No. 330834

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CITY OF AIRWAY HEIGHTS and BRIGITTA ARCHER,

Respondents.

v.

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

Appellants.

BRIGITTA ARCHER'S RESPONSE BRIEF

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[4848-5910-4803]

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I. INTRODUCTION

This appeal involves the City of Airways Heights' legislative action authorizing potential infill multifamily residential development, subject to strict standards and conditional use permit approval, on approximately 29 acres of commercially zoned property in the vicinity of Spokane International Airport ("SIA") and Fairchild Air Force Base ("FAFB"). Specifically, this appeal challenges the Eastern Washington Growth Management Hearings Board's ("Board") Final Decision and Order ("Decision") invalidating this legislative action.

Despite that it is already surrounded by densely populated development, the Board concluded that new residential development on these 29 acres contravenes the Growth Management Act ("GMA") because it will interfere with current and future FAFB and SIA operations. But the Board's Decision was not supported by the substantial evidence in the record or the applicable GMA standards; and it failed to give deference to the legislative discretion the GMA affords a planning city. The Honorable Michael P. Price, who sustained the Hearing Examiner's decision in *Deer Creek Developers, LLC v. Spokane County,*[1] and is thus

[1] 157 Wn. App. 1, 236 P.3d 906 (2010). This decision is also in the certified Administrative Record ("AR") at 334-42.

well-familiar with this area, appropriately reversed the Board's Decision and reinstated Airway Heights' ordinances.

The realities of the actual, established development conditions when Airway Heights made its legislative decision belie the Board's conclusions. And remarkably, though central to respondent Brigitta Archer's successful challenge before the trial court, appellants Spokane, Spokane County and SIA[2] choose not to address the surrounding existing development conditions in their opening brief. To the contrary, after reading appellants' joint brief, one would likely conclude that the subject 29 acres is located in an area that is largely undeveloped. Appellants confine their discussion to the Deer Creek Apartments, as if it is the sole residential development in the area. In reality, these 29 acres form a doughnut hole in an already significantly developed, densely populated area, of which the Deer Creek Apartments is but one component. The 29 acres that are the subject of Airway Heights' ordinances are currently developed with two single-family homes and are

- Bordered on two sides by 400 existing apartment units – the Bentley Apartments (not even mentioned in appellants' brief) comprise more than half these apartments and are at

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[2] The Eastern Washington Growth Management Hearings Board is listed in the caption as an appellant. The Board did not, however, appeal the superior court's reversal of its decision. *See* Clerk's Papers ("CP" 438-40.) It likewise did not participate in the appeal to the superior court. (*See* CP 428.)

the western border of the property; the Deer Creek apartments are at the eastern border;[3]

- Bordered at the northeast by a 33,000 square-foot, 10-screen cinema;[4]
- Already subject to ambient noise from the very nearby and heavily trafficked five-lane Highway 2 that obscures noise generated by FAFB and SIA;[5] and
- In close proximity to a Walmart just north of Highway 2.[6]

There is no evidence in the record that additional residential development of this limited area of land will change the character of the area, much less cause any tangible impact on FAFB or SIA.

Moreover, the ordinances on review do not authorize any residential development outright. The ordinances only allow the property owners to make application for a conditional use permit to construct multi-family residential development. Infill multi-family residential development will only occur if the applicant can demonstrate to a Hearing Examiner, after a public hearing and consideration of comments from FAFB, SIA, Spokane County and Spokane, that

- all conditional use permit criteria are satisfied;
- the proposal complies with Airway Heights' unchallenged Joint Land Use Study ("JLUS") standards as set forth in

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[3] AR 946-48, 950, 952, 1204A.

[4] AR 475.

[5] AR 950.

[6] AR 475.

chapter 17.16 AHMC;

- the property is not within, or within 100 feet of the City's adopted 70LdN contour, and is within the City's adopted 65 LdN sound contour; and
- the project is appropriately mitigated to ensure compatibility, which mitigation will include tools and strategies identified in JLUS, such as sound mitigation, avigation easements, deed restrictions and real estate disclosure requirements.

Again, if conditional use permit approval is obtained, such development will not expand the footprint of existing multi-family residential development – all of the potential development will simply **infill** the existing multi-family development.

It was in this context that Airway Heights adopted its ordinances. Airways Heights considered and balanced its own unfulfilled need for more multi-family housing, the realities of existing conditions, the property rights of its citizens and, of course, the need to protect the Fairchild Air Force Base and Spokane International Airport from new development that will negatively impact current and future operations. Ordinances C-797 and 798 represent a balanced and reasoned answer that satisfactorily accommodates all of these competing needs.

Unfortunately, both the Board and appellants fail to recognize this important context. If residential development in this area impacts FAFB and SIA, such impacts are already a reality of the existing development (though the record does not reflect that FAFB or SIA operations were

impacted). Appellants extensively quote (and the Board exclusively relied upon) comment letters that make general statements regarding the importance of FAFB and SIA followed by conclusory and speculative expressions of concern regarding the general incompatibility between residential development and these facilities. But the quoted comment letters offer no specific evidence or data to demonstrate that fully mitigated, multi-family residential infill development of this limited 29 acre area will be "incompatible with the [FAFB's] ability to carry out its mission requirements"[7] or constitutes the siting of incompatible uses adjacent to" the SIA;[8] or "precludes the siting of essential public facilities" that would otherwise be sited in this area.[9]

This Court should not condone interference with Airway Heights' legislative action based upon expressions of unsubstantiated and speculative concern that fail to acknowledge the protections afforded by the mandatory conditional use permit process. Like the trial court, this Court should reverse the Board and reinstate Airway Heights' ordinances.

II. ASSIGNMENTS OF ERROR AND ISSUES PRESENTED

Appellants Spokane, Spokane County and SIA were petitioners

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[7] RCW 36.70A.530(3).

[8] RCW 36.70.547.

[9] RCW 36.70A.200(5).

before the Board (AR 1-36) challenging Airway Heights legislative action and the prevailed before the Board (AR 1743-80). Respondents Airway Heights and Archer were petitioners before the Superior Court (CP 1-103), challenging the Board's Decision, and prevailed before the Superior Court (CP 427-30). On this appeal, this Court directly reviews the Board's Decision, sitting in the same position as the superior court, applying the standards set forth in the Administrative Procedure Act ("APA"), chapter 34.05 RCW, and the GMA, chapter 36.70A RCW. *City of Redmond v. Central Puget Sound Growth Mgmt. Hrgs. Bd.*, 136 Wn.2d 38, 45, 959 P.2d 1091 (1998). Thus, while Archer and Airway Heights are the respondents in this appeal of the trial court order, they maintain their role as petitioners challenging the Board's Decision on this appeal.

Thus, pursuant to RAP 10.3(h), respondent Archer assigns error to Board Findings 3 through 9 and Conclusions 1 through 7. More specifically, Archer assigns error to the Board's Decision as follows:

1. The Board failed to adhere and its Decision is contrary to the GMA mandate in RCW 37.70A.320 and.3201 to give deference to Airway Heights' legislative discretion. The Board erroneously interpreted and misapplied the consultation requirements of RCW 36.70A.530, RCW 37.70A.510 and 36.70.547, and improperly gave undue deference to the speculative comments of neighboring jurisdictions and outside agencies

such that Airway Heights legislative discretion was improperly usurped.

Issue Presented: Did the Board fail to give deference to Airway Heights' legislative discretion as required by the GMA to allow the city to address and balance unique, local circumstances and competing needs when it favored and deferred to outside agencies and jurisdictions whose comments were general in nature and unsubstantiated with data and evidence specific to the circumstances of the subject property or infill development?

2. The Board erroneously found that the potential infill development authorized by Ordinances C-797-798 will be incompatible with FAFB's ability to carry out its mission, even though such infill development, if approved, will be limited to a small area, will not expand the footprint of existing residential development, and will be subject to strict conditions to ensure compatibility. The Board thus erroneously concluded that Airway Heights failed to comply with RCW 36.70A.530. The Board's decision in this regard misinterprets and misapplies the law, is not supported by the substantial evidence in the record. Relevant to this challenge, Archer assigns error to Findings of Fact 3-7 and 9 and Conclusions of Law 1, 2, and 5-7.

Issue Presented: Is the Board's conclusion that conditionally authorized infill residential development contravenes RCW 36.70A.530

unsupported by the substantial evidence in the record and a misapplication of the law where there were no statements from FAFB that the conditionally authorized infill development will interfere with current or future missions, and the comments submitted were general in nature, unsubstantiated with data and evidence specific to the circumstances of the subject property and no evidence was presented that conditionally authorized residential development that will be confined within and infill the footprint of existing, like development will negatively impact FAFB?

3. The Board erroneously found that Airway Heights Ordinances C-797 and C-798 failed to discourage the siting of incompatible uses adjacent to the SIA even though the infill development, if approved, will be limited to a small area, will not expand the footprint of existing residential development, and will be subject to strict conditions to ensure compatibility. Thus the Board erroneously concluded that Airway Heights failed to comply with RCW 36.70A.510 and RCW 36.70.547. Relevant to this challenge, Archer assigns error to Findings of Fact 3-5, 8 and 9 and Conclusions of Law 3-7.

Issue Presented: Is the Board's conclusion that conditionally authorized infill residential development contravenes RCW 36.70A.510 and 36.70.537 unsupported by the substantial evidence in the record and a misapplication of the law where the Board relied on comments that were

general in nature, unsubstantiated with data and evidence specific to the circumstances of the subject property and no evidence was presented that conditionally authorized residential development that will be confined within and infill the footprint of existing, like development will negatively impact SIA?

4. The Board erroneously found that Ordinances C-797 and C-798 preclude the siting of essential public facilities without identifying any specific planned or proposed airport facility that cannot proceed because of the Ordinances. Thus, the Board erroneously concluded that Airway Heights failed to comply with RCW 36.70A.200(5). Relevant to this challenge, Archer assigns error to Findings of Fact 3- 9 and Conclusions of Law 5-7.

