

NO. 41851-7 II  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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CITY OF SHELTON, a municipal corporation; HALL EQUITIES  
GROUP dba HALL EQUITIES GROUP, a California corporation; and  
SHELTON HILLS INVESTORS LLC,

*Appellants,*

v.

THE PORT OF SHELTON,

*Respondent.*

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COURT OF APPEALS  
DIVISION II  
STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

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RESPONSE BRIEF OF THE CITY OF SHELTON,  
HALL EQUITIES GROUP AND SHELTON HILLS INVESTORS LLC

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## I. INTRODUCTION

This case involves 160 acres of property (“Property”) owned by Shelton Hills Investors LLC (“Shelton Hills”)<sup>1</sup> in the City of Shelton (“City”) near the Port of Shelton’s (“Port’s”) small airport, Sanderson Field. Shelton Hills proposes to develop the Property with homes. Accordingly, Shelton Hills sought and obtained from the City a Comprehensive Plan Amendment and Rezone to allow residential development. The has filed multiple overlapping administrative and judicial appeals of these approvals before the Growth Management Hearings Board (“Growth Board”) and the court, all alleging that residential use of the Property is incompatible with the airport. These appeals have delayed Shelton Hills’ development plans for nearly a year and a half. Yet, during all this time, no appellate body has ruled that residential development of the Property is incompatible with the airport. In this appeal, the City and Shelton Hills ask the Court to prohibit the Port from raising the same issue before multiple appellate bodies, and require that the Port pursue its claim in the proper forum, which is initially the Growth Board and, on appeal, Thurston County superior court. The City and Shelton Hills further ask the Court to reverse the decisions of the

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<sup>1</sup> Hall Equities Group is the developer of the Property. Shelton Hills and Hall Equities Group are collectively referred to as “Shelton Hills.”

Mason County superior court because the court lacks jurisdiction and the standards for granting relief to the Port have not been met.

## **II. ASSIGNMENTS OF ERROR**

The City and Shelton Hills assign error to the following decisions of the superior court: (1) the Order Granting the Port's Motion to Shorten Time, date September 10, 2010 ("First Stay Order"); (2) the Order Granting the Port's Motion for Stay under RCW 36.70C.100, dated September 16, 2010 ("Second Stay Order"); and (3) the Order Granting Summary Judgment entered on January 4, 2011, which reversed the Rezone.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Whether the superior court erred in issuing the First and Second Stay Orders and reversing the Rezone when the superior court lacked subject matter jurisdiction.

2. Whether the superior court erred in reversing the Rezone when the Port failed to demonstrate that any of the standards in RCW 36.70C.130(1) are met; specifically, when the Port failed to demonstrate that the City engaged in unlawful procedure or failed to follow a prescribed process, an erroneous interpretation of the law, a lack of substantial evidence, or a clearly erroneous application of the law to the facts.

3. Whether the superior court erred in issuing the First Stay Order, when the Court did not even consider the criteria for a stay or make the findings required by RCW 36.70C.100.

4. Whether the superior court erred in issuing the Second Stay Order when the Port failed to demonstrate that the standards of RCW 36.70C.100 were met.

#### **IV. STATEMENT OF THE CASE**

##### **A. The Property**

Shelton Hills owns approximately 160 acres of Property located south of Sanderson Field in the City. The Property is located well away from the area underlying the runway approach and landings, and separated from the airport by a buffer of industrial and commercial land, forested wetland and steep topography.

##### **B. The Comprehensive Plan Amendment and Rezone**

The Property was previously zoned for Commercial/Industrial (“C/I”) use, a land use designation that was inappropriate due to the topography and location of the Property adjacent to a residential neighborhood. Shelton Hills sought a Comprehensive Plan Amendment and Rezone to change the designation to Neighborhood Residential (“NR”), the same zone as adjacent property. After exhaustive study and careful consideration, including a thorough study of safety, noise and other

considerations relating to compatibility with the airport, the City approved the Comprehensive Plan Amendment. CP 58, pp. 917-919.<sup>2</sup> When it adopted this amendment, the City Commission found that the NR designation is compatible with the airport and consistent with Comprehensive Plan policies relating to the airport. *Id.*, pp. 917-918. This conclusion is supported by multiple studies and technical guidance documents, some of which were issued by the Port itself, that find no issue with aviation safety or aircraft-generated noise. CP 11, pp. 1298-1305.

Following a hearing before the City's Hearing Examiner, the City Commission implemented the Comprehensive Plan designation by rezoning the Property to NR. CP 58, pp. 922-932, 934-935. Shelton only has one residential zone that implements the NR Comprehensive Plan designation: the NR zone. SMC 20.06.010; Shelton Comprehensive Plan, pp. II-6 to II-9. There is no other possible implementing zone. *Id.* Indeed, the City of Shelton Comprehensive Plan map is entitled, "Future Land Use *and Zoning*." CP 63, p. 39 (emphasis added). Therefore, the only way to achieve the GMA requirement for consistency between the Comprehensive Plan and zoning was to rezone the Property to NR. *See* RCW 36.70A.040.

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<sup>2</sup> Citations to the record in this brief are to the Clerk's Papers ("CP") subnumber and the page number in the Index prepared by the Mason County superior court. Citations to the transcript ("TR") are by date, page and line number.

**C. The Port's Appeal to the Growth Board**

The Port appealed the Comprehensive Plan Amendment to the Growth Board. The Port claimed the NR designation is incompatible with Sanderson Field and inconsistent with policies of the City's Comprehensive Plan relating to airport compatibility. CP 63, pp. 41-44.

