.70A.200.Further, there is nothing in the language of .200 to justify distinguishing between expansion of an existing EPF and a new EPF.Indeed, the present dispute is evidence that it is no less difficult to site the expansion of an existing EPF than it is to site a new EPF.Nor does the language of .200 suggest that a city's comprehensive plan is prohibited only from precluding EPFs within its jurisdiction. Likewise, .200 does not support the notion of precluding necessary support activities for the expansion of the EPF that occur within the city's jurisdiction.**The Board holds that the expansion of an existing EPF, including necessary support activities associated with that expansion, is protected by RCW 36.70A.200.**

The Port does not challenge a specific City action; instead, the Port charges that the City's failure to act violates the GMA.Specifically, the Port asserts that the City failed to amend its Plan in response to the PSRC's regional decision to expand STIA by adding a third runway.

Where a petitioner has proposed a comprehensive plan amendment to a local government and that local government declines to adopt the proposed amendment, the Board has found in favor of the local government.*See Cole v. Pierce County [**Cole**]*, CPSGMHB Case No. 96-3-0009, Final Decision and Order (1996).Cole argued, among other things, that his proposed amendment would "correct" a GMA defect in Pierce County's plan.*Id.* at 9.The Board rejected Cole's appeal, holding "**that the actions challenged in Cole's petition were not taken in response to a GMA duty to act by a certain deadline, or in response to any other duty imposed by the act . . . .**"*Id.*, at 10-11.

The present case is unlike *Cole*.Here, there is a GMA duty -- the duty not to preclude EPFs.RCW 36.70A.200(2).Although the City's Plan may not have conflicted with .200(2) when the Plan was originally adopted, the subsequent regional decision to expand an EPF, STIA, requires the City to re-evaluate its Plan to determine if it still complies with .200(2).

When Des Moines adopted its Plan in December 1995, there was no regional decision to expand STIA.However, the PSRC passed Resolution A-96-02, amending the MTP to include a third runway at STIA, on July 11, 1996.The City's duty to comply with the GMA in the context of the decision to expand an essential public facility (STIA) was triggered when the PSRC passed Resolution A-96-02.RCW 36.70A.200 imposes a duty requiring the City's Plan not to preclude essential public facilities, even when the decision regarding the essential public facility was made subsequent to the initial adoption of the Plan.

In *Children's Alliance*, the Board defined "preclude" as "render impossible or impracticable."*Children's Alliance*, at 19."Impracticable" is defined as "not practicable:incapable of being performed or accomplished by the means employed or at command."*Merriam Webster's Collegiate Dictionary* 584 (10th ed. 1996).In other words, the City's Plan need not make it impossible to build the third runway in order to violate the GMA.If the City's Plan has the effect of making the expansion incapable of being accomplished by the means at the Port's command, then the Plan is in violation of the GMA.

The Board holds that a local government plan may not, through policies or strategy directives, effectively preclude the siting or expansion of an EPF, including its necessary support activities.

The City of Des Moines Comprehensive Plan contains a number of policies that the Port alleges are not in compliance with RCW 36.70A.200.These include policies 1-04-05, 5-02-08, 5-03-02, 5-04-04, 8-03-01(2), 8-04-01(1), 8-04-01(1)(c), 8-03-04(4), 4-04-01, 6-03-23, 6-04-09(4), 6-04-09 (5), 8-03-01(3), 8-03-02(3), 8-04-01(1)(b) and 8-04-02(1).*See* Port's Prehearing Memorandum, at p. 4 and 37 - 40.

The City's Plan contains four categories of policies:Goals, Findings, Policies, and Strategies.The policies relevant here are:

> Finding 5-02-08:The siting, construction, and operation of public facilities and utilities has sometimes resulted in adverse impacts upon nearby properties and the natural environment. *The City currently accepts more than its fair share of adverse impacts associated with air transportation; to allow any increase in those impacts would require that Des Moines accept an even greater disproportionate share of those impacts.*(Emphasis added.)
>
> Finding 7-02-08:Much of Des Moines is impacted by aircraft noise related to Sea-Tac International Airport (STIA).*Virtually all of the Des Moines Planning Area is within the 65 L_{dn} noise contour*, and large portions of the Planning Area are within the 70 or 75 L_{dn} noise contour (STIA Existing Noise Exposure Map, 1991). . . .(Emphasis added.)

Policy 5-03-02:*When not against the City's interests*, Des Moines should promote cooperative working relationships between Des Moines and the other municipalities, agencies and districts identified in this Comprehensive Plan.(Emphasis added.)

Policy 8-03-01:Residential Neighborhood Preservation:. . . (2) Develop plans, land use regulations and review procedures to preserve and protect designated residential communities from inconsistent and incompatible land uses which threaten to undermine their stability and their residential character.(chapter 18.02 DMMC, chapter 18.38 DMMC)

Strategy 1-04-05:Intergovernmental Cooperation/Annexation:(1) . . . *When decisions are made by state, county, regional agencies*, tribes, or special purpose districts, *and those decisions are clearly in the best interests of the state, county or region, take appropriate measures to implement those decisions* within Des Moines and the Planning Area, *unless the decisions unfairly or negatively affect the residents or businesses in the Des Moines area.*(Emphasis added.)

Strategy 5-04-04:. . . Adopt development regulations as needed that provide a process for the identification and possible siting of essential public facilities.Cooperatively work with surrounding municipalities and King County during the siting and development of facilities of regional significance.*Oppose new facilities associated with Sea-Tac International Airport that increase adverse impacts to the City of Des Moines.*(Emphasis added.)

Strategy 6-04-09:In order to protect and preserve park and recreation areas Des Moines should:. . . (4) *Oppose proposed land use and transportation facilities that would subject park and recreation areas of local significance* (except golf courses, ball fields, outdoor spectator sports areas, amusement areas, riding stables, nature trails and wildlife refuges) *to exterior noise exposure levels which exceed 55 L_{dn} or the L_{dn} level existing as of the effective date of this Element, whichever is greater.A reduction in the exterior noise level (greater than 55 dBA) that existed as of April 20, 1995 shall become the new maximum exterior noise level.*(chapter 18.38 DMMC).(Emphasis added.)

Strategy 6-04-09:In order to protect and preserve park and recreation areas Des Moines should:. . . (5) *Oppose proposed land use and transportation facilities that would subject locally significant golf courses, ball fields, outdoor spectator sports areas, amusement areas, riding stables, nature trails, and wildlife refuges to exterior noise exposure levels which exceed an L_{dn} of 60 dBA, or the L_{dn} level existing as of the effective date of this Element, whichever is greater.A reduction in the exterior noise level (greater than 60 dBA) that existed as of April 20, 1995 shall become the new maximum exterior noise level.* (chapter 18.38 DMMC).(Emphasis added.)

Strategy 8-04-01:Residential Neighborhood Protection:(1) Protect and preserve residential neighborhoods by:. . . (b) *Opposing land use changes and infrastructure improvements that would subject residential neighborhoods to environmental noise exposure levels which exceed an L_{dn} of 55 dBA, or existing levels as of April 20, 1995, whichever is greater.* (chapter 18.38 DMMC). (Emphasis added.)

Strategy 8-04-01:Residential Neighborhood Protection:(1) Protect and preserve residential neighborhoods by:. . . (c) *Adopting weight limits and maximum noise levels for commercial trucks on surface streets in residential neighborhoods to ensure that non-routine commercial traffic does not damage residential roads, or subject the neighborhood to unusual congestion and noisy street traffic.*(chapter 7.16 DMMC, chapter 10.28 DMMC, chapter 12.04 DMMC).(Emphasis added.)

Strategy 8-04-02:Historic Preservation:(1) Protect and preserve historic properties and archeological sites by:. . . (d) *Opposing land use and transportation proposals that would subject historic and archeological sites of local significance to environmental noise exposure levels of L_{dn} of 65 dBA, or existing levels as of April 20, 1995, whichever is higher.A reduction in the environmental noise level (greater than 65 L_{dn}) that existed as of April 20, 1995 should become the new maximum environmental level.*(Emphasis added.)

According to Plan Finding 5-02-08, the City has "accepted more than its fair share of adverse impacts" associated with STIA.Any increase in these adverse impacts would require the City to "accept an even greater disproportionate share."This Finding or "fact" assists the Board in interpreting Plan Strategies 1-04-05(1), 5-04-04, and 8-04-01(1)(c).

Strategy 1-04-05(1) directs the City to implement regional decisions "clearly in the best interests of the state, county, or region . . . **unless** the decisions unfairly or negatively affect" the City. There is no question that the expansion of STIA could have some adverse impacts on the City. Nonetheless, these impacts could be minimized or mitigated.Since Finding 5-02-08 makes it clear that expansion of STIA will unfairly or negatively affect the City, Strategy 1-04-05(1) can only be read to mean that the City will not take measures to implement the regional decision to expand STIA.

Further, Strategy 5-04-04 states the City's intent to oppose new facilities at STIA "that increase adverse impacts on the City."Reading this Strategy together with Finding 5-02-08 leads to the conclusion that any action causing adverse impact on the City, however slight, will result in the City's opposition.It is significant that nothing in the challenged policies cited above talks about mitigation; the language used is "oppose."In its brief, the City stated "[T]he City's opposition to the third runway is conditioned on unmitigated impacts."City's Response Brief, at 46.However, the City cites to no Plan policy to support its argument, nor could the Board find support for this

assertion in the City's Plan.The Plan expresses the City's clear intent to exercise its municipal authority to prevent expansion of STIA, not to mitigate its impacts.[8]

Finally, Finding 5-02-08 provides direction to the City in carrying out Strategy 8-04-01(1)(c), which directs the City to limit weight and noise levels of commercial trucks through residential neighborhoods.This Strategy cites to three chapters of the City's municipal code, one of which (chapter 12.04 DMMC) the City asserts requires trucks hauling fill for STIA expansion to obtain City permits.Ex. 148.Since the GMA requires the City to exercise the permit discretion of chapter 12.04 DMMC consistent with the Strategies and Findings of its Plan, the clear effect of the direction of these Plan policies will be to prevent, not mitigate, expansion of STIA.