Issue Presented: Is the Board's conclusion that conditionally authorized infill residential development contravenes RCW 36.70A.200(5) unsupported by the substantial evidence in the record and a misapplication of the law where the Board failed identify any proposed airport facility that will be precluded by the conditionally authorized infill development?

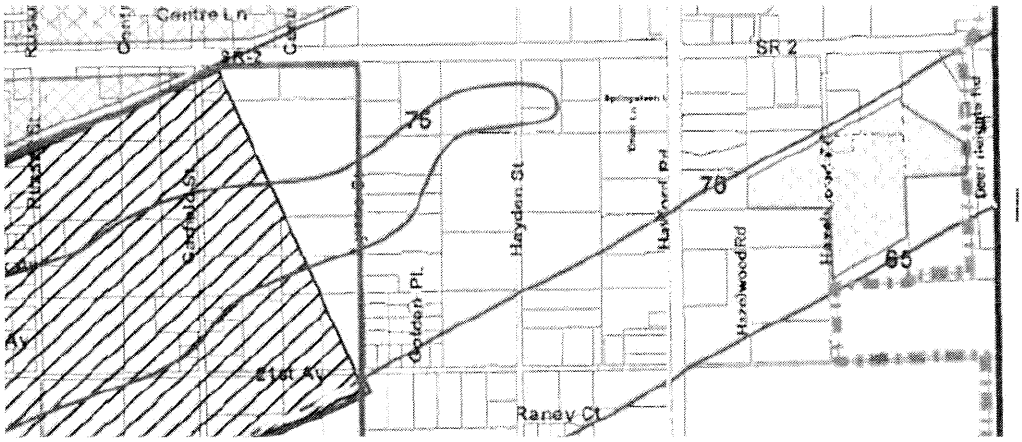
III. COUNTER STATEMENT OF THE CASE

The history leading to the adoption of Ordinances C-797 and C-798, including the multi-jurisdictional joint study process conducted in relation to FAFB is certainly important to resolution of this appeal. Before

evaluating that history, however, an understanding of the subject property, as well as the potential development authorized by the ordinances, provides essential context for evaluation of the issues presented.

A. The 29 Acres Subject To Ordinances C-797 and C-798

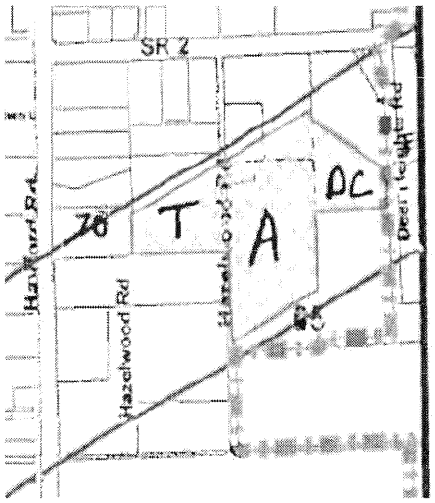
The approximately 29 acres that are the subject of this appeal and affected by Ordinances C-797 and C-798 are within the area known as the East Annexation area, which was only recently annexed into Airway Heights in 2012.[10] The affected properties are depicted through yellow cross-hatching on the map which is Appendix A to Ordinance C-797 (AR 293. *See also* AR 943) and are located several hundred feet south of State Route Highway 2 and east of Hayford Road. An excerpt of the map showing the relevant area is below.



[10] The annexation was contemplated as early as 2009 (*see* AR 344) but became effective on January 1, 2012 pursuant to Airway Heights Ordinance C-749.

Though the property is currently zoned C-2 – General Commercial, the existing use of most of this property is residential. Petitioner Brigitta Archer owns the majority of the property, just over 18 acres along the east side of Hazelwood Road; and has lived and raised her family on this property since 1966.[11] (AR 946-47.) Maike Tan owns approximately 9 acres, also improved with a home, on the west side of Hazelwood Road.[12] (AR 948.) The remaining property (approximately 5 acres) is undeveloped property south of Highway 2, east of the Archer property and north of the existing Deer Creek Apartments and was the subject of the 2008 conditional use application to expand the existing apartments. (AR 309.)

To orient the Court, a smaller excerpt of the map attached as Appendix A to Ordinance C-797 is to the right and has been annotated to reflect the ownership interests in the proprety. Archer's property is marked with an "A", Tan's property is marked with a "T" and the Deer Creek Property is marked "DC."



The existing development surrounding these properties is

[11] Ms. Archer's 18+ acres are at S. 1615 Hazelwood Road. (AR 946)

[12] Ms. Tan's property is located at S. 1626 Hazelwood Road. (AR 948.)

substantial. The property is bounded on two sides by existing apartment complexes – the Bentley Apartments which occupy property between Hayford Road and Hazelwood Road and the Deer Creek Apartment complex, which is further east along Deer Heights Road. Unlike the Deer Creek Apartments, expansion of the Bently Apartments was allowed pursuant to developer's vested rights. (AR 952.) Collectively, these two complexes are comprised of approximately 400 apartments. (AR 946-48, 950, 1204A.) Because the property is "surrounded by existing multi-family residential developments or intervening structures on three sides," Airway Heights "considers these proeprties to be 'infill.'" (AR 950.)

Notably, both the Deer Creek Apartments and the Bentley Apartments are a product of zoning decisions by Spokane County in 2005, before the property was annexed to Airway Heights. In 2005, Spokane County amended its code to authorize more commercial and residential development options for property within the light industrial zoning desigation. (AR 474, 1204A.) As noted in JLUS:

> The 2005 amendment dramatically encouraged increased residential development on land zoned Light Indistrual within the West Plains area. One large subdivision (over 200 lots) was approved in a Spokane International Airport Accident Zone (APZ).

(AR 474) Of course, development that resulted from the County's zoning

action also included the Deer Creek Apartment complex[13] and the Bentley Apartments. (*Id.*; AR 1204A.) Spokane later disallowed residential development in the light industrial zone, but only after significant development was authorized. (*Id.*) In addition to the two apartment complexes, existing development in this area also includes a 10-screen, 33,000 square foot cinema (the Village Center) located north of the Deer Creek Apartments and south of Highway 2. (AR 475.) A 3-story, 79-unit La Quinta Inn is also planned for the area. (*Id.*) JLUS notes that "this situation" created by the County's 2005 zoning action "illustrates the impacts associated with zoning decisions when addititional protections for the area around FAFB are not in place." (AR 474.)

Contrary to the zoning authorized by Spokane County in 2005, Airway Heights recent zoning action was not taken in a situation in which "additonal protections for the area around FAFB are not in place." To the contrary, there are several restrictions imposed on the potential infill development to ensure compatibility is not further compromised.

B. Ordinances C-797 and C-798 – The Limited, Conditional Authorization Of Residential Development In Commercially Zoned Properties.

Ordinances C-797 and C-798 only potentially allow multi-family

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[13] JLUS did acknowledge, however, that the Deer Creek Apartments is "presently located outside the 65 Ldn noise contour as identified in Fairchild's 2007 AICUZ." (AR 474.)

residential development within the 29-acre infill area. Potential multi-family residential development on this limited acreage is authorized if, and only if, the conditional use permit criteria set forth in AHMC 17.03.100 are satisfied, and if, and only if, the proposed development meets the JLUS standards as set forth in chapter 17.16 AHMC.

As discussed more fully below, Airway Heights considered and balanced the competing interests of the needs of its citizens, including the need for additional housing, and the needs of FAFB and SIA. In consideration of those competing needs, Airway Heights carefully crafted ordinances that help reduce its own need of additional housing yet also address compatibility with FAFB and SIA by authorizing only limited potential for infill multi-family residential development that is strictly regulated. The potential residential development will not expand the outer boundaries of the existing multifamily residential development, but be confined to those boundaries already established by the existing Bentley and Deer Creek developments collectively comprised of 400 apartments.

Infill multi-family residential development as authorized by Airway Heights may only occur if the applicant can demonstrate to a Hearing Examiner, after a public hearing and consideration of comments from FAFB, SIA, Spokane County and Spokane, that

- all conditional use permit criteria are satisfied;

- the proposal complies with Airway Heights' adopted JLUS standards as set forth in chapter 17.16 AHMC (*see* AR 988 -1011.)
- the property is not within, or within 100 feet of the City's adopted 70LdN contour, is within the City's adopted 65 LdN sound contour and provides adequate sound mitigation; and
- the project is appropriately mitigated to ensure compatibility, which mitigation will include tools and strategies identified in JLUS, such as avigation easements, deed restrictions and real estate disclosure requirements (*see* AR 381, 610, 630, 635).

(AR 963-70, 988-1011. *See also* AR 1371.) Thus, substantial protections are incorporated into the ordinances to ensure that, if additional residential development does occur in the confined, 29-acre infill area, it will not interfere with the continuing operation of FAFB or the SIA.

C. The Fairchild JLUS And The Subsequent Varying Implementing Regulations Adopted By The Participating Jurisdictions.

Ordinances C-797 and C-798 were not adopted on a whim. These ordinances were adopted with complete consideration of an extended collaborative study effort involving Spokane, Spokane County, FAFB and SIA, including the Fairchild Joint Land Use Study.