**D. The Port's Duplicative Appeal to Mason County Superior Court**

Despite the fact that the Rezone was considered by the City to be a "package" with the Comprehensive Plan Amendment, and was for the identical NR designation, the Port also appealed the Rezone to the superior court under the Land Use Petition Act ("LUPA"). In its LUPA Petition, the Port raised the exact same claims it had already made before the Growth Board, namely that residential use of the Property is incompatible with Sanderson Field and inconsistent with Comprehensive Plan policies relating to airport compatibility. *Compare* CP 63, pp. 41-44 *with* CP 2, pp. 1597-1605.

The superior court issued two stays of the effectiveness of the Rezone pending review. The court issued the First Stay Order to prevent Shelton Hills from vesting a land use application until it could consider the Port's motion for a stay. TR, 9/10/10, 1:13-16. The court then issued the Second Stay Order to prevent Shelton Hills from vesting until the court reached a final decision in the case. TR, 9/16/10, 11:16-24. The City and

Shelton Hills filed an Emergency Motion for Discretionary Review of the stays with the Court of Appeals, which was denied.

**E. The First Growth Board Decision**

While the matter was pending before the Mason County superior court, the Growth Board issued a decision rejecting most of the Port's claims. *Port of Shelton v. City of Shelton*, WWGMHB No. 10-2-0013 (Final Decision and Order, October 27, 2010) ("FDO"). The Growth Board decided only one issue in the Port's favor: that substantial evidence in the record did not support the City's determination that airport noise is compatible with the NR designation. The Growth Board invalidated the Ordinance on this basis alone. The Growth Board stated: "The Board stresses its conclusion is based solely on the record before it in this matter. Furthermore, the Board's decision should not be considered as a determination that residential uses in Zone 3 and 6 [the location of Shelton Hills' property] are necessarily incompatible." FDO, p. 22, fn. 84. The Growth Board did not require the City to change the NR designation, but instead merely remanded to the City for further action. *Id.*, p. 40.

The City and Shelton Hills appealed the portion of the Growth Board decision adverse to them to Thurston County superior court. CP 63, pp. 48-54. This appeal is currently pending.

**F. The Mason County Superior Court Decision**

Meanwhile, the Port moved for summary judgment before the Mason County superior court. The superior court granted summary judgment and reversed the Rezone. This decision disregarded the fact that the same issues were pending before the Growth Board and subject to appeal to the Thurston County superior court. The decision also ignored the fact that the Port provided no factual support for its allegation that residential zoning of the Property is incompatible with the airport. In addition, the superior court issued the decision despite the fact that the Port failed to show it was entitled to judgment as a matter of law.

**G. The Second Growth Board Decision**

Subsequently, on remand by the Growth Board, the City considered extensive evidence on noise and then decided to retain the residential Comprehensive Plan designation and adopt residential zoning. A two-member majority of the Growth Board did not address the merits of this action. *Port of Shelton v. City of Shelton*, WWGMHB No. 10-2-0013 (Compliance Order, July 13, 2011) (“Compliance Order”). Instead, it found that the City and Shelton Hills had to “consult,” again, with the Washington State Department of Transportation Aviation Division (“WSDOT Aviation”), even though extensive consultation had taken place prior to the Comprehensive Plan Amendment, and the Growth Board had

already upheld those consultation efforts as adequate. Compliance Order, p. 12-14; FDO, pp. 31-34. The third Board member wrote a “forceful” dissent in which he opined that redundant consultation would serve no purpose, and that the Board should have upheld the City’s actions because the evidence shows noise levels are compatible with residential use. Compliance Order, pp. 14-20. The City and Shelton Hills appealed the decision to the Thurston County superior court, where the appeal is pending.

#### **H. The City and Shelton Hills’ Appeal**

The exact claims the Port brought before the Mason County superior court – airport compatibility and comprehensive plan consistency – are also pending before the Thurston County superior court. The proper process for resolution of these GMA issues is the one established by the state legislature: an appeal to the Growth Board followed by review of the Growth Board decision by the Thurston County superior court. The assertion of jurisdiction over these GMA issues and subsequent decisions by the Mason County superior court turned the statutory review process on its head and resulted in duplicative review and the risk of inconsistent decisions.

Accordingly, the City and Shelton Hills appeal the Mason County superior court decision to grant the two stays and reverse the Rezone.

## V. ARGUMENT

### A. LUPA sets forth the applicable standard of review.

“On review of a superior court’s decision on a land use petition, [the Court of Appeals stands] in the same position as the superior court and [applies] the... standards [set forth in LUPA] to the record created before the board.” *Henderson v. Kittitas County*, 124 Wn. App. 752, 100 P.3d 842 (2004). Accordingly, consistent with General Order 2010-1 of this Court, the Port was required to file the opening brief setting forth the bases for its challenge to the Rezone.

LUPA provides that the Court may grant relief only when the petitioner has carried the burden of establishing that:

(a) The body or officer that made the land use decision engaged in unlawful procedure or failed to follow a prescribed process, unless the error was harmless;

(b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;

(c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;

(d) The land use decision is a clearly erroneous application of the law to the facts;

(e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision; or

(f) The land use decision violates the constitutional rights of the party seeking relief.

RCW 36.70C.130(1).

As the Court of Appeals recently stated in *J.L. Storedahl & Sons, Inc. v. Clark County*, 143 Wn. App. 920, 928, 180 P.3d 848, 851-852 (2008):

Standards (a), (b), (e), and (f) present questions of law that this court reviews de novo. Standard (c) concerns a factual determination that this court review for substantial evidence. We grant some deference to the party who prevailed in the highest forum that exercised fact-finding authority.

*Id.* (citations omitted). Substantial evidence is “evidence which ‘would convince an unprejudiced thinking mind of the truth of the declared premise.’” *Bjarnsen v. Kitsap County*, 78 Wn. App. 840, 844-845, 899 P.2d 1290, 1292 (1995). A decision is clearly erroneous when a reviewing court is “left with the definite and firm conviction that a mistake has been committed.” *Schofield v. Spokane County*, 96 Wn. App. 581, 586, 980 P.2d, 277, 280 (1999).