Strategy 5-04-04 directs the City to "[o]ppose new facilities associated with Sea-Tac International Airport that increase adverse impacts to the City of Des Moines."Since expansion of STIA will have adverse impacts to the City, this Strategy is particularly instructive in reading Strategies 1-04-05(1), 8-04-01(1)(b), 8-04-01(1)(c), and 8-04-02(1)(d).Reading these Plan provisions as a whole, the City will oppose expansion of STIA because it "unfairly or negatively affect[s]" the City (1-04-05(1)), and because it would increase environmental noise exposure levels (8-04-01(1)(b) and (c), and 8-04-02(1)(d)).These Plan provisions do not allow necessary support activities, such as fill dirt hauling, that are necessary for expansion of STIA.

The City's Plan also includes a Finding that indirectly affects expansion of STIA.According to Plan Finding 7-02-08, virtually all of the City is within the 65 L_{dn} noise contour.This Finding illuminates Strategies 6-04-09(4), 6-04-09(5), 8-04-01(1)(b), and 8-04-02(1).All of these Strategies direct the City to oppose land use changes and transportation facilities or infrastructure improvements that will result in noise of 55, 60, or 65 L_{dn}, or "existing levels as of April 20, 1995."[9] Most of these Strategies provide that, if the environmental noise level declines, the new, lower level will become the maximum allowable.The Board notes that the ambient noise levels, as found by the City in 7-02-08, already exceed the numerical limits of these Strategies; therefore, the practical effect of these Strategies is to make the maximum noise level that level existing as of April 20, 1995.Although the City may certainly impose reasonable mitigating conditions on EPFs, or necessary support activities if the EPF itself is not within the City's jurisdiction, these particular Plan provisions direct the City to prohibit any increase in environmental noise.The obvious effect of these Plan provisions will be to prevent the excavation and fill dirt hauling support activities associated with expansion of STIA.

The GMA made comprehensive plans binding documents.*See* RCW 36.70A.040; see also, *Snoqualmie v. King County*, CPSGPHB Case No. 92-3-0004, Final Decision and Order (March 1, 1993), at 15.The City is bound to implement the policy provisions it includes in its Plan.The Plan Findings, Policies, and Strategies identified by the Port require the City to oppose activities

related to the expansion of STIA.Although the City's jurisdiction is limited to its city limits, clearly the Plan directs the City to oppose those necessary support activities for the expansion of STIA within its limits.*See* City's Response Brief, at 16.The expansion of STIA requires a large volume of fill dirt.The borrow site for the project is within Des Moines and trucks hauling this fill dirt must travel within the City limits.The City's Plan, particularly Strategies 1-04-05 and 5-04-04, obligates the City to oppose necessary support activities, such as the excavation and hauling operations.**The Board holds that the City's Plan does not comply with RCW 36.70A.200 and will preclude expansion of STIA.**

Conclusion No. 2

The City's Plan does not comply with RCW 36.70A.200 because it precludes the expansion of STIA, an essential public facility.

invalidity

The Board specifically finds that Plan policies 1-04-05 and 5-04-04, by precluding the siting of an essential public facility, substantially interferes with the fulfillment of RCW 36.70A.020(3), which provides:

> (3) Transportation.Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.RCW 36.70A.020(3).

These Plan policies substantially interfere with the fulfillment of RCW 36.70A.020(3) because they preclude the expansion of STIA, a regional transportation priority, and an essential public facility.

Vi. ORDER

Having reviewed and considered the above-referenced documents, having considered the arguments of the parties, and having deliberated on the matter, the Board finds that the Des Moines Comprehensive Plan is **not in compliance** with RCW 36.70A.200.Because policies 1-04-05 and 5-04-04 purport to preclude the expansion of an essential public facility, namely, Seattle Tacoma International Airport, and such preclusion would substantially interfere with the fulfillment of RCW 36.70A.020(3), these policies are **invalid**.
The Plan is remanded to the City and it is instructed to bring the Plan into compliance with RCW 36.70A.200 by no later than **Monday, December 15, 1997**, in order to achieve compliance with this Order and the GMA.In amending the plan to address the invalidated policies, the City will, pursuant to the Act, be required to maintain internal plan consistency.Thus, other related policies may need to be amended.

The City is further instructed to file with the Board, and provide a copy to both the Port and Amicus PSRC, a Statement of Actions Taken to Comply, by no later than **4:30 p.m. on Monday, December 29, 1997.**The Board will then promptly schedule a compliance hearing.

So ORDERED this 13th day of August, 1997.
CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
Edward G. McGuire, AICP
Board Member

_____
Joseph W. Tovar, AICP
Board Member
(Board Member Tovar filed a concurring opinion)

_____
Chris Smith Towne
Board Member
Note:This Final Decision and Order constitutes a final order as specified by RCW 36.70A.300 unless a party files a Petition for Reconsideration pursuant to WAC 242-02-830.

Board Member Tovar's Concurring Opinion

I concur with the majority in disposing of this case in resolving Legal Issue 2 - finding that the City's Plan fails to comply with RCW 36.70A.200.However, unlike my colleagues, I would also have reached Legal Issue 3 - the allegation that Des Moines' Plan fails to comply with RCW 36.70A.210 because the challenged City policies are inconsistent with countywide planning policies and multicounty planning policies.Notwithstanding principles of judicial economy, I believe that the controversy at the core of Legal Issue 3 is a matter of significant public interest that can and should be reached.In my judgment, the same policies that the Board finds violate RCW 36.70A.200 also fail to comply with RCW 36.70A.210 because they are inconsistent, to varying degrees, with the King County Comprehensive Plan and the King County County-wide Planning Policies, as well as the multicounty planning policies for the Central Puget Sound Region.

Many allegations were made by the Port regarding the inconsistencies between the City policies and various policies from these regional documents.Des Moines variously argued that there was no inconsistency between city and regional policies (City Response Brief, at 21-42), that various regional policy documents were unlawfully enacted and thus have no effect (City Response Brief, at 9-12), and that, in any case, there is no directive relationship between regional policies and a city plan (City Response Brief, at 49-57).

At the hearing on the merits, the City summarized its position by stating that, rather than a "coercive" hierarchy,the GMA "enshrine[s] the political ethic and the legal history of our region in saying that in this part of the country we do operate through collaboration, cooperation and

consensus building."Transcript of Hearing on the Merits, July 9, 1997, at 77.Des Moines insists that there is no hierarchy of policy authorized or required by the GMA and that there is no support for the proposition that a city plan must yield to a county-wide planning policy, let alone a multicounty planning policy.City's Response Brief, at 49-56.To the extent that the Port relies on Board holdings to this effect in past cases, such as *Snoqualmie*, *Edmonds* and *Aagaard*,[10] the City argues that these readings of the Act have been "called into question" by *Postema v. Snohomish County [**Postema**]* 83 Wn. App. 574 (September 9, 1996), *review denied*, 131 Wn.2d 1019 (April 4, 1997).City Response Brief, at 56-57.

The City's arguments describe a universe in which each city is, in effect, sovereign because each city has the authority to accept only those regional policy decisions that it deems to be "fair" and "not against the interests" of that city.In such a city-centered universe, a city plan is not obligated to yield to a regional[11] decision adopted pursuant to RCW 36.70A.210, regardless of whether or not such a regional policy decision is unambiguous, explicitly directive, and lawfully adopted. While such a city-centered universe may or may not have ever existed in the past, or may exist in a county with only a single incorporated city[12], it certainly does not exist now in the Central Puget Sound Region.The great number of local governments[13] and population density[14] of this metropolitan region, particularly in view of the tremendous population and employment growth currently underway, make the notion of absolute city "sovereignty" archaic.If commonly held and acted upon by the four counties and seventy-eight cities in this region, such a notion would perpetuate the type of "uncoordinated and unplanned growth" that the GMA identified as a "threat to the environment [and] sustainable economic development" of this state.RCW 36.70A.010.

The legislature is presumed to be aware of the *Snoqualmie*, *Edmonds*, and *Aagaard* decisions. While the legislature has amended the GMA many times and has had the opportunity to provide legislative correction to the interpretations that this Board has given to RCW 36.70A.210 in these cases, it is significant that the legislature has never done so.In fact, the legislature has made no substantive revisions to RCW 36.70A.210 since it created that section in 1991.[15] Therefore, I can only conclude that the legislature agrees with the Board's interpretations of the Act in the above cited cases - that RCW 36.70A.100 requires coordination and consistency between and among county and city plans, that CPPs adopted pursuant to RCW 36.70A.210 provides the mechanism to achieve that coordination and consistency, and that in order to do so, CPPs must have a substantive and directive effect on the comprehensive plans of cities.[16]

Even in the most recent session, the legislature relied upon the substantive and directive authority of CPPs to carry out the important task of monitoring land use within the urban growth areas for the purposes of determining what, if any, actions are necessary to assure that adequate land

supply remains available to accommodate expected population growth.While Des Moines called the Board's attention to a portion of Sec. 25 of ESB 6094 in support of its "collaborate and coordinate - but don't coerce" theory (City's Response Brief, at 15-16), a closer inspection of the entirety of this section leads to the opposite conclusion.It is true that this section directs cities and counties to work together in a cooperative fashion.However, this simply mirrors the language of RCW 36.70A.210 by stating that a "county shall adopt, in consultation with its cities, county-wide planning policies to establish a review and evaluation program."ESB 6094, Sec. 25 (1).The emphasized language unmistakably says that, while the county has a GMA duty to consult with the cities, it still has the sole authority to adopt these new CPPs.

While recognizing that "consultation" is essential, the legislature requires more than simply process and dialogue without ultimate closure.The final subparagraph of Section 25 states that, after a cooperative consultative process including the cities, the county "if necessary, [shall] adopt amendments to county-wide planning policies to increase consistency."Section 25 (4).ESB 6094.The directiveness of these action verbs (shall adopt ... increase consistency) reveals legislative intent that cities and counties are to do more than simply engage in an idle process. Rather, this statutory language provides direction to local governments to achieve results. Inevitably, at some point in these iterative and interactive dialogues, a decision needs to be rendered by the county and, when necessary, the county needs to take action "to increase consistency."Section 25 of ESB 6094 describes a process that recognizes the county's role as a regional government responsible for the long-term viability of the UGA.For a county to discharge this duty requires the CPPs to constitute more than the voluntary and advisory process that Des Moines suggests in its arguments.This conclusion is consistent with prior Board holdings regarding the duty of city comprehensive plans to be consistent with CPPs.Unless and until either the legislature or the courts explicitly address the matter of the relationship between lawfully adopted, unambiguous CPPs and city plans and provide explicit direction to the contrary, the

Board's holdings to date on this subject retain their vitality.