1. The 2009 Fairchild AFB JLUS.

The Fairchild JLUS was issued in September 2009. (AR 377-645.) A Joint Land Use Study, including the Fairchild 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 bases," in this case FAFB. (AR 378.) Certainly, a JLUS is performed with a purpose of protecting the local military installation from incompatible land uses that would be detrimental to its mission; but it is not performed to exclusively consider and further the interests of the military. It is to be performed with consideration of competing interests of the surrounding community as well. "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." (*Id.*) "The balancing of community and military needs and desires provides the opportunity to enhance the existing mutually beneficial relationship for all entities." (*Id.*)

The Fairchild JLUS process was designed in consideration of the GMA directive to cities with federal military installations to consult with commanders of those installations when amending comprehensive plans and development regulations. (AR 378; RCW 36.70A.530.) However, the document that results from the collaborative process is not binding on its participants, nor does it have regulatory effect. The JLUS expressly states:

> It is important to note that once the JLUS process is completed, the final document is not an adopted plan, but rather a recommended set of strategies that would require further action by the stakeholders to be implemented. (AR 381.)

2. The collaborative effort to implement the JLUS recommendations.

Accordingly, after the Fairchild JLUS process was complete and the JLUS recommendations were known, Airway Heights began the process of working with Spokane County, Spokane and FAFB to work collaboratively toward drafting development regulations to implement JLUS recommendations in consideration of the interests and circumstances each individual jurisdiction. A Coordinating Committee, comprised of representatives of Airway Heights, Spokane, Spokane County, Medical Lake, and FAFB, was formed in 2010. (AR 1100-04.)

Relevant to this appeal, prior to the formation of the Coordinating Committee, the City of Airway Heights and the City of Spokane were both poised to annex certain properties that were within the JLUS studied area. In anticipation of that annexation, and in recognition of the fact that the JLUS had not yet been implemented in any fashion by ordinance in Airway Heights, the City of Spokane or the County, these three jurisdictions entered into an interlocal pre-annexation agreement to ensure that FAFB and SIA were appropriately protected in this interim period. Specifically, these parties entered the Interlocal Agreement Regarding Annexations of Portions of the West Plains Urban Growth Area Between the City of Spokane, the City of Airway Heights and Spokane County

dated December 3, 2009 ("Annexation Agreement"). (AR 343-69.) The Annexation Agreement provided at Section 7:

> 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 the parties should discourage development adjacent to either facility that is incompatible with the facilities operational needs and/or 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. ... Prior to amending its development regulations in a manner that may affect property in the vicinity of either facility, notice shall be provided to (i) the other parties; (ii) the Fairchild Air Force Base; and (iii) the Director of the Spokane International Airport. Said notice shall request written recommendations and supporting facts opposing the proposed development regulation or amendment. The notice shall be provided sixty days for a response. If there is no response within 60 days, the party may presume that implementation of the proposed development regulations or amendment will not have any adverse effect on the operation of the facility.
>
> Following execution of the Agreement, the parties shall take action to adopt regulations that prevent incompatible development.

(AR 352-53.)

With this interim protection process in place, the Coordinating Committee proceeded to evaluate means through which the participating

jurisdictions could implement the JLUS recommendations. In the course of that process, certain members of the Committee, not including Airway Heights, proposed development regulations that were different than the JLUS recommendations.

Members of the Coordinating Committee proposed to modify the Military Influence Areas ("MIA") and related restrictions. They recommended restrictions for residential development for property within the 65 LdN sound contours, even though the JLUS and DOD standards recommend such (MIA 4) restrictions on properties within direct flight paths or a 70 or greater LdN sound contour. They also recommended combining the MIA 4 and MIA 3 properties and impose MIA 4 restrictions on the combined influence area. (*See* AR 1113-14, 702-773, 774-808.)

3. The differing JLUS regulations adopted by Spokane, Spokane County and Airway Heights.

Spokane County and Spokane adopted standards that were consistent with the Coordinating Committee's recommendations, though the Committee recommendations did not strictly follow the JLUS recommendations. (AR 702-774, 775-808.) These changes were not necessarily inappropriate for these two jurisdictions. Spokane County is addressing rural, rather than urban development; and, frankly, neither

Spokane County nor Spokane are as impacted by the restrictions. However as an urban area subsumed by the combined MIA 3 and MIA 4 area, Airway Heights did not deem them appropriate for their local circumstances. If Airway Heights adopted the standards as recommended by the Committee, it would virtually preclude any further residential development within its city limits. (*See* AR 113-14, 1132-36, 950-55.) Thus, prior to Spokane County's adoption of its JLUS ordinance, the City of Airway Heights expressed and explained its concerns (at AR 1113-14):

> As the only affected jurisdiction that has adopted [regulations protecting] the Fairchild Air Force Base (FAFB), the City of Airway Heights welcomes the efforts of affected jurisdictions to begin implementing the proposed JLUS regulations. Airway Heights adopted the 1995 FAFB Air Installation Compatible Use Zone (AICUZ) in 2008, and has been operating under the AICUZ standards for decades. As such, we believe we have a unique perspective on the subject of protecting FAFB,
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> 1. The City has repeatedly commented that it disagrees with the land-use restrictions associated with sound contours including the 65 LdN contours. The Department of Defense (DOD) AICUZ and JLUS report state that prohibitive land-use restrictions should not occur until the 70 LdN, or in direct flight paths. Though not optimum, residential development within the 65 LdN sound contours can be compatible, with proper mitigations in place. Residential development, with appropriate sound mitigation can be permitted in up to the 75 LdN, according to the AICUZ, though it is strongly discouraged.

Airway Heights would agree that allowing residential development beyond 69 LdN sound contours should not be permitted due to the close proximity of the aviation flight paths.

2. The proposed extension of the MIA 4 land use restrictions out to the boundaries of MIA 3 is too extensive, and not supported by either the DOD AICUZ or the JLUS report, which are supposed to be the basis for regulations. Both DOD AICUZ and the JLUS report state that MIA 3 should only require noise-abatement, not the broad land-use restrictions associated with MIA 4. By arbitrarily extending MIA 4 out to the MIA 3, there is concern that the proposed regulations will not be legally defensible. Also, it unfairly burdens landowners with unnecessary restrictions that offer little, if any, benefit to FAFB because the area between the originally conceived MIA 3 and MIA 4 is far outside the actual encroachment area.

The protection of FAFB must be balanced with landowner rights, the health and safety of residents, and community development. It should be remembered that the proposed planning sound contours are substantially broader than existing sound contours produced by the current FAFB mission profile. Also, the new KC-46A's sound profile is even narrower than the current one.

The City of Airway Heights believes that considering the purpose of the JLUS to protect FAFB, the regulations should, as close as possible, mirror those requirements provided under the base's adopted AICUZ. The AICUZ standards provide the accepted level of protection necessary under the BRAC [Base Realignment and Closure] process. And for the most part, JLUS does. However, Airway Heights believes the items of concern listed above are substantial deviations from the intent and purpose of JLUS.

Though Airway Heights wanted its objections to the approach adopted by Spokane and Spokane County to be known and of record, it nonetheless respected that these jurisdictions had discretion to determine what is best for their respective municipalities and citizens. Thus, Airway Heights expressed that they "understand the right of Spokane County to operate within the unincorporated County as it sees fit, and that any comments from Airway Heights regarding specific application of development regulations in the unincorporated area are only advisory." (AR 1113.) Unfortunately, Spokane and Spokane County view their role in the legislative process of neighboring jurisdictions differently.

Again, Spokane and Spokane County chose to adopt the Coordinating Committee's modified JLUS standards. (AR 702-773, 774-808.) Airway Heights also adopted its own JLUS regulations. (AR 1141-50.) Though similar in many respects, for the reasons articulated above, the JLUS standards adopted by Airway Heights in December 2012 are different from those adopted by Spokane County and Spokane. Airway Heights' regulations adopt different sound contours and do not conflate MIA 3 and MIA 4, thus leaving room for residential development in certain areas. (*Id. See also,* AR 952-53.) The sound contours adopted by the City, however, provide significant protection to FAFB. The City adopted sound contours that are 2.5 times greater than the actual noise

profile from FAFB.[14] (AR 952.) These contours thus provide protection for the existing missions as well as potential expanded missions. In fact, the contours may even provide sufficient to address missions including F-35 fighter jets. (*Id.*)

Initially, before they were adopted, Spokane, Spokane County and SIA resisted Airway Heights' different approach to implementing the JLUS recommendations. Airways Heights agreed to allow time for the parties to discuss the issues. Thus, in July 2012, Airway Heights, Spokane, Spokane County and SIA entered into a Memorandum of Understanding Regarding Implementation of the Joint Land Use Study for Fairchild Air Force Base "Memorandum of Understanding"). (AR 1121-27.) In the Memorandum of Understanding, the parties all acknowledged their commitment to "cooperate in good faith and attempt to reach an agreement" on implementation of the JLUS. (AR 1121.) The parties expressly noted that, under the Annexation Agreement, "incompatible development" was defined as land uses inconsistent with JLUS, WSDOT Aviation Division Regulations, FAA Regulations, state statutes or regulations. (*Id.*) But the parties now understood that rigid application of that standard would be unduly burdensome upon Airway Heights. The

[14] The noise contours Airway Heights adopted are well-founded upon DOD and Federal Aviation Administration ("FAA") standards. Airway Heights explains its application of these federal standards in detail in its response brief to this Court.

Memorandum of Understanding provided:

> The parties also acknowledge that, while implementation of JLUS in Airway Heights is critical to the overall success of JLUS, in the absence of certain types of mitigation, JLUS will have a disproportionate impact on certain types of development in certain areas of Airway Heights. The parties wish to address these impacts and mitigation in this Memorandum of Understanding.

(*Id.*) Toward that objective, the parties agreed to a "stand still period" of 90 days in which the Airway Heights would refrain from adopting any JLUS ordinance and it would also extend its development moratorium. (AR 1122.)

Ultimately, however, Airway Heights adopted its differing JLUS standards, including its noise contours, in December 2012 by Ordinance C-771. (AR 1141-50.) Its JLUS regulations are codified at AHMC 17.17 (AR 988-1011.) Airway Heights differing standards were not only adopted without a subsequent challenge, but Spokane County, Spokane and SIA all expressed support before they were adopted. (AR 1161-64.) They acknowledged Airway Heights standards in Ordinance C-771 as sufficient to "reduce potential for military aviation hazards, prevent incompatible encroachments, optimize the potential mission profile and protect the health and safety of persons within the military influence area identified therein." (AR 1162.)