**B. The superior court did not have jurisdiction over the Port’s claims because the Growth Board has exclusive jurisdiction.**

This appeal turns on a single statutory provision, RCW 36.70.547, which states:

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.

Relying on this provision, the Port claimed, before both the Growth Board and the superior court, that the Comprehensive Plan Amendment and Rezone are “incompatible” with Sanderson Field. CP 63, p. 42; CP 2, p. 1599, 1601.

The superior court found that it had jurisdiction over the Port’s claims because the Rezone is “site-specific” or “quasi-judicial.” TR 9/16/10, 9:17-23. Yet, one does not follow from the other. Regardless of whether the Rezone is considered legislative or site-specific, the superior court lacks subject matter jurisdiction. The superior court’s ruling to the contrary sanctions duplicative review, with potentially conflicting results, in two separate matters dealing with the same subject. This absurd result is directly contradictory to the controlling authority of the Washington Supreme Court as well as multiple decisions of the Growth Board.<sup>3</sup>

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<sup>3</sup> Whether the superior court had jurisdiction is a question of law that this Court reviews de novo. *Somers v. Snohomish County*, 105 Wn. App. 937, 941, 21 P.3d 1165 (2001).

**1. Controlling precedent prohibits the duplicative review authorized by the superior court.**

The Port asserts that the Rezone is site-specific and, therefore, the Superior Court had jurisdiction. Brief of Port of Shelton, LUPA Petitioner (“Port Brief”), p. 9, fn. 4. Notably, the Port’s position that the Rezone is site-specific is an about-face from the position it originally took in this litigation. The centerpiece of the Port’s case in its Petition for Review was its claim that the Rezone results in zoning that is incompatible with the airport, in violation of RCW 36.70.547. But, RCW 36.70.547 applies only to comprehensive plans and development regulations, which are both legislative actions – not site specific rezones. The Port has since abandoned its RCW 36.70.547 claim, since it cannot simultaneously sustain both this claim and the position that the Rezone is site-specific. But, the Port’s early reliance on RCW 36.70.547 is telling.

Most significantly, the Port is incorrect that, if the Rezone was site-specific, then the superior court had jurisdiction. Indeed, this statement is directly contrary to controlling Washington Supreme Court precedent. The Washington Supreme Court recently affirmed that, in a LUPA appeal of a site-specific rezone, the Court lacks jurisdiction to consider claims that the rezone is inconsistent with GMA. *Woods v. Kittitas County*, 162 Wn.2d 597, 174 P.3d 25 (2007). In *Woods*, the

county approved a site-specific rezone to increase the density allowed on the property. Petitioner challenged the rezone, claiming it violated GMA by allowing urban growth in a rural area. On appeal, the Court held that it lacked jurisdiction over this claim. *Id.* at 608-617. The claim was a “disguised” challenge to the comprehensive plan, which could only be heard by the Growth Board. *Id.* at 614.<sup>4</sup>

Similarly here, the heart of the Port’s Growth Board appeal was its claim that residential use of the Property is incompatible with the airport. Specifically, the Port identified the following issue in its Petition for Review to the Growth Board: “Does the Ordinance fail to comply with RCW 36.70A.510, which incorporates the requirements of RCW 36.70.547, by adopting amendments that allow incompatible land uses in the Airport Zone?” CP 63, p. 42. The Port’s Growth Board Petition also claims that the NR land use designation is internally inconsistent with a number of Comprehensive Plan policies relating to the airport. *Id.* The

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<sup>4</sup> This decision is consistent with a line of cases holding that a party cannot retroactively challenge an existing comprehensive plan or development regulation through a LUPA appeal of a site-specific action. *See e.g., King County v. Central Puget Sound Growth Management Hearings Board*, 138 Wn.2d 161, 182, 979 P.2d 374 (1999) (in LUPA action challenging planned urban development approval, court lacked jurisdiction to consider whether the urban growth area boundary was proper under GMA); *Caswell v. Pierce County*, 99 Wn. App. 194, 198-199, 992 P.2d 534 (2000), *review denied*, 142 Wn.2d 1010, 16 P.3d 1265 (2000) (in LUPA action challenging conditional use permit, court lacked jurisdiction to consider whether the zoning improperly allowed urban densities in rural area in violation of GMA); *see also Somers, supra*, 105 Wn. App. 937, 941-949.

Growth Board’s decision on these claims is now pending before the Thurston County Superior Court.

The Port makes these exact same claims in this case. In its Land Use Petition, the Port asserts that the NR designation is incompatible with the airport, in violation of RCW 36.70.547. CP 2, pp. 1599, 1601.<sup>5</sup> The Port also asserts that the NR zone is inconsistent with Comprehensive Plan policies relating to the airport. *Id.*

As in *Woods*, this is a disguised GMA appeal. GMA requires a comprehensive plan map and policies to be internally consistent. RCW 36.70A.040. By claiming the NR zone designation of the Property is inconsistent with Comprehensive Plan policies relating to the airport, the Port is in effect claiming the Comprehensive Plan map and policies are internally inconsistent. *Woods* precludes the Port from bringing this “back door” challenge to the Comprehensive Plan.

There is a good reason for the limitation on the superior court’s jurisdiction. The same claim – that residential use of the Property is incompatible with the airport – is pending in multiple appeals simultaneously. This approach results in unnecessary duplication, the waste of judicial resources and the potential for inconsistent decisions.

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<sup>5</sup> As the Port acknowledges in its Petition for Review to the GMHB, RCW 36.70.574 is incorporated by reference into GMA by RCW 36.70A.510.