In conclusion, I agree with the City that "collaboration, cooperation and consensus building" are good things and that they are part of the "history" of our region.However, these principles are not "enshrined" in the GMA.The City has no explicit GMA duty to "collaborate" or "build consensus;" however, it does have an explicit GMA duty to achieve "coordination and consistency" with the plans of others as to regional issues. RCW 36.70A.100.The fatal flaw in Des Moines' reading of the Act is that it fails to acknowledge and meet this most fundamental and important GMA duty- *consistency with regional policies that address regional issues.*

The regional policies adopted pursuant to RCW 36.70A.210 provide the GMA's mechanism to achieve this consistency.Absent an effective mechanism to adopt and enforce regional policies, whether those be the location or capacity of UGAs, allocation of a fair share of various types of housing, siting of essential public facilities, or location of regional transportation improvements, the Central Puget Sound region would continue to suffer from balkanized decision-making and unmet regional needs.In short, this region would be captive to the inefficient and uncoordinated

land use decision-making of Des Moines' imagined past - a regime that it mistakenly believes the GMA now enshrines.After a review of the record and the argument in this case, I am left with the firm conviction that the City has erroneously interpreted the Act.Des Moines has failed to acknowledge its duty under RCW 36.70A.100 and RCW 36.70A.210 to achieve consistency with regional policy documents, and its Plan breaches that duty.

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[1]
Board member Edward G. McGuire reviewed the briefs and exhibits in this matter and read the transcript of the hearing on the merits.

[2]
At the request of the City,Board member Towne absented herself from the hearing room during argument regarding the City's motion and returned when Presiding Officer Tovar announced his ruling on the motion.*See*WAC 242-02-522(5).

[3]
In addition to the prehearing briefs, the City and PSRC filed post-hearing briefs.*See* Procedural History.

[4]
The Board takes notice of the legislature's clear intent to reemphasize the importance of the Boards' deference to local policy choices and decisions when those choices and decisions comply with the GMA.

[5]
Any actions taken by a local government after July 27, 1997, including actions taken to comply with a Board remand order, will be subject to the provisions of ESB 6094.The Board's compliance review of the remand action in this case will, likewise, be subject to ESB 6094.

[6]
The other legal issues listed in the Prehearing Order were as follows:

> ***1.Does the City's Plan fail to comply with RCW 36.70A.100 because Plan policies (CP) 1-04-05, 5-02-08, 5-03-02, 5-04-04, 8-03-01(2), 8-04-01(1), 8-04-01(1)(c), 8-03-04(4), 4-04-01, 6-03-23, 6-04-09(4), 6-04-09(5), 8-03-01(3), 8-03-02(3), 8-04-01(1)(b) and 8-04-02(1) are inconsistent with King County Comprehensive Plan policies T-101, T-107, F-218, T-540 and T-542?***
>
> ***3.Does the City's Plan fail to comply with RCW 36.70A.210:***
>
> > ***3.1Is the City's Plan (including all of the CPs listed in these legal issues) inconsistent with King County Countywide Planning Policies FW-19, S-1.11, and FW-32?***
> >
> > ***3.2Is the City's Plan (including all CPs listed in these legal issues) inconsistent with Multi-county Planning policies (MPPs) adopted by the PSRC and embodied in the VISION 2020 Regional Growth Strategy and Regional Transportation Plan (RTP), including the following MPPs contained in VISION 2020's 1995 Update adopted on May 25, 1995:RF-3, RC-2.11 and RT-8.31, and the RTP as implemented and amended by PSRC Resolution No. A-96-02?***
>
> ***4.Does the City's Plan fail to comply with RCW 36.70A.070 because it is internally inconsistent, including inconsistencies between CP 1-03-07, (including all CPs listed in these legal issues) and CP 1-04-05(1);***

also, is there an inconsistency between CP 3-02-04, and CP 5-04-04 (as well as all of the CPs listed in these legal issues)?

5.Does the City's Plan fail to comply with RCW 36.70A.020(6) because it contains policies, including CP 6-02-04, CP 8-03-03 and 8-04-03(1)(c), that deprive the Port of Seattle of its property rights without consideration of whether such policies protect property owners from arbitrary and discriminatory actions?

[7]

In *Children's Alliance v. City of Bellevue* ***[Children's Alliance]***, the Board noted that it would regard the last sentence of RCW 36.70A.200(2) as a third subsection of .200.CPSGMHB Case No. 95-3-0011, Final Decision and Order (July 25, 1995), at 17.

[8]

In a earlier EPF case dealing with a transportation facility, the Board observed that RCW 36.70A.200 does not prevent a local government from identifying in its plan appropriate and reasonable provisions for mitigation.In *Hapsmith v. City of Auburn* ***[Hapsmith]***, CPSGMHB Case No. 95-3-0075c, Final Decision and Order (May 10, 1996), the Board stated:

> Regardless of whether the MTP or the Preliminary WSDOT Plan explicitly names the Auburn Railyard as a site for an intermodal facility serving the Ports of Tacoma and Seattle and much of Western Washington, all the evidence before the Board indicates that the City must plan for this eventuality.
> At the same time, the City has made a number of credible points about the serious localizedconsequences of siting an essential public facility such as BNSF has described for its property.The Board has also concluded that the Special Planning Area designation for the Railyard is an innovative comprehensive plan technique authorized by RCW 36.70A.090 to enable the City to articulate its legitimate site and off-site issues in the form of a more detailed localized planning document.The planning process described by the City in its briefing and in the Plan itself (Plan, at 14-16 to 14-18) provides the opportunity for the concerned state, regional and local agencies to craft appropriate site design standards and identify the necessary infrastructure improvements and mitigation.Such a planning process provides a reasonable framework for the City to articulate its legitimate concerns, and for other public agencies and the Railroad to respect and creatively respond to those concerns.*Hapsmith*, at 33.

[9]

The record does not reveal the existing noise levels on April 20, 1995.

[10]

In its first CPP case, the Board examined the purpose, nature and effect of CPPs.In *Snoqualmie v. King County* ***[Snoqualmie]***, CPSGMHB Case No. 92-3-0004, Final Decision and Order (March 1, 1993), the Board concluded:

> The requirement that plans be coordinated suggests the need to jointly decide upon procedural matters such as schedules, formats, common data bases and methods for communication.However, RCW 36.70A.100 requires not just coordination but also consistency.To achieve the consistency requirement of the GMA requires more than simply a coordination of the mechanics of process, but rather a substantive and directive relationship between the policies in the CPPs and the policies in the comprehensive plans of cities and counties.Therefore, the Board concludes that the *effect* of the CPPs is both procedural and substantive.
> Further, the Board observes that the CPPs provide substantive direction not to development regulations, but rather to the comprehensive plans of cities and counties.Thus, the consistency required by RCW 36.70A.100 and RCW 36.70A.210 is an *external* consistency between comprehensive plans.The CPPs do NOT speak directly to the implementing land use regulations of cities and counties.Thus, the Board concludes that the requirement for consistency in RCW 36.70A.100 and .210 does not require an alteration to the land use powers of cities.*Snoqualmie*, at 15-16.Emphasis added.

The Board clarified the new GMA-created reality in a 1993 case, *City of Edmonds and City of Lynnwood v. Snohomish County [**Edmonds**]*, CPSGMHB Case No. 93-3-0005, Final Decision and Order (October 9, 1993):

> To conclude that each of those local governments retains the full range of its pre-GMA land use prerogatives would perpetuate balkanized self-interest and thwart the Legislature's clear direction to take decisive regional action to limit sprawl, site needed facilities, meet pressing human needs, protect the environment and sustain economic development.*See* RCW 36.70A.010 and RCW 36.70A.020.
>
> The broadened perspective that permeates the Act means that local governments, particularly cities, must include a regional perspective in the making of their plans, indeed, in the definition of their responsibilities to plan for the future.The "land use powers of cities" cannot be construed in such a way as to allow a city to deny its regional context or shirk its regional responsibilities.*Edmonds*, at 27-28.Emphasis added.

In 1995, the Board summarized the relationship among the goals of the GMA, policies in regional policy documents, and city plans.In *Aagaard, et al., v. City of Bothell [**Aagaard**]*, CPSGMHB Case No. 94-3-0011, Final Decision and Order (July 21, 1995), the Board stated:

> Thus, the decision-making regime under GMA is a cascading hierarchy of substantive and directive policy, flowing first from the planning goals to the policy documents of counties and cities (such as CPPs, IUGAs and comprehensive plans), then between certain policy documents (such as from CPPs to IUGAs and from CPPs and IUGAs to comprehensive plans), and finally from comprehensive plans to development regulations, capital budget decisions and other activities of cities and counties.*Aagaard*, at 6.Emphasis added.

[11]

"Regional" in the context of the GMA means either a county or two or more contiguous counties.RCW 36.70A.210(1) and (7).

[12]

In the State of Washington, there are a number of counties planning under the GMA that have only one city: Ferry, Garfield, Jefferson, Mason and San Juan.None of these counties is in the Central Puget Sound Region. Washington State Data Book, 1995.

[13]

There are at present four counties and 78 cities in the Central Puget Sound region.Washington State Department of Community, Trade and Economic Development, *"Growth Management - It's Beginning to Take Shape,"* Olympia, WA.January 1997, at 9.This does not include the cities of Maple Valley and Covington, where incorporation has been approved by the voters, but the effective date of the incorporation has not yet arrived.

[14]

The population density of the Central Puget Sound region is 12 times that of the balance of the state.In a 1995 case, the Board took official notice of the *July 6, 1995, Correction Release of the Washington State Office of Financial Management's April 1, 1995, Populations of Cities, Towns and Counties used for the Allocation of State Revenues*.According to these counts, the four counties of the Central Puget Sound Region then contained 3,020,000 people (approximately 56 percent of the state's population) in 6,287 square miles (approximately 9.4 percent of the total area of the state) for a regional population density of 480 people per square mile.The balance of the population (2,409,900 people) on the remaining land area of the state (60,295 square miles) then equaled a population density of 40 people per square mile.*Bremerton v. Kitsap County*, CPSGMHB Case No. 95-3-0039, Final Decision and Order, October 9, 1995, at 29, fn. 12.

[15]

RCW 36.70A.210 was created in 1991.ReSHB 1025 § 2.This section has never been substantively amended by the legislature.Deadlines for adoption of CPPs were changed by amendments in 1993 and the name of the growth planning hearings board was changed to the growth management hearings board in 1994.[1994 c 249 § 28; 1993 sp.s. c 6 § 4; 1991 sp.s. c 32 § 2.]