Of course these same unappealed standards are now being applied to the potential infill development authorized through the later enacted Ordinances C-797 and C-798, along with the additional protections and mitigation requirements included in C-797and C-798.

4. Airway Heights subsequent adoption of Ordinances C-797 and C-798.

Airway Heights continued its planning efforts, focusing its attention on potential multifamily development within certain sound contours. On June 17, 2013, the City of Airway Heights enacted Ordinances C-797 and C-798, which, relevant to this appeal, authorize infill development on the subject 29 acres. (AR 286-308.) These ordinances were only adopted after an extensive process that included consultation with Spokane, Spokane County, SIA, FAFB and the Washington State Department of Transportation ("WSDOT") and earnest evaluation of the contributed comments. (*See* AR 950-55.)[15]

Airway Heights chose to authorize this limited infill development for many reasons. The City has a shortage of multifamily housing and the potential infill development could fill a critical need. (AR 287-88, 954-55.) It also addressed significant property devaluation the landowners

[15] Airway Heights' Development Services Director prepared a detailed memorandum explaining the reasons for Airway Heights proposed ordinance and addresses all of the concerns expressed by commenting agencies and jurisdictions. This memorandum is attached as Appendix A.

(including Archer) experienced after Spokane County imposed zoning (light industrial) that is incompatible with the surrounding residential development that the County previously authorized. (AR 954, 946-48.)

The greatest concern articulated by commenting agencies was that these properties may be subject to noise impacts from FAFB and SIA and residents may complain about such noise.[16] But, since the JLUS process began, these particular properties comprising the 29 acres had "always

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[16] The subject 29-acres are not in a crash zone for either FAFB or SIA. In the absence of any probable safety issues, the primary focus of the comment letters was concern for potential noise complaints and the impact of such complaints might have on continued FAFB and SIA operations. However, through liberal use of ellipses, appellants attempt to create the impression that that Airway Heights's staff was thoughtlessly and callously indifferent and dismissive of all appellants' concerns, including potential safety concerns. At page 22 of their brief, appellants attribute the following quote to Airway Heights' Development Services Director as representative of his attitude toward and treatment of concerns expressed by AFAB, Spokane and Spokane County, including safety concerns:

> 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.

Appellants' citation (AR 674) does not corroborate the quote. The actual "quote" is in a wholly different document and is comprised of three culled lines found on not one, but three different pages (AR 951, 952 and 953) of a six-page memorandum. There are 6 intervening paragraphs omitted between the first and second quoted lines and 8 intervening paragraphs omitted between the second and third quoted lines. Important context is omitted, including a discussion of the actual FAFB crash history and the conclusion that risk of a crash in this area is extremely low; the area is more vulnerable to tornados than plane crashes. (AR 953.) Also omitted is a detailed discussion of the regulatory foundation of Airway Heights' differing JLUS standards. (AR 951-52.) The complete memo is attached as Appendix A. The memo has been annotated to identify the three lines that appellants selectively grabbed and combined for the above quote.

Contrary to appellants' portrayal, the attached 6-page memorandum reveals that Airway Heights' Development Services Director seriously considered and carefully evaluated each and every one of the concerns expressed in the comment letters; and that he presented reasoned and thoughtful justifications for Airway Heights' legislative action.

been proposed by Airway Heights to be included for limited, multifamily residential use. This is due to the existing structures and the fact that they lie outside the actual sound contour above 65 LdN from either FAFB or SIA's current, or likely future, operations." (AR 952.) Also, the properties are in close proximity to Highway 2 and already subject to ambient noise that obscures operational flight noise. (AR 950.) Notably, though there are 400 existing apartments surrounding the subject 29 acres, none of the comment letters included evidence that residents of these apartments have experienced unacceptable noise, much less lodged complaints.

Airways Heights concluded that development in this limited infill area, if appropriately conditioned and mitigated, could relieve a housing shortage and consider private property rights without jeopardizing Fairchild Air Force Base or Spokane International Airport.

D. The Board Invalidated Ordinances C-797 and C-798.

Spokane, Spokane County and SIA appealed the ordinances. (AR 1-34.) The Board thereafter invalidated Ordinances C-797 and C-798, holding that the ordinances authorize development incompatible with the SIA and FAFB in contravention of the GMA. (AR 1743-79.) Though the Board is directed to defer to Airway Heights' discretion in making its land use decisions, the Board instead deferred to speculative and unsubstantiated comments submitted by Spokane, Spokane County, SIA,

FAFB and WSDOT. The Board also relied, erroneously, on the Annexation Agreement to define incompatible development, even though the Agreement was effectively superseded by the Memorandum of Understanding and, regardless, the Board is without authority to delegate interpretation of GMA terms.

Both Airway Heights and Archer appealed to the superior court. (CP 1-103.) The Honorable Michael P. Price reversed the Board and reinstated Airway Heights Ordinances C-797 and C-798. (CP 425-30.)

IV. ARGUMENT

A. Standards Of Review

This Court directly review's the Board's Decision pursuant to the standards set forth in the APA. RCW 36.70A.300(5); *City of Redmond, supra,* 136 Wn.2d at 45. Relevant here, the APA directs that this court shall grant relief from the Board's decision if the court determines the Board has erroneously interpreted or applied the law, the decision is not supported by the substantial evidence when view in light of the entire record or the decision is arbitrary and capricious. RCW 34.05.570(3).

The question of whether an agency has erroneously interpreted or applied the law is reviewed de novo. *Honesty in Environmental Analysis and Legislation (HEAL) v. Central Puget Sound Growth Management Hearings Bd.*, 96 Wn. App. 522, 979 P.2d 864 (1999); *City of Redmond,*

supra. Courts review an agency's statutory interpretations under the error of law standard, "which allows an appellate court to substitute its own interpretation of the statute or regulation for the [agency's] interpretation." *Seattle Area Plumbers v. Washington State Apprenticeship and Training Council*, 131 Wn. App. 862, 871, 129 P.3d 838 (2006), *quoting, Cobra Roofing v. Dept. of Labor & Industries*, 122 Wn. App. 402, 409, 97 P.3d 17 (2004). While courts will accord deference to the Board's interpretation of the GMA, they retain the ultimate authority to interpret a statute and are not bound by the Board's interpretation of the GMA. *Yakima County v. Eastern Washington Growth Management Hearings Board,* 168 Wn. App. 680, 687, 279 P.3d 434 (2012); *City of Redmond, supra,* 136 Wn.2d at 46. Courts "will not defer to an agency determination which conflicts with the statute." *Waste Management of Seattle v. Utilities and Transportation Comm'n*, 123 Wn.2d 621, 628, 869 P.2d 1034 (1994). *See also, Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 815, 828 P.2d 549 (1992). A decision is arbitrary and capricious if there is willful and unreasoned action, taken without regard to or consideration of the surrounding facts and circumstances. *City of Redmond,* 136 Wn.2d at 46.

Beyond the standards of review set forth in APA, evaluation of the Board's decision also requires an understanding those review standards

that the GMA mandated the Board to apply to the underlying challenge to Airway Heights legislative action.

Of course, the GMA establishes a framework within which a city must perform its comprehensive planning. The GMA articulates certain goals, with no particular order of priority and some of which are conflicting, that a city must consider and then balance in its discretion and in light of specific local circumstances. (*See* RCW 36.70A.020.) It also sets forth policies guidelines to implement using the city's discretion. In recognition of the fact that the balancing contemplated by the GMA is highly discretionary, the GMA provides that local plans and development regulations are presumed valid on adoption. RCW 36.70A.320(1). Thus, before the Board, the burden was on Spokane, Spokane County and the SIA to overcome that presumption, RCW 36.70A.320(2), and the burden was high. In adjudicating a challenge, the Board must find compliance unless a city's action is clearly erroneous. *Olympic Stewardship Foundation v. Western Washington Growth Management Hearings Bd.*, 166 Wn. App. 172, 186-187, 274 P.3d 1040 (2012).

In assessing compliance, the Board is directed to give deference to a city's discretion to balance competing goals and local needs:

> The legislature intends that the board applies a more deferential standard of review to actions of counties and cities than the preponderance of the evidence

> standard provided for under existing law. In recognition of the broad range of discretion that may be exercised by counties and cities consistent with the requirements of this chapter, the legislature intends for the board to grant deference to counties and cities in how they plan for growth, consistent with the requirements and goals of this chapter. Local comprehensive plans and development regulations require counties and cities to balance priorities and options for action in full consideration of local circumstances. The legislature finds that while this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.

RCW 36.70A.3201.

B. The Board Failed To Address The Issue Of "Compatibility" In The Context Of Infill Development, And, Contrary To The GMA Directive Failed To Give Deference To Airway Heights' Discretionary Legislative Action.

It was error for the Board to interfere with Airway Heights' legislative discretion and invalidate the ordinances based upon the conclusory and speculative comment letters. The Board was required under the GMA to defer to Airway Heights' legislative discretion and presume that its legislative action was valid. RCW 36.70A.320(1); .3201. Archer does not argue that the legislatively mandated deference serves to inoculate Airway Heights' legislative action from review; but the review must nonetheless be deferential and a finding of noncompliance must be supported by more than speculative and unsubstantiated comments.

Here, the Board afforded no deference to Airway Heights' legislative discretion, but instead effectively accorded the operators and advocates of FAFB and SIA veto power. Under the Board's approach, these agencies need do no more than provide comment letters – and regardless of their speculative nature and regardless of their failure to address the realities of existing conditions and the effectiveness of the actual standards adopted, Airway Heights has no choice but to surrender to their unsubstantiated concerns. The Board's decision to defer to the comments letters contravenes the legislatively mandated deference to the local legislative authority set forth in RCW 36.70A.320; .3201. *See also Kittitas Count v. Eastern Washington Growth Management Hearings Board,* 172 Wn.2d 144, 174-75, 256 P.3d 1193 (2011).