**2. Decisions of the Growth Board prohibit the duplicative review authorized by the superior court.**

The Growth Board has reached the same conclusion as the Courts. Redundant appeals before both the Growth Board and superior court of substantively identical actions, on the same grounds, are not permitted.

Rather, the Growth Board has determined that a rezone is a “development regulation” subject to its exclusive jurisdiction when the rezone is part of a “package” with a comprehensive plan amendment. *North Everett Neighbor Alliance (NENA) v. City of Everett*, CPSGMHB No. 08-3-0005, Order on Motions (January 26, 2009).<sup>6</sup> The determination of the GMHB is entitled to deference. *Lewis County v. Western Washington Growth Management Hearings Board*, 157 Wn.2d 488, 498, 139 P.3d 1096 (2006).<sup>7</sup>

The Growth Board cases involve a comprehensive plan amendment and rezone adopted concurrently. But, *NENA* emphasizes that the substance of the action determinative, not “the procedure employed or

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<sup>6</sup> See also *The McNaughten Group v. Snohomish County*, CPSGMHB No. 06-3-0027, Order on Motions (October 30, 2006); *Bridgeport Way Community Association v. Lakewood*, CPSGMHB No. 04-3-0003, Final Decision and Order (July 14, 2004).

<sup>7</sup> No published Court opinion has directly addressed whether a rezone adopted along with a comprehensive plan is a “development regulation” or a “project permit application.” In *Coffee v. Walla Walla*, 145 Wn. App. 435, 187 P.3d 272 (2008), the Court stated that a party wishing to challenge both a comprehensive plan amendment and rezone would have to appeal to both the GMHB and Superior court. This statement is dicta, however, because *Coffee* involved a “stand alone” comprehensive plan amendment without an accompanying rezone. The Port also relies on *Wenatchee Sportsmen Assoc. v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000), and *Phoenix Development v. City of*

the label attached.” *NENA, supra*, at 23. In *NENA*, the Growth Board considered a comprehensive plan amendment, rezone and amendment to a hospital’s master plan. The Growth Board determined it had jurisdiction over all three actions because they were all necessary in order for the property to be used as a hospital, they were proposed as a “package,” and the approval document characterized them as “development standards.” *Id.*, pp. 7-24.

Applying these factors here, the Rezone is subject to Growth Board review because it is necessary for the Property to be used for residential development, it was proposed and considered by the City as a package with the Amendment, and the Hearing Examiner and City Commission specifically determined it is legislative. CP 11, pp. 1298-1300, 1304-1305.

The Port argued to the superior court that the Hearing Examiner process was site-specific and repeats this argument to this Court. The superior court based its ruling on this assertion. TR 9/16/10, 9:17-23. But, “employing a quasi-judicial process, rather than a legislative one, is not determinative of whether the action is properly a policy or regulation subject to GMA.” *NENA, supra*, at 23.

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*Woodinville*, 171 Wn.2d 820, 258 P.3d 1150 (2011), but both of these cases involve “stand alone” rezones, without any corresponding comprehensive plan amendment.

In sum, the Growth Board has exclusive original jurisdiction over the Port's appeal of the Rezone. To hold otherwise is to invite conflicting decisions and create inconsistencies between comprehensive plans and zoning regulations in violation of GMA.

**C. The Port failed to demonstrate that any of the standards in RCW 36.70C.130(1) are met.**

Even if the superior court had jurisdiction, and even if one assumes that the rezone is site specific, the Port's claims fail. The Port argues the City erred by: (1) considering the Rezone to be a legislative act; and (2) not expressly reviewing the Rezone for consistency with comprehensive plan policies relating to the airport.<sup>8</sup> These claims fail on their merits.

**1. The City did not commit reversible error by considering the Rezone a legislative act.**

The Port asserts that the Rezone must be reversed because the City considered it a legislative act. Port Brief, pp. 8-9. The Port is incorrect.

The Port's argument on this point is internally contradictory. Contrary to its own claim, the Port asserts that the process employed by the City was a quasi-judicial one, including a fact-finding hearing by the

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<sup>8</sup> Notably, the Port does not even brief the central issue raised in its Petition for Review, the claim that the City violated RCW 36.70.547 relating to airport compatibility. The Port has abandoned this claim and others by failing to brief them to this Court. *Holder v. Vancouver*, 136 Wn. App. 104, 107, 147 P.3d 641 (2006), *review denied*, 162 Wn.2d 1011, 175 P.3d 1094 (2008) (a party abandons an issue by failing to brief it).

Hearing Examiner. Port Brief, pp. 14-15. The Port cannot have it both ways.

The Port also asserts that the City's identification of the rezone as legislative caused the City not to evaluate the Rezone's consistency with Comprehensive Plan policies relating to airport compatibility. Port Brief, pp. 15-16. The Port is wrong. As discussed below, the City was strictly precluded from considering consistency with these policies in the context of a site specific rezone. Accordingly, if there was error, which there was not, it was harmless. *Phoenix Development, supra*, 171 Wn.2d 820, 836 (city's statement that it was acting in its legislative capacity in a quasi-judicial rezone process was error, but since this error was harmless, it was not a basis for reversal).

**2. The City cannot revisit its prior conclusion that the NR designation is consistent with comprehensive plan policies during site specific review.**

The Port claims that, prior to rezoning the Property to NR, the City was required to re-evaluate whether the rezone to NR is consistent with Comprehensive Plan policies relating to the airport—something the City had extensively done prior to amending the Comprehensive Plan. Port Brief, p. 19. The Port's claim turns the statutory scheme for land use review on its head.

State law expressly prohibits the City from revisiting its earlier decisions in connection with a site specific project permit action, as the Port characterizes the rezone. The Local Project Review Act (RCW Chapter 36.70B) states:

(1) Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review. The review of a proposed project's consistency with applicable development regulations, or in the absence of applicable regulations the adopted comprehensive plan, under RCW 36.70B.040 shall incorporate the determinations under this section.