[16]
The Board has recognized that the more abstract CPPs are, the more room will be left for interpretation.*See Snoqualmie*, at 13.In addition, there are limitations on the substantive effect of CPPs.*Snoqualmie*, at 18-19.*See also, Edmonds*, at 29-31.

[17]
As to the City's arguments regarding the *Postema* decision, I note that the court addressed only one issue - whether RCW 36.70A.210 creates a regional government that violates the principle of one person, one vote."83 Wn. App., at 580.To decide this issue, the court looked at the scope of powers of "an informal intergovernmental planning group" which was tasked by Snohomish County to draft CPPs.*Id.*, at 578.The court recognized that the group's draft policies were not binding and that RCW 36.70A.210 did not vest this group with governmental powers.*Id.*, at 582-583.The court expressly declined to decide whether RCW 36.70A.210 creates a hierarchy of authority giving CPPs the power to "trump" city policies, because there was no actual controversy on that issue in *Postema*.Id., at 584.

CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

STEPHEN PRUITT and STEVEN VAN CLEVE,	)	**Case No. 06-3-0016**
Petitioners,	)	***(Pruitt)***
v.	)	
TOWN OF EATONVILLE,	)	**FINAL DECISION and ORDER**
Respondent.	)	

I. SYNOPSIS

Within the corporate limits of the Town of Eatonville is Swanson Field, a small utility airport, but which serves as a general aviation airport nonetheless. The Town's Comprehensive Plan contains policies to protect the airport from encroachment of incompatible uses and structures that would pose dangers to aviation safety and the general public. In February 2006, the Town adopted development regulations governing Swanson Field. Ordinance 2006-6 adopted an Aerospace District that specified permitted uses, and an Airport Overlay District regulating height.

Petitioners challenged the Town's action alleging that rather than discouraging incompatible uses adjacent to the airport, the Town encouraged incompatible uses. Petitioners also asserted that the Town's adopted height restrictions governing structures in close proximity to the airport posed aviation safety dangers and were contrary to provisions of the Federal Aviation Administrations (FAA) regulations and Washington State Department of Transportation – Aviation Division's (WSDOT) comments.

Petitioners, WSDOT – Aviation Division, and the FAA commented on the Town's proposed development regulations, noting serious incompatibility and height encroachment concerns that endangered aviation and posed safety concerns to the general public. Petitioners noted the Town's Plan specifically directed compliance with state and federal regulations. Nonetheless, the Town completely ignored the concerns voiced by Petitioners and the agencies charged with aviation safety and adopted the proposed regulations without amendment or revision.

The Board found and concluded that the Town of Eatonville's adoption of its general aviation development regulations was ***clearly erroneous****. The adopted regulations were*

internally inconsistent, did not comply *with its own Plan policies and* ***did not comply*** *with RCW 36.70A.130(1), RCW 36.70A.510 and RCW 36.70.547. Further, the Town's disregard for aviation safety, as expressed in Ordinance 2006-6, caused the Board to enter a* ***determination of invalidity****. The Ordinance adopting the development regulations pertaining to Swanson Field was remanded to the Town with direction to revise the regulations to achieve compliance with the Act. A compliance schedule was established.*

II. BACKGROUND

On March 23, 2006, Stephen Pruitt and Steven Van Cleve filed a Petition for Review (**PFR**) challenging the Town of Eatonville's adoption of Ordinance 2006-6 amending the Town's development regulations related to the Town of Eatonville Airport – Swanson Field. The Town had been working on such regulations for an extended period of time.

In April 2006, the Board held the prehearing conference and issued a prehearing order setting forth a schedule and the legal issues to be resolved by the Board. No motions were filed during the time authorized for motions.

In June 2006, the parties requested and were granted a 90-day settlement extension to provide time for them to resolve their dispute. The Board received one status report, indicating although two meetings had been held, the disagreement had not been resolved.

In October, the Board received timely briefing from the parties, as well as several motions. The briefing received is referenced in this Order as **Pruitt PHB**, **Town Response,** and **Pruitt Reply**.

On November 6, 2006, the Board held a HOM at the 20th floor conference room, 800 5th Avenue, Seattle, Washington. Board member Edward G. McGuire presided at the HOM. Board members David Earling and Margaret Pageler were present for the Board. Julie Taylor, Board Law Clerk, also attended. Petitioners Stephen Pruitt and Steven Van Cleve appeared *pro se*. Robert E. Mack and Edward G. Hudson represented Respondent Town of Eatonville. Eatonville Mayor Tom Smallwood and Mart Kask were also present. Court reporting services were provided by Eva Jankovits of Byers and Anderson Inc. The hearing convened at approximately 2:00 p.m. and adjourned at approximately 4:00 p.m. The Board ordered a transcript of the proceeding (**HOM Transcript**).

On November 13, 2006, the Board received the HOM Transcript.

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF and STANDARD OF REVIEW

Upon receipt of a petition challenging a local jurisdiction's GMA actions, the legislature directed the Boards to hear and determine whether the challenged actions were in compliance with the requirements and goals of the Act. *See* RCW 36.70A.280. The

legislature directed that the Boards "after full consideration of the petition, shall determine whether there is compliance with the requirements of [the GMA]." RCW 36.70A.320(3); *see also*, RCW 36.70A.300(1). See *Lewis County v. Western Washington Growth Management Hearings Board,* 139 P.3d 1096 (2006) ("The Growth Management Hearings Board is charged with adjudicating GMA compliance and invalidating noncompliant plans and development regulations").

Petitioners challenge Eatonville's adoption of Ordinance No. 2006-6, amending its development regulations. Pursuant to RCW 36.70A.320(1), these Ordinances are presumed valid upon adoption.

The burden is on Petitioners to demonstrate that the actions taken by the Town of Eatonville are not in compliance with the goals and requirements of the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board "shall find compliance unless it determines that the action taken by [Eatonville] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." For the Board to find Eatonville's actions clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

The GMA affirms that local jurisdictions have discretion in adapting the requirements of the GMA to local circumstances and that the Board shall grant deference to local decisions that comply with the goals and requirements of the Act. RCW 36.70A.3201. Pursuant to RCW 36.70A.3201, the Board will grant deference to Eatonville in how it plans for growth, provided that its planning actions or policy choices are consistent with, and comply with, the goals and requirements of the GMA. The State Supreme Court's most recent delineation of this required deference states: "We hold that deference to county planning actions that are consistent with the goals and requirements of the GMA . . . cedes only when it is shown that a county's planning action is in fact a 'clearly erroneous' application of the GMA." *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224, 248, 110 P.3d 1132 (2005).

The *Quadrant* decision is in accord with prior rulings that "Local discretion is bounded . . . by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearing Board* (***King County***), 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). As the Court of Appeals explained, "Consistent with *King County*, and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent' with the requirements and goals of the GMA." *Cooper Point Association v. Thurston County,* 108 Wn. App. 429, 444, 31 P.3d 28 (2001); *affirmed Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn2d 1, 15, 57 P.3rd 1156 (2002); *Quadrant*, 154 Wn.2d 224, 240 (2005). And *see*, most recently, *Lewis County*, 139 P.3d at fn. 16: "[T]he

GMA says that Board deference to county decisions extends only as far as such decisions comply with GMA goals and requirements. In other words, there are bounds."

The scope of the Board's review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to those issues presented in a timely petition for review.

III. BOARD JURISDICTION, PREFATORY NOTE and PRELIMINARY MATTERS

A. BOARD JURISDICTION

The Board finds that the Petitioners' PFR was timely filed, pursuant to RCW 36.70A.290(2); Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged ordinance, pursuant to RCW 36.70A.280(1)(a).

B. PREFATORY NOTE

The Challenged Action:

Ordinance 2006-6 established development regulations at and adjacent to the Eatonville Municipal Airport – Swanson Field.[1] These new regulations create an Aerospace district – Airport Overlay zone, which specifies certain uses, distances and imaginary vertical planes to protect airport operations. Generally, the permitted uses are airport-related uses as well as single-family residential, commercial and industrial, as permitted elsewhere in the Town's code. The regulations also establish height limitations for structures in proximity to the airport's runway. See discussion infra for specific relevant provisions of the Ordinance.

Board Discussion of Legal Issues:

The Board will discuss Legal Issues 1 and 2 together, and then address Legal Issues 3, 4 and 5.

C. PRELIMINARY MATTERS

Oral Rulings at the HOM:

At the HOM the Board heard argument on the Town's Motions to Supplement the Record and Motion to Dismiss. The following oral rulings were made, and affirmed here.

[1] Swanson Field is a general aviation airport that is presently (2002) home to 22 single engine aircraft. The airport operations accommodate local (594), itinerant (2000), and military (15) traffic. Ex.74, WSDOT Aviation Division data on Swanson Field.

- Town Motion to Dismiss for failure to enumerate specific legal issues in Pruitt PHB – **Denied**.
- Town Motion to Supplement the Record
    - Item 73 – confirmation from the Washington State Department of Transportation (**WSDOT**) regarding a grant for developing an airport plan – **Admitted**.
    - Item 74 – WSDOT Aviation Division data from 2002 regarding airport activity at Eatonville Airport – **Admitted**.
    - Item 75 – News Tribute article regarding Spanaway Airport – **Denied**.

The Board also noted that the Town's Index includes items produced after the 3/8/06 notice of publication of the challenged Ordinance. These items obviously were not before the Town Council at the time its decision was made. The Board's review is of the record before the decision-makers. The Board will not strike the "post-decision" exhibits, but they will be accorded the limited weight they merit.[2]

Abandoned Issues:

The Board's Rules of Practice and Procedure provide:

> A petitioner . . . shall submit a brief on each legal issue it expects a board to determine. *Failure by such a party to brief an issue shall constitute abandonment of the unbriefed issue.* Briefs shall enumerate and set forth the legal issue(s) as specified in the prehearing order if one has been entered.

WAC 242-02-570(1), (emphasis supplied).

Additionally, the Board's April 25, 2006 PHO in this matter states: "**Legal issues, or portions of legal issues, not briefed in the Prehearing Brief will be deemed to have been abandoned and cannot be resurrected in Reply Briefs or in oral argument at the Hearing on the Merits.**" PHO, at 6 (emphasis in original). *See City of Bremerton, et al., v. Kitsap County,* CPSGMHB Consolidated Case No. 04-3-0009c, Final Decision and Order (Aug. 9, 2004), at 5; *and Tulalip Tribes of Washington v. Snohomish County,*, CPSGMHB Case No. 96-3-0029, Final Decision and Order (Jan. 8, 1997), at 7.