Likewise, both the Board and appellants fail to acknowledge and address the protections afforded FAFB and SIA through the conditional use permit process that is mandatory under the ordinances. Scrutiny for incompatibility of potential additional residential development does not and did not end with the adoption of the ordinances. If there exists quantifiable or substantiated evidence that additional infill development cannot be adequately mitigated to be compatible with FAFB and SIA, appellants hold the absolute right to present such evidence to the Hearing Examiner if and when the property owners submit a conditional use permit

application. For purposes of review of Airway Heights' legislative action, however, the Board should have presumed, as it has admonished in other cases, that future government actions under the ordinances (in this case Hearing Examiner decisions) will be taken in good faith and in compliance with the adopted standards. *Franz v. Whatcom County Council,* 2005 WL 2458412, WWGMHB Case No. 05-2-011 (Final Decision and Order ("FDO"), September 19, 2005) (Addressing mineral resource lands designation authorizing mining only upon issuance of conditional use permit and holding "[t]here is no reason to believe that Whatcom County will not utilize all tools in the comprehensive plan, development regulations, zoning code, and its Critical Areas Ordinance to permit and monitor any mining operations with this designation"); *Central Puget Sound Regional Transit Authority v. City of Tukwila,* 199 WL 33100213m WWGMHB Case No. 99-3-0003 (FDO, September 15, 1999) ("the Board cannot assume the City will elect to act unlawfully"). Unfortunately, the Board did not do so and instead made a decision based upon generalized expressions of concern without consideration of Airway Heights' adopted standards and without appropriate consideration of the existing conditions of the area.

This Court should review the comment letters relied upon by the Board and appellants in context. The comments must be reviewed in light

of existing conditions, in recognition of the fact that the Court is addressing a legislative act and, finally, in the context of the actual standards set forth in the GMA and discussed below. When reviewed in this proper context, it is clear that the Board's decision is not supported by evidence or the law. Like the trial court, this Court should reverse the Board's Decision and Airway Heights' ordinances should be reinstated.

C. The Board Erroneously Concluded That Allowing Limited Potential Infill Residential Development Pursuant To A Conditional Use Permit Is Incompatible With Fairchild AFB's Ability To Carry Out Its Mission.

Relevant to this appeal, the GMA provides the following with respect to planning actions that will affect military installations at RCW 36.70A.530:

> (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 form incompatible development.
>
> ***
>
> (3) A comprehensive plan, amendment to a plan, a develop regulations 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.
>
> (4) As part of the requirements of RCW 36.70A.070(1) each county and city planning under RCW 36.70A.040 that has a federal military installation, other than a reserve center, that employs one hundred or more personnel and is operated by the

> United States department of defense within or adjacent to its border, shall notify the commander of the military installation of the county's or city'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. (Emphasis added.)

The Board did not conclude that Airway Heights failed to notify, request and provide opportunity for comment from FAFB regarding its intent to adopt Ordinances C-797 and C-798. It did, however, conclude that the potential development authorized by these ordinances was "incompatible with the installation's ability to carry out its mission requirements." To reach this conclusion, the Board relied upon the definition of incompatible as set forth in the Annexation Agreement and unsubstantiated agency comment letters comprised of conclusory and speculative statements that did not specifically address impacts related to limited infill development.

1. The Board failed to independently interpret the GMA, but instead improperly deferred to an interlocal pre-annexation agreement that was later superseded.

The term "incompatible" is not defined in the GMA. Of course, in the context of the RCW 36.70A.530, the term must be applied as to the military installation's "ability to carry out its mission requirements."

The Board borrowed from the Annexation Agreement to define the terms and stated that "[t]he term 'incompatible development' means

permitted land uses that are inconsistent with the Fairchild Air Force Base Joint Land Use Study." (AR 1757-58.) Notably, Board only borrowed from a portion of the definition agreed to in the Annexation Agreement. The Annexation Agreement provided:

> 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.

(AR 352.) Consideration of the applicable Federal regulations is critical to determining whether development is, indeed, "incompatible," and Airway Heights heavily incorporated Federal standards into its ordinances.

Regardless, reference to the Annexation Agreement for purposes of determining compliance with the GMA was in appropriate. First, the Annexation Agreement in this regard was superseded by the Memorandum of Understanding, which fully acknowledged that deviation from the JLUS recommendations was necessary to avoid unduly burdensome impacts to Airway Heights and its citizenry. (AR 1121.) The unappealed JLUS standards Airway Heights adopted in December 2012, with the full support of Spokane, Spokane County and SIA, demonstrates that mere deviation from the JLUS recommendations does not equate to "incompatible development."

Moreover, the Board does not have jurisdiction to enforce

interlocal agreements, which is effectively what it did here. "Unless a petition alleges that a comprehensive plan or a development regulation (or amendments to either) is not in compliance with the requirements of the GMA, the Board does not have jurisdiction to hear the petition." *City of Burien v. Central Puget Sound Growth Mgmt. Hrgs Bd.*, 113 Wn. App. 375, 384, 53 P.3d 1028 (2002) (citing *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wash.2d 169, 178, 4 P.3d 123 (2000)) (upholding Board's decision that it had no authority to review interlocal agreement); *see also Spokane County v. City of Spokane*, 148 Wn. App. 120, 107 P.3d 1228 (2009) (holding that Hearings Board exceeded its statutory authority in reviewing the lack of a joint planning agreement between the City and County, since interlocal agreements are not GMA actions.

Finally, if the JLUS is applied as having regulatory effect upon Airway Heights such that no deviation is allowed, its citizens, including Archer, were deprived due process of law. The GMA sets forth strict citizen participation requirements that require notice to affected property owners and the right to participate, comment and be heard. *See* RCW 36.70A.140. The planning process is not exclusively about FAFB and the SIA. Archer, as a property owner, also has rights, and those rights are acknowledged in the GMA planning goals. RCW 36.70A.020(6). The Board's rigid application of the JLUS as creating binding standards from

which there may be no deviation was in error and without legal support.

Airways Heights did deviate, moderately, from the JLUS. But it did so based upon evidence that the development will not be incompatible with the respective missions of FAFB and SIA and with appropriate safeguards to ensure these facilities are appropriately protected. The Board's decision, however, was not supported by evidence or the GMA.

2. The Board improperly gave deference to unsubstantiated and unquantified comments submitted by the Fairchild AFB Commander and a prior site-specific land use decision issued under different circumstances.

Beyond the Annexation Agreement, the Board also relied heavily upon comments submitted by the Base Commander, both in relation to the proposed ordinances, in in 2008 in relation to a specific permit application to expand a nonconforming use.

Notably, though it mandates notification when promulgating regulations for lands adjacent to military installations,[17] section 530 of the

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[17] It should be noted that, with respect to C-797 and C-798, Airway Heights was not required under RCW 37.70A.530 to notify and request comment from the AFB commander. While RCW 36.70A.530(4) and (5)(b) does impose a mandatory notice requirement in certain circumstances, it is only mandatory when the city intends to promulgate regulations "on lands adjacent to military installations." The approximately 30 acres affected by these Ordinances is not "adjacent to" the Fairchild AFB. In fact, the property is well outside the boundaries of the Fairchild Accident Protection Zone ("APZ"), is also outside the 65 LdN contour line as set by the 2007 AICUZ study. (*See* AR 646-51, 652-54, 475.)

Though Archer is not aware of case law interpreting the phrase "adjacent to" in the context of RCW 36.70A.530, the phrase as used in other GMA provisions has repeatedly construed to mean that the subject property shares a boundary with the other property in

GMA does not mandate that all recommendations from the commander made pursuant to such requisite notification be implemented wholesale. It does, however, provide substantive guidance, advising that a city "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." RCW 36.70A.530(2) (emphasis added). Use of the word "should" rather than "shall" indicates that the direction is advisory, not mandatory.[18] *See Spokane County v. City of Spokane,* 148 Wn. App. 120, 130, 197 P.3d 1228 (2009) (holding the word "should" as used in RCW

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question. *See, e.g. City of Arlington v. Central Puget Sound Growth Management Hearings Bd.*, 164 Wn.2d 768, 791, 193 P.3d 1077 (2008) ("Because the land in question touches the Arlington UGA, it is adjacent to territory already characterized by urban growth for the purposes of RCW 36.70A.110(1)") (emphasis added); *Clark County Washington v. Western Washington Growth Management Hearings Review Bd.*, 161 Wn. App. 204, 254 P.3d 862 (2011), *review granted* 172 Wn.2d 1006, 259 P.3d 1108, *vacated in part* 177 Wn.2d 136, 298 P.3d 704 (upholding Board's determination that parcels are not "adjacent to" areas characterized by urban growth under RCW 36.70A.110 where the parcels have no adjacent borders with the existing UGA).

Airway Heights was not obligated under the GMA to notify the Fairchild AFB commander. Thus, to the extent the notification requirement in RCW 36.70A.530(4) may be construed as also imposing a requirement to "ensure those lands are protected from incompatible development." The requirement is only imposed on "those lands," which are defined in the same subsection as "lands adjacent to military installations." Nonetheless, Airway Heights, which has long been dedicated to protecting the interests of the AFB, sent notification and considered and addressed the commander's recommendations in lights of the supporting facts.

[18] The Legislature invokes the word "shall" several times within the GMA, indicating that when the Legislature intended to make a provision mandatory, it used the appropriate word. *See, e.g.,* RCW 36.70A.060(1)(a); RCW 36.70A.070(1); RCW 36.70A.110(1).