(2) During project review, a local government or any subsequent reviewing body shall determine whether the items listed in this subsection are defined in the development regulations applicable to the proposed project or, in the absence of applicable regulations the adopted comprehensive plan. At a minimum, such applicable regulations or plans shall be determinative of the:

(a) Type of land use permitted at the site, including uses that may be allowed under certain circumstances, such as planned unit developments and conditional and special uses, if the criteria for their approval have been satisfied;

(b) Density of residential development in urban growth areas; and

(c) Availability and adequacy of public facilities identified in the comprehensive plan, if the plan or development regulations provide for funding of these facilities as required by chapter 36.70A RCW.

(3) During project review, the local government or any subsequent reviewing body shall not reexamine alternatives to or hear appeals on the items identified in subsection (2) of this section, except for issues of code interpretation. As part of its project review process,

a local government shall provide a procedure for obtaining a code interpretation as provided in RCW 36.70B.110.

RCW 36.70B.030(1)-(3) (emphasis added). Under this statute, the

Comprehensive Plan amendment to designate the property NR is

determinative of the type of use and residential density permitted on

Shelton Hills' property. In connection with project review of the rezone,

state law prohibits the City from reexamining alternatives to the NR

designation or hearing appeals with regard to the NR designation.

The Shelton Municipal Code recognizes and incorporates this limitation, stating:

In enacting this title, the city commission intends to establish a mechanism for implementing the provisions of RCW Chapter 36.70A regarding compliance, conformity and consistency of proposed projects with the comprehensive plan, related plans, and implementing development regulations. In order to achieve this purpose, the commission finds that:

A. Given the extensive investment of time and effort that both public agencies and local citizens are making, and will continue to make, in the plans and development regulations for their community, it is essential that project review start from the fundamental land use planning choices made therein. If the plans or implementing regulations identify type of land use, specific residential density, design standards and/or identify and provide for funding of public facilities needed to serve the proposed development and site, these decisions at a minimum provide the foundation for further project review unless there is a question of code interpretation. The project review process, including the environmental review process under RCW Chapter 43.21C and the consideration of consistency, should start from this point and not reanalyze these land use planning decisions in making a permit

decision.

\* \* \*

C. Consistency with existing plans, regulations and rules should be determined in the project review process by considering four factors found in applicable regulations and plans: the type of land use allowed; the level of development allowed, such as residential density; adequacy of infrastructure; and the character of the proposed development, including compliance with development standards, and specific design standards. This approach is consistent with current city practice and represents no additional burden on applicants or local government. The city intends that this approach should be largely a matter of checking compliance with existing requirements for most projects, while more complex projects may require more analysis.

SMC 17.04.020 (Emphasis added). Under the Shelton City Code, just as under state law, the City is prohibited from revisiting prior land use planning decisions in the context of project review. Instead, the City must take the type of land use identified in existing plans as a given and use this as a “foundation” for project review. *Id.* The project review process, including “the consideration of consistency” must start with the Comprehensive Plan and development regulations and may not “reanalyze these past land use planning decisions.” *Id.* Consistency must be determined in light of the type of use allowed by the comprehensive plan and development regulations. *Id.*

When the City adopted the Comprehensive Plan amendment, it determined that the amendment is compatible with the airport and

consistent with the rest of the Comprehensive Plan. CP 58, pp. 917-919. Specifically, the City Commission found that “the proposed amendment would not create an incompatible land use adjacent to Sanderson Field.” *Id.*, p. 918. The Commission also found that “the proposed amendment is consistent with the other goals, objectives, and policies contained in the City’s Comprehensive Plan.” *Id.*, p. 917. The Port now contends that the City should re-examine the conclusions it already made with regard to a subsequent land use decision the Port contends is site specific: the Rezone. Such re-examination is prohibited by state law. RCW 36.70B.030(1)-(3).

The Port relies on a City Code provision stating that a rezone must be “duly considered in relationship to a comprehensive plan as required by the laws of Washington.” Port Brief, p. 16, citing SMC 20.52.010. Yet this provision must be read to be consistent with other applicable provisions of the City Code, including SMC 17.04.020, which specifically addresses how consistency is to be determined. *Am. Legion Post No. 149 v. Dept. of Health*, 164 Wn.2d 570, 585, 192 P.3d 306 (2008) (Courts “give effect to every word, clause and sentence of a statute.” In interpreting a statute, the “goal is to avoid interpreting statutes to create conflicts between different provisions so that we achieve a harmonious statutory scheme.” The more specific provision controls over the

general.). Also, this provision must be read in harmony with state law, which expressly prohibits the City from revisiting the Comprehensive Plan in the context of a site specific rezone decision. *Heinsma v. City of Vancouver*, 144 Wn.2d 556, 566, 29 P.3d 709 (2001) (municipal ordinances and statutes are to be harmonized if possible).

The Courts have also affirmed that a city cannot revisit prior planning decisions in the context of a site specific rezone. *Storedahl & Sons, Inc. v. Clark County*, 143 Wn. App. 920, 931-932, 180 P.3d 848 (2008). The Port relies on *Phoenix Development, Inc. v. City of Woodinville, supra*, 171 Wn.2d 820, for the proposition that the City must revisit its analysis of comprehensive plan consistency. But, *Phoenix* is readily distinguishable. In that case, the property in question had a comprehensive plan designation of Urban Residential. *Phoenix Development, Inc., v. City of Woodinville*, 154 Wn. App. 452, 505, 229 P.3d 800 (2009), *reversed on other grounds, Phoenix Development, supra*, 171 Wn.2d 820. This comprehensive plan designation was implemented by a number of zones, including the R-1 and the R-4 zone. *Id.* The property was zoned R-1. *Id.* at 500. Phoenix Development sought a rezone to R-1. *Id.* The city denied the rezone on the ground that the R-1 zoning was inconsistent with various comprehensive plan policies, among

other things. *Id.* The Washington Supreme Court ultimately upheld that decision.