Also, the Board has stated, "Inadequately briefed issues would be considered in a manner similar to consideration of unbriefed issues and, therefore, should be deemed abandoned." *Sky Valley, et al., v. Snohomish County*, CPSGMHB Case No. 95-3-0068c, Order on Motions to Reconsider and Correct (Apr. 15, 1996), at 3.

[2] The Board notes that Item 71 is an excerpt from the Town's Plan, a key document in this proceeding. The Board takes official notice of this item.

The PHO sets forth Legal Issue 4 as follows:

> *Legal Issue No. 4: Did the Town of Eatonville fail to comply with the review requirements as defined in RCW 36.70A.106 [by not transmitting these regulations to state agencies for review]?*

Petitioners offer no argument anywhere in the prehearing brief on whether the City complied with the filing requirements of RCW 36.70A.106. *See* Pruitt PHB, at 1-10. Therefore, **the Board deems Legal Issue 4 as abandoned**.

IV. LEGAL ISSUES AND DISCUSSION

A. LEGAL ISSUE NO. 1 and LEGAL ISSUE NO. 2

The Board's PHO set forth Legal Issue No. 1:

> *Legal Issue No. 1: Do the adopted regulations fail to comply with the requirements of RCW 36.70A.130(1) to develop regulations that are consistent with the comprehensive plan?*

The Board's PHO set forth Legal Issue No. 2:

> *Legal Issue No. 2: Do the adopted development regulations fail to comply with the requirements of RCW 36.70.547 [as per RCW 36.70A.510] to discourage the siting of incompatible land use near general aviation airports?*

Applicable Law

The relevant provision of RCW 36.70A.130(1) states, "(d) Any amendment of or revision to development regulations *shall be consistent with and implement the comprehensive plan*."

The relevant Town of Eatonville Plan Policies contested by Petitioners are the following:

- Under General Land Use Goal LU-1,[3] the following policies:

> . . .
>
> 7. Encourage the *protection of Swanson Airport from adjacent incompatible land uses and activities* that could impact the present and future operations of the airport. *Uses may include non-aviation residential, multifamily,*

[3] LU-1 states: "To support and improve a rural small town, residential community comprised largely of single-family neighborhoods together with a central commercial area and a broad range of other support services and businesses which occur in identified commercial areas."

height hazards, and special uses such as schools, hospitals, and nursing homes and explosive/hazardous materials.

. . .

9. *Discourage the siting of uses adjacent to airports that* attract birds, create visual hazards, or emit transmissions [that] would interfere with aviation communications and/or instrument landing systems, or *otherwise obstruct or conflict with aircraft patterns, or result in potential hazards to aviation.*

10. *Encourage the adoption of development regulations that protect the airport from height hazards by developing a Height Overlay District [that] will prohibit buildings or structures from penetrating the Federal Aviation Regulations (FAR) Part 77 "Imaginary Surfaces."*

(Emphasis supplied).

- Under Airport Lands Goal LU-5,[4] the following policies:

. . .

2. *Protect the viability of the airport* as a significant economic resource to the community and the State;

3. Enhance coordination and consistency between comprehensive plans, implementing regulations and airport plans; and

4. *Reduce hazards that may endanger the lives of property and the public.*

. . .

6. *Encourage aviation related land uses, commercial and industrial development within the Aerospace zone.*

7. *Discourage all residential uses within 2,500 feet of the runway ends and limit the intensity of commercial, industrial or other land uses to five or less people per acre.*

(Emphasis supplied).

RCW 36.70A.510 states, "Adoption and amendment of comprehensive plan provisions and development regulations under this chapter affecting a general aviation airport are subject to RCW 36.70.547."[5]

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[4] LU-5 states "Protect the airport from incompatible uses through provisions in the Comprehensive Plan and Development Regulations."

[5] It is undisputed that the Town of Eatonville's airport, Swanson Field, is a general aviation airport subject to the provisions of RCW 36.70.547.

RCW 36.70.547 provides:

> *Every* county, city, *and town in which there is located a general aviation airport* that is operated for the benefit of the general public, whether publicly owned or privately owned public use, *shall, through its comprehensive plan and development regulations, discourage the siting of incompatible uses adjacent to such general aviation airport.* Such plans and regulations may only be adopted or amended after formal consultation with: Airport owners and managers, private airport operators, general aviation pilots, ports, and the aviation division of the department of transportation. All proposed and adopted plans and regulations shall be filed with the aviation division of the department of transportation within a reasonable time after release for public consideration and comment. Each county, city, and town may obtain technical assistance from the aviation division of the department of transportation to develop plans and regulations consistent with this section.
>
> *Any additions or amendments to* comprehensive plans or *development regulations required by this section* may be adopted during the normal course of land use proceedings.
>
> This section applies to every county, city, and town whether operating under chapter 35.63, 35A.63, 36.70, [or] 36.70A RCW, or under a charter.

(Emphasis supplied).

Board Discussion

Position of the Parties:

Petitioners' argument is quite straightforward. Ordinance No. 2006-6 does not discourage the siting of incompatible uses adjacent to Swanson Field since residential, commercial and industrial uses can all be located in the Aerospace District/Airport Overlay District and height restrictions do not protect the airport from height hazards because it allows structures to penetrate federally-established height limitations [Federal Aviation Regulations Part 77 (**FAR 77**)] adjacent to general aviation airports. By permitting these incompatible uses and allowing structural penetration of the height limitations, the Town has not reduced hazards associated with the airport and is endangering the lives and property of the pubic and airport users. These defects, Petitioners allege, do not comply with, or implement, the Town's Plan Policies and specific GMA requirements for general aviation airports. Pruitt PHB, at 1-7. Petitioners contend their position is supported by evidence submitted by the Washington State

Department of Transportation (**WSDOT**) Aviation Division and a corroborating e-mail from the Federal Aviation Administration (**FAA**). Index Exs. 54 and 58 [Petitioners' Exhibits A and B]

In response, the Town notes that it continues to work with the State in developing an airport plan for Swanson Field. In the meantime, the Town acknowledges that existing residences at the airport exceed FAR 77 height limits, and that if they were treated as "non-conforming uses, the owners would find it difficult to resell at market value or obtain fire and casualty insurance." Town Response, at 4. Additionally, the Town contends that FAR 77 does not prohibit structures of a certain height. *Id.* at 7. Instead, FAR 77 sets up a system of notice, review and comment by the Administrator of the FAA. *Id.* If after review of proposed construction, the FAA considers the proposal to exceed FAA height standards, then, "the Town may choose to disallow the construction." *Id.* at 8. However, the Town argues that residences that exceed the FAR 77 height limits would have to obtain a variance from the Town Board of Adjustment in order to exceed the FAA height limits. *Id.* The Town acknowledges that under its Comprehensive Plan, LU-1, Policy 10, the Town commits to adopting regulations to prohibit buildings that would penetrate the imaginary plane established in FAR 77, but the Town contends "Ordinance 2006-6 by its own terms is, and was not intended to be, not the final regulate [regulation] on this matter." *Id.* at 7.
Eatonville claims that what the Petitioners want is to have "air park" residential development (residences with hangars attached) rather than having "non-aviation" residential development. *Id.* at 9. To the contrary, the "Town wants the community to utilize the airport in a safe way, and believes this can be done with some structures that exceed FAR Part 77 height limits." *Id.* Additionally, the Town states "Some communities may find residential housing incompatible with the airports (sic), but this is not true in Eatonville where residential housing has been for years an acceptable adjacent use." *Id.* at 10. The Town also contends that FAR 77 merely sets out a process for FAA to comment on development proposals around the airport; it does not contain standards or requirements that prohibit any type of use or set height limitations. HOM Transcript, at 48.

In reply, Petitioners first contend that Ordinance 2006-6 is a final regulation intended to implement the comprehensive plan; it is not an intermediary step as the Town contends. Pruitt Reply, at 7. Secondly, Petitioners assert that state and federal testimony and comment letters were ignored by the Town. *Id.* And third, since the Town has not defined incompatible uses, it cannot discourage such uses adjacent to Swanson Field – "the Town has never met a land use it doesn't like." *Id.* at 10

Board Analysis:

On its face, Ordinance 2006-6 is not an *interim* development regulation; it is a *final* regulation,[6] to "[establish] development regulations at and adjacent to the Eatonville Airport – Swanson Field." *See* Ordinance 2006-6, Title. As such, these development regulations must be consistent with, and implement, the Town's Comprehensive Plan and comply with the GMA.

It is clear that the provisions of RCW 36.70A.510 and RCW 36.70.547 provide explicit statutory direction for local governments to give substantial weight to WSDOT Aviation Division's comments and concerns related to matters affecting safety at general aviation airports. Eatonville "*shall . . .* discourage the siting of incompatible uses adjacent to [Swanson Field]." RCW 36.70.547. Likewise, the FAA's expertise and decades of experience, as reflected in FAR Part 77, cannot be summarily ignored. Both these agencies have statutory authority to inject their substantial experience and expertise into local governmental matters involving airport safety.

The primary question for the Board is whether Eatonville's development regulations, pertaining to Swanson Field, are consistent with, and implement, the Town's Plan *and* are consistent with the GMA and related statutory requirements – *i.e.* RCW 36.70.547.

Ordinance 2006-6 Provisions – Incompatible Land Uses and Height Limitations:

The Town's Aerospace District, which apparently coincides with the geographic area of the Airport Overlay District, permits residential, commercial and industrial uses, so long as they do not violate the Airport Overlay District provisions. *See* Ordinance 2006-6, at 2; Eatonville Municipal Code 18.04.185.A. 3, 4 and 5. The Airport Overlay identifies six specific Zones as displayed in Map B attached to Ordinance 2006-6. The following table from the Town's regulations displays "Incompatible [and compatible] Land Uses." Only Zones 1, 2 and 3, the relevant Airport Overlay Zones, are shown.

Table 1
Incompatible Land Uses

Airport Overlay Zones	Applicable Uses
Zone 1 - Runway Protection Zone [*Extending 900' from the end of the primary surface, which is 200' beyond the end of the runway.*]	1. Land uses which by their nature will be relatively unoccupied by people should be encouraged (mini-storage, small parking lots, etc.)