Specifically, within RCW 36.70A.530, the Legislature made deliberate decisions with regard to which of its provisions would be mandatory rather than advisory. For example, the notification provision in subsection (4) mandatory, directing that "each county ... shall notify the commander." But subsection (2) is the only provision within RCW 36.70A.530 in which the Legislature elected to invoke the advisory term "should."

36.70A.110(3) "does not impose a mandatory requirement on jurisdictions; it provides that urban growth *should* not *shall*, be located..."). *See also, Erection Co., Inc. v. Department of Labor & Indust.*, 160 Wn. App, 194, 205, 248 P.3d 1085 (2011) ("Particularly in inferring legal obligations, 'should' cannot be read to mean 'shall.'")

The Board's (and appellants') reliance on *McHugh v. Spokane County*, EWGMHB Case No. 05-10-0004, FDO (Dec. 16, 2005) as support for its conclusion that RCW 36.70A.530 mandated the City to defer to Fairchild's comments and recommendations was misplaced. (*See* AR 1749.) Contrary to the Board's assertion, the *McHugh* Board in no way held that "failure to modify a proposal in response to an objection from a military base commander is a violation of RCW 36.70A.530." (*Id.*) Although the Board noted in that case that it "would recommend" that the County "consider" the objections of the representatives of Fairchild to the proposed urban development, the Board explicitly declined to interpret the statute as imposing any specific obligations on the County:

> 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.

Id. at 14 (emphasis added).

No doubt, the GMA contemplates that a city will give earnest consideration to military comments when adopting regulations for land adjacent to military installations, but nothing in the GMA directs that a city must abdicate all planning discretion to the wishes of a nearby military facility. Here, even though RCW 36.70A.530(3) is advisory, Airway Heights acted in accord with this GMA provision. Ordinances C-797 and C-798 do not authorize development in the vicinity of FAFB that is incompatible with Fairchild's ability to carry out its mission.

First and foremost, the Commander's comment letter, which was required to include "supporting facts" with its recommendations,[19] does not state that the potential infill residential development, if adequately mitigated, will interfere with Fairchild's current or future missions. After acknowledging that the property is not within the current 65 LdN noise contours, the Commander nonetheless summarily asserts that noise from the AFB and SIA will be "a factor." (AR 654-53.) Thereafter, he states: "we strongly do not recommend increasing residential development in this area." (*Id.*) In the instance Airway Heights proceeded with the proposed ordinance, the Commander recommended that certain noise mitigation measures be a condition of approval. (*Id.*) Again, the Commander did not

[19] RCW 36.70A.530(5)(b).

state that the infill development potentially authorized by Ordinance C-797 would interfere with Fairchild's missions and he did not say that such development could not be mitigated to make the two uses compatible. Again, FAFB has not joined in this appeal and it would appear that the ordinance does not pose a threat.

The City considered these comments and determined that, under the restrictions imposed through the City's JLUS standards and with proper mitigation, multi-family residential development in this area can be compatible. The City's Development Services Director explained.

> Throughout the JLUS process, these properties have been proposed by Airway Heights to be included for limited, multi-family residential use. This is due to the existing structures and the fact that they lie outside the actual sound contours above 65 LdN from either FAFB or SIA's current, or likely future, operations.
>
> Though located in the City's adopted 65-69 LdN sound contour for FAFB, they lie well outside the current, and likely future, actual sound profile. The City's adopted sound contours are 2.5 times the actual noise profile from FAFB operations. They may even be adequate to handle F-35 fighter jets.[20] This was done to ensure an adequate buffer was provided for current and likely future FAFB mission profiles. Also, any proposed residential uses would go through a conditional use process, perform sound studies, provide notification the property may experience noise disturbance from aviation activities, provide

[20] Again, because of their proximity to Highway 2, the affected property is also exposed to ambient noise from the highway that obscures operational flight noise. (AR 950.)

> and avigation easement for the property, adhere to height limitations, and other conditions. Residential building on these sites would likely have a cost increase of at least 10% to 20% over similar builds located outside the 65 LdN lines.

(AR 951.)

Finally, the Board's reliance on the 2008 Hearing Examiner decision (AR 309-33) and the subsequent affirmation under the Land Use Petition Act in *Deer Creek Developers LLC v. Spokane County,* 157 Wn.2d 1, 236 P.3d 906 (2010) (AR 334-42) is misplaced. The Examiner in that proceeding was applying the Spokane County Code to determine if it was appropriate to expand a non-conforming use, which expansion was expressly discouraged by the County Code. (AR 329.) The Examiner's factual findings, which were in the context of different Code criteria and were made under different circumstances, were "unchallenged" on the LUPA appeal and thus deemed sufficient to support the Examiner's conclusions. *Deer Creek,* 157 Wn. App at 17. Moreover, Airway Heights considered the 2008 proceeding and determined that the circumstances have changed. The City's Planning Director explained:

> Since that initial decision, things on the ground are different, and there is new information that could not be considered at that time. The 2003 Airport Master Plan that was used as a metric showing why these properties would be a concern is currently being updated, and any existing aviation overlays for that facility will need to be updated to reflect the new

> data. Based on the draft Master Plan documents available, and modeling shown on the maps developed by the City of Spokane, these properties lie outside the 65 LdN contours of the SIA and the actual sound contours for the FAFB's current, and likely future, operations. The alignment of the 3rd runway had not been established in 2007. Accordingly to the draft Master Plan documents, these properties are located in the FAA's designated "Zone 6, Traffic Pattern Zone." According to the FAA, as shown in the 2013 SIA Master Plan, it is recommended that "most residential and non-residential uses" be allowed in the Traffic Pattern Zone. (2013 SIA Mater Plan, pg:7-6.)

(AR 4.)

Airway Heights determined that it has a critical need for additional multi-family housing. Based upon the evidence presented, the City determined that, utilizing its JLUS standards and the conditional use permit process, it could potentially provide the needed additional multi-family in this limited infill area that is compatible with Fairchild. No evidence was presented that this potential infill development, with proper noise attenuation, and appropriately conditioned with avigation easements, deed restrictions and real estate disclosures, will threaten Fairchild's current or future missions. The County's action was well-reasoned, within its discretion and wholly consistent with the GMA and the Board's conclusion is erroneous.

D. Airway Heights' Ordinances C-797 and C-798 Did Not Authorize Development Incompatible With SIA And Its Action Complies With RCW 36.70A.510 and RCW 36.70.547.

The GMA, specifically RCW 37.70A.510, directs that comprehensive plans and development regulations that affect general aviation airports are subject to RCW 36.70.547, which 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. . . 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 added.)

This statutory provision mandates that a city consult with WSDOT and the appropriate airport representatives and officials before adopting regulations regarding land uses adjacent to the airport. It cannot be denied that WSDOT was consulted – the opening paragraph of its comment letter confirmed that it was "formally consulted." (AR 655-56.)

RCW 36.70.547 does not, however, direct that the city is without discretion or that it must abandon its own evaluation and capitulate to differing recommendations from WSDOT or airport officials. Deference

remains with the City's discretion if it is exercised in the absence of clear error; it is not transferred to WSDOT or the SIA officials.

Washington's Supreme Court confirmed the appropriate placement of deference in *Kittitas County v. Eastern Washington Growth Management Hearings Bd.*, 172 Wn.2d 144, 256 P.3d 1193 (2011). In *Kittitas County,* the petitioner challenged a county development regulation within an airport overlay, claiming that the development regulation authorized high residential densities that were incompatible with the airport operation. Like in this case, the development regulation adopted by the County did not follow WSDOT recommendations. The Growth Management Hearings Board held that the County's action violated the GMA, specifically RCW 36.70.547, because it adopted a regulation that was contrary to the WSDOT recommendation. *Id.* at 174-175.

Our Supreme Court reversed the Board, holding that the Board improperly gave deference to the WDOT recommendations:

> ¶ 50 The question properly before the Board was whether the County's failure to prohibit residential uses and higher-than-recommended densities by the Washington State Department of Transportation (WSDOT) violates the GMA. The GMA subjects county land use planning affecting general aviation airports to RCW 36.70.547, which states that a county "shall, through its comprehensive plan and development regulations, discourage the siting of incompatible uses adjacent to such general aviation airport." RCW 36.70A.510. The Board found that,

> because the County's regulation diverges from WSDOT recommendations for land use near airports, the County's regulation violates the GMA. We disagree and find that the Board should have deferred to the County.
>
> ¶ 51 The County's regulation differs from WSDOT recommendations by allowing higher densities and not flatly prohibiting residential uses in certain safety zones. *See Kittitas Conservation II,* 2008 WL 1766717, at *31. The Board gave substantial weight to WSDOT's recommendations. *Id.* at *32. The Board, however, is supposed to give deference to the County unless the County clearly erred. RCW 36.70A.320(3). The statutory scheme requires only that counties "discourage" incompatible uses. RCW 36.70.547. Discouragement is not the same as prohibition. The County clearly did not follow all of WSDOT's recommendations. While this may be imprudent, the statutory scheme does not suggest that counties *must* follow the advice of WSDOT. Considering the loose statutory language and the requirement of boards to defer to counties' planning choices, the record before the Board does not establish firmly and definitely that the County erred.

172 Wn.2d at 174-175.

Though this case was cited to the Board (AR 936-37), it failed to even address the Supreme Court decision. Instead, the Board relied on one of its own decisions, *Pruitt v. Town of Eatonville*, CPSGMHB Case No. 06-3-0016, FDO (Dec. 18, 2006). (AR 1761-62). Even if it applied to this

case, *Pruitt* is readily distinguishable; but in any event, is not in accord with the subsequent Supreme Court decision.[21]

The City consulted with SIA and WSDOT and, after considering their comments, determined that, with mitigation and the imposition of strict standards on the potential development, it adequately "discourage[ed] the siting of incompatible uses adjacent to [the SIA]." The City acted within its discretion and in compliance with the GMA.