This case is entirely different. In *Phoenix Development*, the comprehensive plan designation could potentially be implemented by multiple zones. In contrast, in this case, the NR comprehensive plan designation is implemented *only* by the NR zone. Once a property has been designated NR, it must also be zoned NR, or the comprehensive plan designation and zoning will be inconsistent, in violation of GMA. In this case, the City of Shelton's determination that the NR comprehensive plan designation is consistent with the airport is tantamount to a determination that the NR zone is also consistent. State law as well as the City Code prevents the City from revisiting this decision in the context of a site-specific rezone. RCW 36.70B.030; SMC 17.04.020.<sup>9</sup>

Contrary to this overwhelming authority, the Port's claim in this case is that, when the City reviewed the rezone, it was required to reexamine its prior decision that the NR designation is consistent with the Comprehensive Plan policies. This argument fails as a matter of law.

When the City adopted the Comprehensive Plan amendment designating

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<sup>9</sup> The Port also cites *Woods, supra*, 162 Wn.2d 597. In *Woods*, as in *Phoenix*, the comprehensive plan designation of the property at issue could be implemented by multiple zones. *Id.* at 621. The Port also cites *Cingular Wireless, LLC. V. Thurston County*, 131 Wn. App. 756, 129 P.3d 300 (2006), but this case does not involve a rezone at all, but a special use permit.

the property NR, it found that “the proposed amendment is consistent with the other goals, objectives, and policies contained in the City’s Comprehensive Plan.” CP 58, p. 917. State law and the City Code prohibit the City from revisiting this land use policy choice during review of the site specific rezone. The Port’s interpretation of *Woods* to require the reexamination of comprehensive plan consistency during review of this rezone is flatly inconsistent with the statutory scheme. This strained interpretation is also inconsistent with the fundamental holding of *Woods* that a petitioner cannot make a back door challenge to an existing GMA comprehensive plan in the context of a challenge to a site specific rezone.

The City and Shelton Hills are not asserting that the Port has no remedy for its claim of Comprehensive Plan inconsistency. The Port may appeal this issue – which is a GMA issue – to the Growth Board, as it has done. What the Port cannot do is seek duplicative review by the superior court as well.

Accordingly, the superior court erred in granting summary judgment reversing the Rezone.

**3. Reversal of the rezone is inappropriate.**

Reversal of the rezone is inappropriate because the Port’s claims are without legal merit. Even if the Port’s claims had merit, however, reversal would still not be appropriate. The Port argues that reversal is

required because the Board has invalidated the Comprehensive Plan amendment “removing any underlying foundation for the Rezone.” Port Brief, p. 22. The Port misrepresents the Board decision.

Contrary to the Port’s implication, the Board did not determine that the NR designation is incompatible with the airport. Rather, it decided only that substantial evidence in the record did not support the City’s determination that airport noise is compatible with the NR designation. FDO, p. 22. The Board stated: “The Board stresses its conclusion is based solely on the record before it in this matter. Furthermore, the Board’s decision should not be considered as a determination that residential uses in Zone 3 and 6 [the location of Shelton Hills’ property] are necessarily incompatible.” *Id.* at p. 22, fn. 84 (emphasis added). The Board did not require the City to change the NR designation, but instead merely remanded to the City for further action. *Id.* at p. 40. On remand, the City retained the NR designation. The Board remanded again on purely procedural grounds, but never has the Board determined that the NR designation is incompatible with the airport.

Indeed, the Port’s sole support for its claim that the Rezone is incompatible with the airport are its own and WSDOT Aviation’s comment letters. Yet, the comments of a party and an interested single-purpose agency do not establish incompatibility. In fact, the Washington

Supreme Court recently emphasized that the opinions of WSDOT Aviation Division are not binding on local jurisdictions, *Kittitas County v. Eastern Washington Growth Management Hearings Board*, \_\_\_ Wn.2d \_\_\_ (July 28, 2011), pp. 39-40.

The matter is now pending with the City. The City has yet to take action on remand. If the Court grants the Port any relief – which it should not – the most appropriate relief would be to remand the matter to the City Commission so that it can take appropriate action on remand in relation to both the Comprehensive Plan Amendment and Rezone. Since the Comprehensive Plan designation of the Shelton Hills property remains NR today, reversal of the rezone would create an internal inconsistency between the Comprehensive Plan map designation of NR and the zoning, in violation of GMA. RCW 36.70A.040.

**D. The superior court erred in issuing the First Stay Order without even considering the standards of RCW 36.70C.100.**

No published Washington case identifies the standard of review for issuance of a stay under LUPA. The Port asserts the standard of review is abuse of discretion, citing a non-LUPA case involving a stay of discovery. Port Brief, p. 22, *citing King v. Olympia Pipeline Co.*, 104 Wn. App. 338, 16 P.3d 45 (2000). But, this Court’s role in a LUPA case is different from its role in other types of cases. In a LUPA case, this Court stands in the

same position as the superior court and applies the standards of LUPA directly to the record. *Henderson, supra*, 124 Wn. App. 752. Accordingly, this Court should apply the standards of LUPA for issuance of a stay, at RCW 36.70C.100, directly to the record.<sup>10</sup>

The superior court had no authority to issue the First Stay Order, which prevented Shelton Hills from vesting a land use permit application pending a hearing on the merits of the Port's request for a stay. LUPA provides:

A court may grant a stay only if the court finds that:

- (a) The party requesting the stay is likely to prevail on the merits;
- (b) Without the stay the party requesting it will suffer irreparable harm;
- (c) The grant of a stay will not substantially harm other parties to the proceedings; and
- (d) The request for the stay is timely in light of the circumstances of the case.