[6] This is not to say the development regulations governing Swanson Field may not evolve and be improved as the Town proceeds with its Airport Plan, as funded and supported by WSDOT Aviation Division. *See* Ex. 73.

	2. Schools, hospitals, nursing homes, churches, day care centers, and mobile home parks are **prohibited**.
Zone 2 - Inner Safety Zone [*Extending 1,600' from the end of Zone 1.*]	1. Schools and day care centers are **prohibited**. 2. Outside the existing Eatonville UGA the average density of residential development will be one (1) dwelling unit per ten (10) acres on the property at the date of adoption of this ordinance. 3. Inside the Eatonville UGA the average density of residential development will be a maximum of four (4) dwelling units per acre on the property at the date of adoption of this ordinance.* 4. At the time surrounding development takes place, Weyerhaeuser Way South shall be built as a two-lane collector street with two twelve (12) foot travel lanes, separated by a ten (10) foot painted median and flanked by eight (8) foot paved shoulders, beginning at Center Street East and extending south for a distance of one thousand (1000) feet. The street section is constructed absent curb and gutter. Stormwater flows are managed by constructing low level grassy swales. The above specified roadway design and layout allows distressed aircraft to set down on this section of the street.
Zone 3 - Inner Turning Zone [*Fanning out at 60 degrees from each side of the centerline of the runway and extending 2,500' from the end of primary surface.*]	1. School and day care centers are **prohibited**.

Ordinance 2006-6, at 11-12; (emphasis supplied).

* The Board notes that this provisions would only apply to the *incorporated* portion of Eatonville's UGA since the City has no jurisdiction to establish densities in the unincorporated areas of Pierce County.

In short, the Town identifies schools and day care centers as *incompatible* and *prohibited* uses in Zones 1, 2 and 3. Additionally, hospitals, nursing homes, churches and mobile home parks are *prohibited, i.e.* incompatible, in Zone 1. However, residential development [apparently up to 4 du/acre within the UGA], commercial, and industrial use are all permitted, *i.e.* compatible, in Zones 1, 2 and 3. Even though these uses are permitted, height limitations as provided in the Ordinance, still apply. *See* Ordinance 2006, at 10 and 7-9. So how do the height restrictions limit these uses?

The Ordinance establishes five Height Restriction Zones. It appears to the Board that the primary focus of Petitioners' challenge to the height limitations is with the "Transitional Zone." The Ordinance defines the Transitional Zone as,

> Beginning at the center of the paved runway and at the same elevation as the paved runway, extending outward at ninety (90) degrees to the center of the runway, for one hundred and twenty five (125) feet and rising to a vertical height of twenty eight (28) feet, then extending further outward at a *defined slope of five (5) feet outward for each one (1) foot upward until it meets the horizontal surface which is one hundred fifty (150)* feet above the airport elevation of eight hundred forty three (843) feet, or nine hundred ninety three (993) feet above sea level. HEIGHT RESTRICTIONS: No object shall penetrate the imaginary line created by a slope of ***seven (5)*** feet [inconsistency in original text] outward for each one (1) foot upward.

Ordinance No. 2006-6, at 8, (emphasis supplied). Thus, at 125 feet, and perpendicular, from the centerline of the runway, a structure (apparently only residential structures[7]) could be 28 feet high (*i.e.* a 4.46:1 slope). Beyond that point, one foot of height could be added for each five feet of horizontal measurement (*i.e.* a 5:1 slope). Thus, at 175 feet from the runway centerline, a structure could be as high as 38 feet. The Board finds that this section of the height regulation is internally inconsistent and contradictory since the text indicates a 4.46: 1 slope for the first 125 feet from the runway centerline, followed by a 5:1 slope extending beyond that point. However, the "HEIGHT RESTRICTIONS" indicate either a 7:1 or 5:1 restriction from the centerline outward!

Consistency with, and implementation of, the Plan Policies and compliance with RCW 36.70A.510 and RCW 36.70.547:

The Comprehensive Plan Policies cited by Petitioners clearly articulate and adhere to the explicit requirement provided by RCW 36.70A.510 and RCW 36.70.547 to discourage the siting of incompatible uses at and adjacent to a general aviation airport. *See* LU-1 Policies 7, 9 and 10; and LU-5 Policies 2, 3, 4, 6 and 7. Additionally, LU-1 Policy 10 clearly commits the Town to protecting the airport from height hazards by developing a

[7] At another section of the Town's regulations, this 28-foot height limit is only applied to residential structures, while the height limit for *commercial* structures is set at 38 feet. *See* Ordinance 2006-6, at 3.

Height Overlay District [that] *will prohibit buildings or structures from penetrating the "Imaginary Surfaces" established in FAR Part 77.* But, do the Town's identified incompatible uses and height restrictions implement these Town Plan Policies, and do they comply with the relevant statutory provisions? The Board's answer is **NO**.

In support of their assertions, Petitioners, at least one of whom is a general aviation pilot, rely heavily on the comments made by WSDOT Aviation Division and FAA. RCW 36.70.547, via RCW 36.70A.510, is explicit in its requirement that the Town consult with WSDOT Aviation Division regarding the identification and discouragement of incompatible uses. It is undisputed that the Town provided a draft of its development regulations for Swanson Field to the WSDOT Aviation Division. While the Aviation Division's comments supported the Town's use of an Airport Overlay Zone, WSDOT noted that the regulations "fail to protect some of the most critical areas adjacent to the airport and provide a safe environment for aviation users and the general public." Ex. 54, at 1. The WSDOT Aviation Division's comments continue:

> [T]he regulations fail to protect some of the most critical locations adjacent to the airport in accordance with best management practices. According to historical aircraft accident data from the National Transportation Safety Board (NTSB), Zones 1 and 2, as well as areas adjacent to the airport runway within the Aerospace District, have the highest potential for aircraft accidents. Zone 3 also has a high potential for aircraft accidents, especially in the right-hand turning radius, which is the typical traffic pattern for this airport [*Swanson Field*]. These areas also have high aircraft noise levels. Residential and other noise sensitive uses are considered incompatible when located in these zones and have the highest potential to disrupt the long term viability of an airport.
>
> Our comments and recommendations to correct these deficiencies are as follows:
>
> 1. The proposed development regulations would permit residential development within Zone 1. These areas are located at the runway ends and are also known as the Runway Protection Zone or RPZ. Recommendation: *Prohibit residential development and high intensity non residential development in Zone 1.*
>
> 2. Most of Zones 2 and 3 south of the airport's runway are located within a proposed high-density mixed-use residential district. This area is largely undeveloped with large ownership patterns. The proposed street set-aside within the extended runway centerline is a good first step to improving airport safety; however, residential density plays a significant role in land use compatibility. Additionally, residential density should be decreased within the right turning radius of Zone 3, due to the typical airport traffic

pattern. Residential clustering provisions may be an alternative approach.
Recommendation: *Zone 2 should be reserved for commercial or industrial uses. Residential uses in Zone 2 should be allowed only as a last resort, and only if clustering.*

3. The Aerospace District as well as the Airport Overlay District fails to provide adequate setbacks from the airport runway centerline. The proposed setback is less than the setback required in the previous code with a minimum lot size of one-half acre and 100 foot lot widths. Currently, the Aerospace District is largely undeveloped. There are approximately 9 residential structures presently located within 125 feet of the airport runway centerline. However, at full development, the number of residential dwellings just along the airport runway could increase from 9 dwelling units to as many as 40 or 50 dwellings.

   According to the NTSB aircraft accident data, areas located parallel to the airport runway have the highest incidence of aircraft accidents. Structures this close to the runway would also penetrate the Federal Aviation Administration [*sic* Regulations] (FAR) Part 77 airspace surfaces at a higher degree than if the setback was lengthened, and structures placed further [*sic* farther] from the airport runway and primary surface. Height hazards are one of the leading causes of aircraft accidents nationally.

   Two other residential airparks in the state, Crest Air Park and Desert Aire, have setbacks from the centerline of the runway of 225 feet and 215 feet, respectfully [*sic* respectively]. This is 90 to 100 feet greater then [*sic* than] the proposed regulations.

   Additionally, the current Aerospace District has many elements that create unnecessary confusion and directly conflict with the airport overlay. These include setback provisions and intensity requirements within the runway approach and departure area (Zone 1).

   Recommendation: *Setbacks from the airport runway should be increased to promote airport safety and limit penetration of FAR Part 77. Non-aviation residential development should be limited as much as possible, especially along the airport runway. The Aerospace District should be reviewed and amended.*

4. The height hazard standards within the proposed regulations are flawed and, if implemented, would disrupt airport operations,

compromise public health and endanger pilots and the general public. Height hazards are one of the leading causes of aircraft accidents. The height standards described in the proposed code do not conform to federal regulations and would increase allowed structure heights above the FAR Part 77 airspace surfaces. The attempt to define new standards for the surfaces creates confusion with federal regulations and promotes an unsafe environment for people on the ground and in the air.

Recommendation: *Use the Federal Aviation Regulations (FAR) Part 77 standards to define airspace. These regulations are supported by years of research and analysis and have been used nationally for all public use airports for over 50 years.*

5. The proposed regulations incorrectly reference FAR Part 77 notice requirement application form 7460-1. It is the individual developer's responsibility to submit this application form to the FAA if the proposed development triggers the application criteria. These criteria [in the Town's regulations] are different than whether or not the proposed development may penetrate FAR Part 77.

   Recommendation: *Amend the regulations to correctly reference the application form 7460-1. A statement should also be inserted into the regulations noting that the development regulations do not waive the developer's responsibility to submit proper applications to the FAA.*

If allowed in areas adjacent to the airport, increased residential density and increased encroachment of navigable airspace will make it increasingly difficult for Swanson Field to operate. The challenge for local leaders becomes choosing the right type of development that allows for the protection of the airport to meet current and future demands for transportation. *Taking appropriate steps to address incompatible land use activities during the lifetime of the airport can decrease the consequences and severity to the public health and protect the airport as an essential public facility. . . .*

Ex. 54, at 2-4, (emphasis supplied).