E. Ordinances C-797 and C-798 Do Not Preclude The Siting Of An Essential Public Facility.

Finally, the Board erroneously concluded that the ordinances preclude placement of Essential Public Facilities.

RCW 36.70A.200(5) provides that "no local comprehensive plan or development regulation may preclude the siting of essential public facilities." Once again, the record is devoid of evidence that this infill development, already sandwiched between two apartment complexes comprised of approximately 400 residential units precludes expansion of the SIA, especially if properly conditioned.

More importantly, a duty to accommodate arises only after decision to site or expand an essential public facility has been made. Even

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[21] In *Pruitt*, the properties affected by the challenged regulations were located "at and adjacent to" the Eatonville Municipal Airport that the Town identified as being in the "Airport Overlay Zone" or "Aerospace District." *Id.* at 4, 10. The affected property in this case is not in the same proximity.

then, a city is in violation only if it effectively precludes siting of the facility in its jurisdiction, which it has not done here. *See Central Puget Sound Regional Transit Authority v. City of Tukwila*, CPSGMHB Case No. 99-3-0003, FDO (July 31, 2003).

As the City's Planning Director informed the Council:

> Based on the draft Master Plan documents available, and modeling shown on the maps developed by the City of Spokane, these properties lie outside the 65 LdN contours of the SIA and the actual sound contours for the FAFB's current, and likely future, operations. The alignment of the 3rd runway had not been established in 2007. Accordingly to the draft Master Plan documents, these properties are located in the FAA's designated "Zone 6, Traffic Pattern Zone." According to the FAA, as shown in the 2013 SIA Master Plan, it is recommended that "most residential and non-residential uses" be allowed in the Traffic Pattern Zone. (2013 SIA Mater Plan, pg:7-6.)

(AR 953.) The Board did not even address this issue.

The infill residential development authorized by Ordinances C-797 and C-798 do not preclude expansion of the SIA and the Board erred.

V. CONCLUSION

The record reveals that Airway Heights consulted and collaborated with the affected agencies and jurisdictions, in good faith, and earnestly addressed their comments and recommendations. Airway Heights balanced FAFB and SIA's concerns with its own local competing needs to

- protect Fairchild Air Force Base;
- protect the Spokane International Airport;
- protect the welfare and safety of its citizens;
- resolve a deficiency in multi-family housing and address a need to provide diverse housing opportunities for low income families currently living within a FAFB crash zone; and
- protect its citizens' property rights.

(*See* Ordinance C-797 and C-798 Findings at AR 963-86.)

Airway Heights' action was well-reasoned and appropriate and certainly within its discretion. Before the Board, Spokane, Spokane County and SIA did not meet their burden to overcome the presumption of validity afforded Airway Heights' legislative action and demonstrate that the action was clearly erroneous. The Board failed to give the required deference to Airway Heights and, instead, deferred to unsubstantiated and speculative concerns that were in no way specific to infill development – effectively providing veto power over Airway Heights' legislative actions. This was contrary the law and the substantial evidence in the record. Like the trial court, this Court should reverse the Board's Decision.

Dated this 11th day of May, 2015.

Respectfully submitted,

GORDON THOMAS HONEYWELL LLP

By _____
Margaret Y. Archer, WSBA No. 21224
Attorneys for Brigitta Archer

APPENDIX A

Memorandum

From: Derrick Braaten, Development Services Director
To: City Manager, City Council, File
CC:
Date: 7/24/2013
RE: ZCA 2013-01 & ZCA 2013-02 Comment Summary & Responses

The City has received various comments regarding the proposed amendments to AHMC 17.11 & 17.37. Most have been focused on the amendments to 17.11, which proposes to designate certain C-2 properties as potentially allowed to develop multi-family projects. The properties of concern appear to be those located in the East Annexation area. These three properties comprise an area of approximately 30 acres, located to the south, and parallel to, the FAFB flight path. They are also located to the north, and parallel to, the proposed future 3rd runway alignment for SIA. Basically, they are located between the FAFB operational flight-path and the proposed 3rd runway alignment for SIA.

They are surrounded by existing multi-family residential developments or intervening structures on three sides. Staff considers these properties to be "infill" due to the surrounding structures and uses. They lie within the City's adopted 65 LdN contours, but outside of the actual contours produced by current FAFB operations. Also, their proximity to Highway 2 creates ambient sound that helps obscure operational flight noise.

Spokane International Airport Master Plan
Various statements have been made regarding what the City agreed to during the Joint Land-Use Study (JLUS) process regarding the properties in the East Annexation Area. It has been repeatedly stated that Airway Heights agreed to wait to take final action on these proposals "until the SIA Master Plan is completed". This is inaccurate.

As our JLUS process wrapped up, and just before adoption in December, 2012, SIA and the City of Spokane requested that the City designate these properties as "under study by SIA" until the SIA Master Plan was completed. SIA stated that they projected the plan would be submitted to the FAA by March 31, 2013. The City recognized that these types of projects often take longer than expected, so agreed to not take final action, through Ordinance C-759, before May 15, 2013. The City requested that it be provided with any science that it was not aware of that would indicate these properties should not be used as is being proposed. It also asked that it be permitted to see the draft documents as they develop in order to ensure compatibility with their plan.

However, that request was denied and Staff could only review documents as they were released to the public. Therefore, Staff used modeling from the 2009 3rd Runway Alignment Study, a 2011 map developed by the City of Spokane, and other available documents to ensure the proposals do no conflict with DOD or FAA recommendations. As the draft documents have been released from the SIA Mater Plan, they have not shown any indication that what is being proposed would conflict with the transport elements of the draft plan. However,

increased residents in that area could have a detrimental affect on recruiting aviation industries in the area between the 3rd runway alignment and the City's SE border, especially if the proposed industrial uses would generate noise, such as engines revving, etc. Final FAA approval of the draft plan can take up to 2-years, though that is not likely.

Compatibility With JLUS:
The City of Spokane and Spokane County have both commented that they do not believe allowing any new residential in the East Annexation area would be appropriate. Their comments indicate they believe that allowing any new residential in the area to be in conflict with the adopted JLUS standards. These comments appear to be based on their adopted JLUS regulations, not ours. To help clarify how these concerns have been addressed, a brief explanation of AICUZ and JLUS standards is necessary, and will help clarify how Staff developed its recommendations based on these standards. **

First of all, these properties lie outside the area covered by the Department of Defense (DOD) Air Installation Compatible Use Zones (AICUZ) standards for FAFB. AICUZ standards are developed by the DOD aviation facility to protect current operations. The AICUZ consist of the Clear Zone (CZ), Accident Potential Zones (APZ) 1 & 2, and modeled sound contours produced by the facility's current mission profile. The CZ and APZs are geometrically determined based on the size of the facility's runway. Absent a local JLUS process, these standards determine whether something would be considered an encroachment concern. Those standards are then forwarded on to affected jurisdictions, with a recommendation that they be adopted. Airway Heights has been operating under the FAFB AICUZ standards since they were established in 1995 and adopted them as code (AHMC 17.16) in 2008. AICUZ standards are a DOD exercise regarding the current operations of the facility, but they do not look at potential future mission impacts. That is done through a JLUS local process.

A JLUS is a DOD guided process, with a local community, or communities, acting as the lead. An appropriate JLUS process includes all affected communities and stakeholders. It establishes standards geared towards protecting not only the current mission profile of a DOD aviation facility, but also considers likely future mission profiles. Draft standards are developed and then forwarded on to the affected communities for review, local modification to meet specific community needs, and implementation. Ultimately, the desire is for all affected jurisdictions to adopt the same regulations and standards.

However, DOD recognizes, and expects, that each jurisdiction's specific impact from the facility will be different, as each jurisdiction is located in a different aspect of the overall impact area. There is no legal requirement under law that affected jurisdictions adopt, or even participate in, a JLUS process. Also, not only can jurisdictions choose not to participate, they can adopt regulations that are more, or less, stringent than those recommended through the JLUS process or suggested by DOD.

JLUS standards include the CZ and the APZs, but also subdivide land-use compatibility zones into Military Influence Areas, or MIAs. Under DOD recommendations, a JLUS should consist of four MIAs. MIA 1 represents the entirety of Spokane County. MIA 2 covers an area extending 5-miles from the runway alignment and any land-use activities within this area require coordination between the affected jurisdiction and the aviation facility. MIA 3 covers an area extending 1/4-mile beyond the 65 LdN sound contours and represents an area considered a "noise impact area". MIA 4 is the only MIA that should include land-use restrictions, and represents the area covering direct operational flight paths (closed pattern flight) and sound contours exceeding 70 LdN.

Under MIA 3, as defined by DOD, within the 65 LdN contour, residential development should be discouraged. However, if a community has a need for residential uses in the area, such uses can generally be made compatible using appropriate sound mitigation, height limitations, and design. Residential development is *strongly discouraged* within sound contours 70 LdN or higher, or the operational flight path of the facility, which also defines, under DOD recommendations, MIA 4.

According to DOD recommendations, these properties would be located in MIA 3. As noted earlier, under DOD standards, most residential can be made compatible in 65 LdN contours, but requires sound mitigation, notification that there are operational over-flights, and that there will likely be noise generated by such activity. However, during the local JLUS process, the draft regulations developed recommended consolidating MIAs 3&4. This extended the land-use restrictions recommended under DOD standards for MIA 4 out to the 65 LdN line. Due to how the proposed regulations would negatively affect Airway Heights' development, we did not agree to this recommendation. Instead, we implemented MIAs more closely based on the 1995 FAFB AICUZ sound contours, with the allowed land-uses being very close to, but somewhat more restrictive, than DOD recommendations.