RCW 36.70C.100(2) (emphasis added). Here, it is undisputed that the superior court made none of the required findings when it issued the First Stay Order. In fact, the basis for the first stay was the court's scheduling problems, caused by the Port's tactical decision to file an affidavit of prejudice against one of the two judges in the Mason County superior

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<sup>10</sup> Even if the abuse of discretion standard applies, "[a] trial court necessarily abuses its discretion if the decision is based upon untenable grounds, or the decision is manifestly unreasonable or arbitrary." *Kucera v. Department of Transportation*, 120 Wn.2d 200, 995 P.3d 63 (2000). Here, this standard is met. The stays were based on untenable

court.<sup>11</sup> CP 6. Accordingly, the stay violates the plain language of LUPA. LUPA provides the exclusive means for appealing a land use decision and contains express statutory limitations on the relief that can be granted. RCW 36.70C.030, .100, .140. In a LUPA case, substantial compliance with the statutory requirements is mandatory. *James v. Kitsap County*, 154 Wn.2d 574, 588, 115 P.3d 286 (2005). Here, there was no compliance whatsoever. The Court must reverse the First Stay Order.

**E. The superior court erred in issuing the Second Stay Order when the standards of RCW 36.70C.100 were not met.**

The superior court issued the Second Stay Order to preserve the “status quo” existing prior to the Rezone (TR, 9/16/11, 12:15) – but the legislative framework governing this case does not authorize the issuance of a stay on this basis. A land use decision remains in effect, and property owners may vest under that decision, unless the standards of RCW 36.70C.100 are satisfied. Here, the Port failed to meet these standards.

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grounds because they were issued despite the fact that the mandatory standards of LUPA were not met.

<sup>11</sup> The Port acknowledges it filed an earlier action in Mason County Superior Court, which was dismissed. Port Brief, p. 4, fn. 2. But, the Port fails to reveal that, when it filed this action, it also filed an affidavit of prejudice against the Judge who heard the first case, and was familiar with the facts and governing law. CP 6. The Port’s tactical move required the one remaining Judge in the Mason County Superior Court to hear this case, despite her busy calendar.

**1. The Port failed to demonstrate that it is likely to succeed on the merits.**

The superior court found the Port was likely to prevail on its claim that the City did not consider consistency with the Comprehensive Plan generally. TR, 9/16/10, 11:4-9. But the City did so, when it adopted the Amendment. CP 58, pp. 917-919. The superior court's determination that the City was required to reexamine this conclusion during its consideration of the Rezone is flatly inconsistent with its prior conclusion that the Rezone is site-specific. In the context of a site-specific Rezone, the City is neither required, nor permitted, to reevaluate its prior policy choice to designate the Property NR. RCW 36.70B.030; SMC 17.04.020.

The superior court did not address the ultimate likelihood of success on the Port's underlying substantive claim that residential zoning of the Property is incompatible with the airport at all. TR 9/16/10, pp. 8-13. The Port claims that the Rezone is incompatible with the airport. Yet, the Port did not even attempt to demonstrate that this claim will succeed, instead submitting only cursory, unsupported allegations of incompatibility.

In contrast, Shelton Hills and the City submitted the uncontested declaration of the City's Senior Planner, which establishes that the Rezone is compatible with the airport. The Rezone is fully consistent with the

City's previously adopted airport overlay ordinance, which was adopted to protect the airport from incompatible uses. While it could have relied entirely on consistency with the overlay, the City also conducted an exhaustive review of the Amendment and Rezone, with particular attention to airport compatibility. The City accepted and considered comments from interested agencies and the public. The City conducted technical studies on the key issues, noise and safety, raised in these comments, which confirmed that residential use of the Property is compatible with the airport. CP 11, pp. 1298-1305.

In sum, the Port did not show it is likely to prevail on the merits. The Court must reverse the Second Stay Order.

**2. The superior court erred in finding that the Port will suffer irreparable harm in the absence of a stay.**

The superior court improperly granted the stay because the Port failed to show irreparable harm. Indeed, the Port failed to demonstrate that the NR zoning will harm the Port at all, let alone irreparably. The only evidence in the record shows the NR zoning is compatible with the airport. CP 11, pp. 1298-1305. There is substantial preexisting NR zoning on other properties to the southeast and northeast of the Port and additional residential zoning surrounding Goose Lake. CP 63, p. 39. If residential zoning alone harmed the Port, the damage would be done

already.

Furthermore, the NR zoning resulting from the Rezone does not authorize any construction. While the submission of a subdivision application would “vest” the Property to the NR zone, it would not guarantee the ability to build. *West Main Associates v. City of Bellevue*, 106 Wn.2d 47, 53, 720 P.2d 782 (1986), review denied, 112 Wn.2d 1009 (1989).

In order to construct homes on the Property, Shelton Hills will need to obtain subdivision approval, which is a discretionary land use approval that can only be issued if “appropriate provisions are made for the public health, safety, and general welfare” and “the public use and interest will be served” by the subdivision. RCW 58.17.110(2); SMC 19.16.060.F. Approval of a subdivision is subject to LUPA appeal. SMC 19.16.070; RCW 36.70C.030. In addition, subdivision of the Property will require review of environmental impacts under SEPA, which authorizes the City to impose mitigation for any significant impacts. SMC 19.16.060.D.

The superior court found that the Port would suffer irreparable harm due to the potential future expense of challenging subdivision applications. TR 9/16/10, 12:3-8. This is not a valid basis for finding irreparable harm. The costs are wholly speculative at this point, and there

is no case law supporting the proposition that potential costs of a future appeal constitute irreparable harm.