The FAA strongly concurred with the WSDOT Aviation Division's concerns. The FAA stated:

> We would like to take this opportunity to let you know that the Federal Aviation Administration *fully supports* the attached letter from the

> Washington State Department of Transportation. *We are seriously concerned that the City of Eatonville is not taking the appropriate steps to address incompatible land use proposals and are ignoring federal regulations.*
>
> *The height hazard standards within the proposed regulations, in particular, are flawed and, if implemented, would disrupt airport operations, compromise public health and endanger pilots and the general public. . . . Federal Aviation Regulation Part 77 is not something that can be arbitrarily modified* to match a particular development proposal. FAR Part 77 has been in existence for over 50 years . . . and it should be recognized accordingly. The Federal Regulations and State Planning guidelines have been written to take into consideration different sizes and types of airports. We therefore recommend that your development regulations be modified to adopt FAR Part 77 in its entirety.

Ex. 58, at 1, (emphasis supplied).

These agencies, with expertise in aviation safety and defining airspace, had the opportunity to review the Town's proposed development regulations. They provided specific comments noting flaws, which related to height limitations and incompatible uses and offered recommendations to correct the noted deficiencies. The agencies' comment letters detailed serious conflicts that, if uncorrected, would endanger those using Swanson Field and the general public. These comment letters were available to the Town Council prior to its taking action on the development regulations; yet no changes were made to address the serious safety concerns raised by the state and federal agencies charged with aviation safety. Nor did the Town pay any heed to its own Plan Policies. Without any technical aviation safety support in its record, the Town simply adopted the proposed regulations without further revision or amendment. *See* HOM Transcript, at 60-61. It appears to the Board that the Town completely ignored the concerns of general aviation pilots (Petitioners), the FAA and WSDOT Aviation Division, the very federal and state agencies charged with aviation safety at general aviation airports, and the groups the town was required to engage in "formal consultations" with per RCW 36.70.547.

At the HOM, Petitioners offered an illustrative demonstration, without objection of the Town, to illustrate FAR Part 77's height restrictions in the Transitional Zone extending perpendicular to the runway. In essence, the imaginary surface for the Transitional Zone, as set forth in FAR 77.25(e), requires a slope of 7:1 – seven feet outward for each foot upward. Thus, at 125' from the centerline of the runway, penetration of the imaginary surface (obstruction) would occur at approximately 18 feet in height. The Town's regulations allow a 28 foot structure. Under FAR Part 77's imaginary surface regulations, a structure would have to be almost 200' from the runway centerline to achieve a height of 28 feet and almost 270' for a 38-foot high structure.

It is clear that the Town's height restrictions are contrary to, and conflict with, FAR Part 77 height provisions. Nor are the Town's regulations consistent with, nor do they implement, the Town's Comprehensive Plan Policies – LU-1 Policies 7, 9 and 10; and LU-5 Policies 2, 3, 4, 6 and 7. Allowing structures to penetrate the height limits established by the imaginary surfaces creates a potential obstruction hindering airport operations. Therefore, the Town has not complied with the provisions of RCW 36.70A.130(1), RCW 36.70A.510 and RCW 36.70.547.

Likewise, the limited definition of incompatible uses in the Town's regulations is contrary to the Town's own Plan Policies and contrary to WSDOT Aviation Division and FAA comments on incompatible uses. Allowing extensive incompatible uses to continue developing adjacent to Swanson Field is also contrary to the Town's own Plan Policies and the provisions of RCW 36.70.547. The Town acknowledges that it authorized the continuation of incompatible uses in its Ordinance.

> This chapter is adopted pursuant to RCW 36.70A.547 and 36.70A.200 which requires a county, city or town to enact development regulations, to discourage the siting of incompatible land uses adjacent to general aviation airports.
>
> *The incompatible land use regulations presented in this Chapter differ from the Federal Aviation Administration FAR 77 height regulations and the State of Washington Department of Transportation Aviation Division, suggested planning guidelines regulating land uses adjacent to general aviation airports.* This departure, however insignificant, is necessitated by the fact that the Eatonville Airport (Swanson Field) was built and later expanded before the incompatible land use regulations adjacent to the general aviation airports came into existence. Residential development was permitted close to the airport runway and other developments, such as schools, were permitted to be built adjacent to the airport property. At the time, these developments were considered to coexist safely with the airport operations. Today, the view at the Federal and State level has changed. Many of the early permitted developments are now being judged unsafe by the Federal and State agencies. However, the Town of Eatonville had the obligation to accommodate the Federal and State desires and the rights of property owners at and near the airport. This chapter attempts to find a compromise that recognizes the Federal regulations and State planning guidelines and protects the rights and values of property owners at and around the airport. By adopting this chapter, the airport is more safe than having done nothing.

Ordinance 2006-6, at 4; (emphasis supplied).

Again, the Board finds that the Town's development regulations for Swanson Field do not discourage the siting of incompatible land uses at or adjacent to the airport thereby

hindering airport operations. These discrepancies are far from insignificant. Allowing new development, especially residential development at, and adjacent to, Swanson Field is not consistent with, nor does it implement, the Town's Comprehensive Plan Policies – LU-1 Policies 7, 9 and 10; and LU-5 Policies 2, 3, 4, 6 and 7. Allowing incompatible uses at and adjacent to this general aviation airport creates serious safety hazards to airport users and the general public and hinders airport operations contrary to statute. Therefore, Ordinance 2006-6 fails to comply with RCW 36.70A.130(1), RCW 36.70A.510 and RCW 36.70.547.

The Town seems extremely concerned with protecting the rights and property values of the few residents that own structures that would not comply with the height restrictions or whose uses (primarily residential[8]) are deemed incompatible by the FAA and WSDOT Aviation Division criteria. The Town is resistant to making these uses nonconforming. *See* Town Response, at 4 and 10; Ordinance 2006-6, at 4; and HOM Transcript, at 34-37. However, in its zeal to protect these few property owners, the Town overlooks the fact that Ordinance 2006-6 not only permits existing uses to continue, but also allows new construction and development within the airspace of concern to FAA and to WSDOT. The Town's approach does more than permit existing "nonconforming" uses to continue, it *perpetuates* incompatibility and *exacerbates* the very serious safety concerns raised by WSDOT and FAA. Instead of discouraging incompatible uses at and adjacent to Swanson Field, the Town's adoption of Ordinance 2006-6 is actually encouraging the development of future incompatible uses. This is directly contrary to the Town's own Plan Policies and the direction of RCW 36.70.547.

The "Variance" Process:

As noted by Petitioners, WSDOT Aviation Division and the FAA, the Town's "variance procedures" appear contradictory and confusing. The Town's regulations suggest that a person pursuing a proposal that would not comply with the requirements of the Town's Aerospace District or Airport Overlay District may apply to the Town's Board of Adjustment for a variance from these regulations. The application for a variance must be reviewed by the FAA and a determination made [by the FAA] "as to the effect of the proposal on the operation of air navigation facilities and the safe and efficient use of navigable airspace." *See* Ordinance 2006-6, at 14. Nonetheless, the Town may grant a variance, regardless of the FAA's determination, if unnecessary hardship is found by the Board of Adjustment. *Id.*

As noted previously, the Town's Height Restrictions are already different than those provided in FAR Part 77. Yet the Town's variance process would seem to suggest additional relief would be available for "hardship." Also, as the Board understands the concerns of Petitioners, the FAA and the WSDOT Aviation Division, *the FAA review* is

[8] Apparently, there are presently between 6 to 10 home owners whose residences might be deemed nonconforming if the WSDOT and the FAA provisions were enacted by the Town.

based upon FAR Part 77, *not what the Town has adopted.* Nonetheless, this provision is ambiguous and unclear.

Additionally, Ordinance 2006-6 also provides that no penetration of the Town's height restrictions can occur without a variance approved by the Board of Adjustment; and that once such variance is received by the applicant, *then* the FAA must be notified. *See* Ordinance 2006-6, at 3. This provision is directly contradictory to the variance provisions noted *supra*, indicating that the FAA review occurs *prior* to considering a variance. These two "variance" provisions are contradictory, ambiguous and unclear.

Conclusion Legal Issues 1 and 2

The Town of Eatonville's adoption of Ordinance 2006-6 establishing development regulations for Swanson Field does not discourage the siting of incompatible land uses at or adjacent to the airport thereby hindering airport operations. Further, these development regulations are not in accord with FAR Part 77 height provisions. Additionally, the variance procedures are contradictory and confusing. These deficiencies and flaws are far from insignificant. The Town's action in this matter was **clearly erroneous**. Ordinance 2006-6's provisions, pertaining to height restrictions and allowing new development, especially residential development, at and adjacent to Swanson Field, is **not consistent with, and does not implement**, the Town's Comprehensive Plan Policies – LU-1 Policies 7, 9 and 10; and LU-5 Policies 2, 3, 4, 6 and 7. Allowing incompatible uses and heights at and adjacent to this general aviation airport creates serious safety hazards to airport users and the general public and hinders airport operations. Therefore, Ordinance 2006-6 **fails to comply** with RCW 36.70A.130(1), RCW 36.70A.510 and RCW 36.70.547.

B. LEGAL ISSUE NO. 3

The Board's PHO set forth Legal Issue No. 3:

> *Legal Issue No. 3: Did the Town of Eatonville fail to comply with the requirements of RCW 36.70A.100 to coordinate their development regulations with Pierce County on this regional issue?*

Applicable Law

RCW 36.70A.100 provides:

> The comprehensive plan of each county or city that is adopted pursuant to RCW 36.70A.040 shall be coordinated with, and consistent with, the comprehensive plans adopted pursuant to RCW 36.70A.040 of other counties or cities with which the county or city has, in part, common borders or related regional issues.

Discussion

Position of the Parties:

Petitioners assert that the Town has not coordinated the adoption of its development regulations for Swanson Field with Pierce County. To support this contention, Pruitt refers to Ex. C, which expresses the County's concern and objection to the proposed zoning for unincorporated Pierce County in the vicinity of the Eatonville Airport. Pruitt PHB, at 6, and Ex. C.

In response, the Town argues that "Ordinance 2006-6 does not have any application to land use development in unincorporated Pierce County. . ." Town Response, at 10. Additionally, the Town argues that RCW 36.70A.100 requires coordination and consistency among the comprehensive plans of adjacent jurisdictions, and the challenged Ordinance does not alter the Town's comprehensive plan. *Id.* at 11.

In reply, Petitioners state, "Petitioners are willing to remove this item as a separate issue, but argue that the substance of the original issue is extremely relevant to issue no. 1." Pruitt Reply, at 11.