The version of JLUS adopted by the City of Spokane and Spokane County state that residential density would not increase in areas that lie within the 65 LdN, or higher, contours. Our version also states there will not be any increase in residential density beyond that in place at the time of adoption of our JLUS. However, though very similar, our JLUS standards do not match with theirs, and the status of the properties in the area of concern has not been finalized under our JLUS. Throughout the JLUS process, these properties have always been proposed by Airway Heights to be included for limited, multi-family residential use. This is due to the existing structures and the fact they lie outside of the actual sound contours above 65 LdN from either FAFB or SIA's current, or likely future, operations. **

Though located in the City's adopted 65-69 LdN sound contour for FAFB, they lie well outside the current, and likely future, actual sound profile. The City's adopted sound contours are 2.5 times the actual noise profile from FAFB operations. They may be even adequate to handle F-35 fighter jets. This was done to ensure an adequate buffer was provided for current and likely future FAFB mission profiles. Also, any proposed residential uses would go through a conditional use process, perform sound studies, provide notification the property may experience noise disturbances from aviation activities, provide an avigation easement for the property, adhere to height limitations, and other conditions. Residential building on these sites would likely have a cost increase of at least 10% to 20% over similar builds located outside the 65 LdN lines.

Hearing Examiner's Decision

Another issue often mentioned in their comments is the Hearing Examiner's 2007 decision regarding the expansion of Deer Creek Apartments, and the results of subsequent appeals of that decision. One property owner sought to develop a new multi-family project on the 5-acre site between the theatre and the existing Deer Creek apartments. The proposed expansion was denied, and the denial was upheld on appeals. However, when using a decision of this nature as a basis for a reason to not allow others to develop, one needs to look at the questions being asked, and whether it applies to the current situation.

The Hearing Examiner was asked whether expanding a non-conforming use was appropriate. It is pretty well understood that except for very rare circumstances, the answer is no. Non-conforming uses are not to be expanded. Upon appeal of a Hearing Examiner decision, the record is closed *and no new information, even if it would clearly change the rulings, is permitted to be included in reviewing the decision.* Therefore, any new information, science, or best practices would not be considered. Only those items originally reviewed by the Hearing Examiner are considered, and whether the Examiner's decision was appropriate *based on the information in the record.* Not necessarily reality or new information.

Initially, Spokane County allowed multi-family in light-industrial zones. After Deer Creek and the first phase of the Bentley Apartments was built, but before the developers tried to expand, the County placed a moratorium on multi-family in light industrial zones. Bentley Apts. was permitted to expand their use due to when they vested the property and the fact they had already been approved for the expansion before the moratorium. Deer Creek had not. After implementation of the moratorium, both properties were designated as non-conforming uses. However, the existing multi-family developments are not non-conforming uses in Airway Heights. Also, the

second phase of Deer Heights should be considered a new project, not an expansion of an existing non-conforming use.

Since that initial decision, things on the ground are different, and there is new information that could not be considered at that time. The 2003 Airport Master Plan that was used as a metric showing why these properties would be a concern is currently being updated, and any existing aviation overlays for that facility will need to be updated to reflect the new data. Based on the draft Master Plan documents available, and modeling shown on maps developed by the City of Spokane, these properties lie outside the 65 LdN contours of SIA and the actual sound contours of FAFB's current, and likely future, operations. The alignment of the 3rd runway had not been established in 2007. According to the draft Master Plan documents, these properties are located in the FAA's designated "Zone 6, Traffic Pattern Zone". According to the FAA, and as shown in the 2013 SIA Master Plan, it is recommended that "most residential and non-residential uses" be allowed in the Traffic Pattern Zone. (2013 SIA Master Plan, pg:7-6)

Aviation Community's Comments

Spokane International Airport, WSDOT Aviation, and FAFB all submitted comments. The basics of their position is that they would prefer no residential be permitted on the East Annexation properties. However, if the City determines it is necessary to permit residential uses on those properties, then they request that such uses only be permitted as part of a complementing mixed-use development.

One of their prime concerns regarding the East Annexation properties is that they lie between two runway alignments. Because planes do not fly "on a wire" and move through a 3-dimensional space, there is concern there could be an accident. Staff does not dispute there could be an accident. However, due to the intervening structures that already exist, it is less likely that these vacant sites would be struck. Building residential on these sites would in no way increase the likelihood of an airplane crash. In fact, based on actual events, it is more likely that a tornado will strike the area rather than a plane would crash.

The last crash incident occurred at FAFB in 1994 during an air show practice. The last incident over the City was in 1958, when two B-52s collided over Airway Heights. Thirteen crewmen were killed, three survived, and there were no casualties on the ground. All these incidents involved B-52s, which are no longer based at FAFB. Crashes locally involving KC-135s are as follows:

- In 1962, a KC-135 was on approach to Fairchild from Ellsworth Air Force Base in Rapid City, SD when it crashed into a ravine on Mount Kit Carson 32 kilometers northeast of Fairchild. 44 people were killed in that crash.
- In 1967, a KC-135, flying from Hickam Air Force Base in Hawaii to Fairchild, crashed into Shadow Mountain while on descent into Spokane. 9 people were killed in that crash.
- In 1987 a KC-135 crashed at Fairchild Air Force while rehearsing maneuvers for an air show. The crash was later determined to be the result of the tanker hitting the wake turbulence of a B-52 ahead of it, causing the aircraft to roll 90 degrees, and was flying too low and slow for the air crew to recover. Six airmen in the KC-135 and a spectator on the ground were killed in the crash.

As can be seen above, the only crash incidents since 1958 have occurred during air show practice over the base itself, or well outside the West Plains. However, if a catastrophic event did occur, increased density could make such an event worse due to the increased numbers of people in the area. Since 1957, seven tornadoes have hit the general area, ranging in intensity from F0-F2. There have also been at least three incidents since 2000 where weather conditions were such that cyclonic weather phenomenon occurred, but did not quite reach the status of an official tornado. **

Secondarily, they are concerned about noise. However, they acknowledge that if the City deems it necessary to allow residential on these sites, the proposed design requirements would help mitigate noise. Also, they view the

review process being implemented for any proposed residential uses in the area in question as a positive. That said, they cannot declare support for the amendment as proposed, as they still have the concerns indicated above, and would prefer no new residential uses in the area. In addition to the proposed design requirements and the review process, if the City deems it necessary to allow residential use in the area, they would feel more comfortable if the City only permitted new residential as part of a complementary mixed-use development. A complementary mixed-use development would consist of a compatible mix of residential, retail, entertainment venues, and/or offices, that through design, layout, and uses complement one another, as well as create ambient noise that helps drown out aviation noise. Also, mixed-uses would reduce the residential density to some degree, as some of the space will be taken up with non-residential uses.

Landowner Comments

Two East Annexation Area landowners provided comments. They indicate they have been negatively impacted by the County allowing the existing multi-family projects, as potential commercial developers are concerned that if they build a commercial use that could disturb residents, due to noise, dust or whatever, they will get sued. So, they will not buy the properties. Also, they claim that because they do not have Highway 2 frontage, commercial developers have little interest in the properties. This is also their main concern with only allowing residential as part of a mixed-use development. They strongly support the proposal as submitted.

Staff Comments

Staff believes that though not necessarily easy, mixed-use could be done in this area. However, it would likely need to be a group effort involving multiple landowners and sites. As indicated earlier, Staff views these sites as being infill. If these properties were not surrounded by existing structures already, or the vacant properties were surrounding existing structures, Staff would not consider these properties *infill*. Also, though the C-2 amendment seeks to allow building heights up to 60', any of these properties would not be permitted to exceed the height of the existing surrounding structures.

There is a difference in how multi-family and single-family developments are built and how renters relate to noise disturbances compared to homeowners. First of all, multi-family developments are built to commercial standards that are much sturdier than most single-family homes. This sturdier construction makes for less noise and vibration. Also, interior units, those between other units, are more protected from noise because of the surrounding units.

If a renter does not like their experience in a rental unit, they do not renew the lease and move out. Apartment dwellers do not generally have the same expectation of quiet that a single-family dweller does. They also do not generally have an expectation of the quiet enjoyment of their yards, because they do not usually have yards. Single-family dwellers do have this expectation, and usually have a mortgage as well that makes it difficult to just move out. That is one reason why only multi-family is being proposed.

Third, the City currently has a deficiency in available apartments. Average multi-family occupancy rates in Airway Heights runs between 95%-99%. The Office of Financial Management (OFM) states the state average is closer to 89%. The average rent for new market-rate apartments in Airway Heights is $800-$1,200 per month, likely due, in part, to the fact that there is limited competition. Because of this, there are residents living in the APZs because they cannot afford to live anywhere else. However, we have no place for them to go. We have received reports that Wal-Mart and Northern Quest Casino employees are living 3 to 4 people to a unit to afford rents in Cedar Summit and Deer Creek. One hope is that an increased number of multi-family units may lower these rates.

Though not likely to create an increased crash risk, increasing the residential density in this area may have a detrimental effect on recruiting aviation industries to the area between the 3rd runway alignment and the City's SE border, as proposed in the SIA Master Plan. This could especially be the case if the proposed industry produces a lot of noise, such as from revving plane engines. However, it is not appropriate for the City to choose to limit one

set of landowners use rights in order to promote another's, especially if it lies within another jurisdiction, and there is no guarantee the development will ever occur. As with any developer, if there is something preventing the proposal from going forth, then the developer needs to address it. If they need to buy out a surrounding landowner, then that is what they need to do. This would be the case regardless of whether it is vacant property or not.

Finally, multiple studies have shown that baby-boomers are downsizing, and Generation Y is not very interested in buying a home. In 2012, the president of the American Planning Association (APA) stated that "communities that do not allow multi-family and other higher density residential development types are telling retirees and young professionals that they are not welcome." They seek a walkable, "urban experience", where they can easily commute to work, entertainment, stores, etc. This is one step, of many, to prepare the City for this new paradigm.