Board Analysis:

The Town is correct in its characterization of the requirements of RCW 36.70A.100. This section of the Act requires coordination and consistency between the comprehensive plans of Pierce County and the Town of Eatonville. Here, the challenged action – Ordinance No. 2006-6 – adopts development regulations. As Petitioners acknowledge, RCW 36.70A.100 is not applicable as stated in this Legal Issue. Legal Issue No. 3 is dismissed with prejudice.

Conclusion Legal Issue 3

RCW 36.70A.100 is not applicable in the challenge to the Town's adoption of Ordinance 2006-6. Legal Issue No. 3 is **dismissed with prejudice**.

C. LEGAL ISSUE NO. 4

The Board's PHO set forth Legal Issue No. 4:

Legal Issue No. 4: Did the Town of Eatonville fail to comply with the review requirements as defined in RCW 36.70A.106 [by not transmitting these regulations to state agencies for review]?

Conclusion Legal Issue 4

Legal Issue 4 was deemed **abandoned**. *See* Preliminary Matters, *supra.*

D. LEGAL ISSUE NO. 5 [Invalidity]

The Board has previously held that a request for invalidity is a prayer for relief and, as such, does not need to be framed in the PFR as a legal issue. The Board may consider the necessity of a determination of invalidity *sua sponte. See King County v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 13, 2003) at 18. Nevertheless, here Petitioners have framed the request for invalidity as a Legal Issue:

Legal Issue No. 5: Do these failures substantially interfere with the goals of the GMA [specifically, goals (3) Transportation, (5) Economic development, and (12) Public facilities and services] warranting a determination of invalidity under RCW 36.70A.302?

Applicable Law

RCW 36.70A.302 provides:

(1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
   (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
   (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
   (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

(2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or City. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the City or city or to related construction permits for that project.

Findings of Fact and Conclusions of Law

In its discussion of Legal Issue 1 and 2, supra, the Board found and concluded that: the Town of Eatonville's development regulations for Swanson Field, as adopted by Ordinance 2006-6, **did not implement**, and **were not consistent with** the Town's Comprehensive Plan Policies as required by RCW 36.70A.130(1); and that these development regulations **did not comply** with the requirements of RCW 36.70A.520 and RCW 36.70.547 to discourage the siting of incompatible uses near general aviation airports. On these Legal Issues, the Board found noncompliance. The Board is also **remanding** Ordinance 2006-6 with direction to the Town to take legislative action to revise their development regulations to comply with the requirements of the GMA.

In light of these defects, discrepancies, ambiguities, flaws and inconsistencies discussed in Legal Issues 1 and 2, *supra*, and the potential endangerment posed to not only those using the Eatonville general aviation airport, but to the safety of the general public as well, the Board concludes that the continued validity of Ordinance 2006-6 substantially interferes with the fulfillment of Goal 3 – RCW 36.70A.020(3).[9] Ordinance 2006-6 does not encourage an efficient multimodal transportation system that is based on regional [state and federal] priorities and coordinated with county and city comprehensive plans. Additionally, the Board concludes that the continued validity of Ordinance 2006-6 substantially interferes with Goal 11's direction to ensure coordination between communities and jurisdictions to reconcile conflicts – RCW 36.70A.020(11).[10] The Town's actions clearly conflict with state and federal priorities. Therefore, the Board enters a **determination of invalidity** with respect to Ordinance 2006-6 in its entirety.

V. ORDER

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

1. The Town of Eatonville's adoption of Ordinance 2006-6, establishing development regulations for Swanson Field, a general aviation airport, was **clearly erroneous**.
2. Ordinance 2006-6 **does not comply** with the requirements of RCW 36.70A.130(1), since the adopted development regulations for Swanson Field do not implement GMA-compliant Policies in the Town's Comprehensive Plan.
3. Ordinance 2006-6 **does not comply** with the requirements of RCW 36.70A.510 and RCW 36.70.547 requiring the Town of Eatonville to

[9] Goal 3: Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans. RCW 36.70A.020(3).
[10] Goal 11: Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

discourage the siting of incompatible uses near its general aviation airport – Swanson Field.

4. Additionally, the Board has found that the continued validity of Ordinance 2006-6 will potentially endanger those persons using the Eatonville general aviation airport and endanger the safety of the general public near this facility. The Board has determined that Ordinance 2006-6 substantially interferes with the fulfillment of Goals 3 and 11 – RCW 36.70A.020(3) and (11). Therefore the Board has entered a **determination of invalidity** with respect to the entirety of Ordinance 2006-6.
5. The Board **remands** Ordinance 2006-6 to the Town of Eatonville with direction to take the necessary legislative actions to adopt development regulations for Swanson Field that are consistent with, and implement, its compliant Plan Policies, per RCW 36.70A.130(1), and comply with the requirements of RCW 36.70A.510 and RCW 36.70.547, as set forth and interpreted in this Order.

- The Board establishes **March 16, 2007,** as the deadline for the Town of Eatonville to take appropriate legislative action to comply with the GMA as interpreted and set forth in this Order.
- By no later than **March 23, 2007**, the Town of Eatonville shall file with the Board an original and four copies of the legislative enactment described above, along with a statement of how the enactment complies with the GMA and this Order (**Statement of Actions Taken to Comply - SATC**). The Town shall simultaneously serve a copy of the legislative enactment(s) and compliance statement, with attachments, on Petitioners. By this same date, the City shall also file a "**Compliance Index**," listing the procedures (meetings, hearings etc.) occurring during the compliance period and materials (documents, reports, analysis, testimony, etc.) considered during the compliance period in taking the compliance action.
- By no later than **March 30, 2007**,[11] the Petitioners may file with the Board an original and four copies of Response to the Town's SATC. Petitioners shall simultaneously serve a copy of their Response to the Town's SATC on the Town.
- Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **10:00 a.m. April 12, 2007,** at the Board's offices. If the parties so stipulate, the Board will consider conducting the Compliance Hearing telephonically. If the Town of Eatonville takes the required legislative action prior to the **March 16, 2007**, deadline set forth in this Order, the Town may file a motion with the Board requesting an adjustment to this compliance schedule.

[11] **March 30, 2007** is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. *See* RCW 36.70A.330(2). The Compliance Hearing is limited to determining whether the Town's remand actions comply with the Legal Issues addressed and remanded in this FDO.

So ORDERED this 18th day of December, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

David O. Earling
Board Member

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.[12]

[12] Pursuant to RCW 36.70A.300 this is a final order of the Board.

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

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

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

APPENDIX A

Procedural Background

A. General

On March 23, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Stephen Pruitt and Steven Van Cleve (**Petitioners** or **Pruitt**). The matter was assigned Case No. 06-3-0016. Board member Margaret A. Pageler was initially assigned the role of Presiding Officer (**PO**) in this matter.[13] Petitioners challenge the Town of Eatonville's (**Respondent**, **Town** or **Eatonville**) adoption of Ordinance No. 2006-6 (**Ordinance**). The Ordinance *amends* the Town's development regulations pertaining to the area at or adjacent to the Eatonville Airport – Swanson Field. The grounds for the challenge are noncompliance with several sections of the Growth Management Act (**GMA** or **Act**).

On March 27, 2006, the Board issued a "Notice of Hearing"; on April 24, 2006, the Board held the PHC; and on April 25, 2006 the Board issued a "Prehearing Order" (**PHO**) setting the schedule and Legal Issues for this case.

On June 29, 2006, pursuant to a request for a settlement extension, the Board issued an "Order Granting Settlement Extension and Amending Case Schedule."

On September 28, 2006, the Board received a "Settlement Status Report." The Board received no further requests for settlement extensions.

B. Motions to Supplement the Record and Amend the Index

On April 24, 2006, the Board received the Town of Eatonville's "Index to Record" (**Index**), listing 72 items.

The Board's PHO set forth the schedule for filing Motions to Supplement the Record.

During the scheduled motions practice, the Board did not receive any Motions to Supplement the Record. The Settlement Extension was granted after the motions schedule had lapsed. However, there was a Motion to Supplement the Record filed with the Town's Response brief. This motion is addressed in this Order under Preliminary Matters.

C. Dispositive Motions

The Board's PHO set forth the schedule for filing Dispositive Motions.

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[13] Prior to the Hearing on the Merits, Board member Edward G. McGuire assumed the role of PO in this proceeding.

During the scheduled motions practice, the Board did not receive any Dispositive Motions. The Settlement Extension was granted after the motions schedule had lapsed. However, there was a Motion to Dismiss filed with the Town's Response brief. This motion is addressed in this Order under Preliminary Matters.

D. Briefing[14] and Hearing on the Merits

On October 10, 2006, the Board received Petitioners' "Prehearing Brief," with three attached exhibits [A, B & C]. **(Pruitt PHB)**.

On October 24, 2006, the Board received the Town of Eatonville's "Respondent's Prehearing Brief," eight attached exhibits [three exhibits were not included in the Index] **(Town Response)**. Accompanying the Town Response were: 1) Motion to Supplement Record, asking that three exhibits be added to the record **(Town Motion – Supp)**; 2) Motion for Leave to File a Motion to Dismiss Petition; and 3) Motion to Dismiss **(Town Motion – Dismiss)**. That same day the Board notified the parties via e-mail that the Board would entertain argument at the Hearing on the Merits **(HOM)** on both motions. Also, the Board received Petitioners' "Response to Motion to Dismiss" **(Pruitt Response – Dismiss)**.

On October 30, 2006, the Board received Petitioners Pruitt and Van Cleve's "Petitioners' Reply Brief;" no exhibits were attached **(Pruitt Reply)**.

On November 6, 2006, the Board held an HOM at the 20th floor conference room, 800 5th Avenue, Seattle, Washington. Board member Edward G. McGuire presided at the HOM. Board members David Earling and Margaret Pageler were present for the Board. Julie Taylor, Board Law Clerk also attended. Petitioners Stephen Pruitt and Steven Van Cleve appeared *pro se*. Robert E. Mack and Edward G. Hudson represented Respondent Town of Eatonville. Eatonville Mayor Tom Smallwood and Mart Kask were also present. Court reporting services were provided by Eva Jankovits of Byers and Anderson Inc. The hearing convened at approximately 2:00 p.m. and adjourned at approximately 4:00 p.m. The Board ordered a transcript of the proceeding **(HOM Transcript)**.

On November 13, 2006, the Board received the HOM Transcript.

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[14] All electronic briefing was timely filed; the dates noted *infra* indicate the date the Board received hard copy of the briefing.