**3. The superior court erred in finding that Shelton Hills and the City are not substantially harmed.**

Shelton Hills and the City are substantially harmed by the stay. The superior court issued the stay in this action specifically to prevent Shelton Hills from exercising its statutory right to vest. TR 9/16/10, 11:16-21. This judicial nullification of the vested rights doctrine is directly contrary to the intent of the Legislature to permit vesting during appellate review of zoning regulations and 80 years of Washington jurisprudence.

The right to vest to existing regulations by filing a subdivision application is codified at RCW 58.17.033(1), which provides that a subdivision “shall be considered under the subdivision or short subdivision ordinance, and zoning or other land use control ordinances, in effect on the land at the time a fully completed application” is submitted.

The State “embraces a vesting principle which places great emphasis on certainty and predictability in land use regulations.” *Noble Manor v. Pierce County*, 81 Wn. App. 141, 145, 913 P.2d 417 (1996), citing *Erickson & Assocs. v. McLerran*, 123 Wn.2d 864, 872 P.2d 1090 (1994) (internal quotations omitted). The right of a property owner to vest

has been affirmed by the Washington Supreme Court on numerous occasions over the past 80 years. *See Allenbach v. Tukwila*, 101 Wn.2d 193, 676 P.2d 473 (1984).<sup>12</sup>

“The vesting doctrine is rooted in concepts of fundamental fairness and due process.” *Schneider Homes, Inc. v. City of Kent*, 87 Wn. App. 774, 777-778, 942 P.2d 1096 (1997). Accordingly, the Washington Supreme Court has held that a government-imposed delay in a property owner’s right to vest violates the property owner’s due process rights. *West Main Associates, supra*, 106 Wn.2d 47.

A government-imposed delay in vesting also impermissibly conflicts with the statutory right to vest under RCW 58.17.033. *Adams v. Thurston County*, 70 Wn. App. 471, 855 P.2d 284 (1993).

In addition to RCW 58.17.033, State policy on vesting is embodied in the GMA provisions governing review by the Growth Board of rezones such as the one at issue here. The Legislature specifically declined to authorize the Growth Board to issue injunctive relief. Instead, comprehensive plan and zoning amendments are presumed valid upon

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<sup>12</sup> Citing *State ex. rel. Hardy v. Superior Court*, 155 Wn. 244, 284 P. 93 (1930); *State ex. rel. Ogden v. Bellevue*, 45 Wn.2d 492, 275 P.2d 899 (1954); *Hull v. Hunt*, 53 Wn.2d 125, 331 P.2d 856 (1958); *Hass v. Kirkland*, 78 Wn.2d 929, 481 P.2d 9 (1971); *Norco Construction, Inc. v. King County*, 97 Wn.2d 680, 649 P.2d 103 (1982).

adoption. RCW 36.70A.320. Here, the Growth Board has acknowledged that the Comprehensive Plan designation of NR remains in effect.

Compliance Order, p. 5.

In this case, the superior court acted to intentionally block Shelton Hills' ability to vest to the Rezone, at the behest of the Port, a government agency. The Legislature has expressly provided that property owners have the right to vest, even to zoning regulations that are under appeal. The Washington Supreme Court has repeatedly affirmed this right and held that government agencies cannot legally thwart vesting. The Court must reverse the stay because its sole purpose is to prevent Shelton Hills from exercising its right to vest, contrary to firmly established State law.

The purpose of the vesting doctrine is perfectly illustrated by this case. Shelton Hills is currently in the process of planning for the development of the Property and adjoining property. Shelton Hills must be able to "fix" the regulations applicable to the Property in order to have sufficient certainty to proceed with its planning. Without residential development of the Property, the plan is not economically feasible. The stay halted Shelton Hills' development planning in its tracks, jeopardizing the development and the significant benefits of that development to the City. CP 31.

Shelton Hills and the City are substantially harmed by the stay, and

the superior court erred in finding to the contrary.

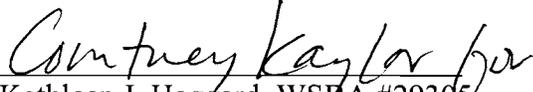
## VI. CONCLUSION

For these reasons, the City and Shelton Hills request that the Court reverse the superior court's decision, affirm the Rezone and void the stays.

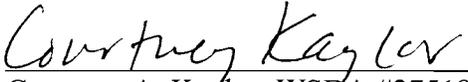
DATED this 14<sup>th</sup> day of September, 2011.

Respectfully submitted,

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## **APPENDIX**

- Exhibit A: *Port of Shelton v. City of Shelton*, WWGMHB No. 10-2-0013 (Final Decision and Order, October 27, 2010)
- Exhibit B: *Port of Shelton v. City of Shelton*, WWGMHB No. 10-2-0013 (Compliance Order, July 13, 2011)
- Exhibit C: RCW 36.70B.030
- Exhibit D: SMC 17.04.020

## **APPENDIX A**



1 support of the City.<sup>1</sup> The Board will also refer to the City and Intervenor collectively as the  
2 Respondents.

3  
4 **MOTIONS**

5 On July 20, 2010, the Board issued an Order on Motions denying both the Respondents'  
6 motion to dismiss all or parts of certain issues and the Petitioner's motion for summary  
7 judgment which was also limited to certain issues.

8  
9 On September 9, 2010, the Board granted Amicus status to the Washington State  
10 Association of Municipal Attorneys (WASAMA). WASAMA filed a brief in support of the  
11 City.<sup>2</sup>

12  
13 On October 15, 2010, one month after the HOM, the Port filed a Motion to Supplement the  
14 Record.<sup>3</sup> Respondents filed a response on October 20, 2010<sup>4</sup> to which the Port replied on  
15 October 22, 2010.<sup>5</sup> It is true WAC 242-02-540 authorizes motions to supplement; however,  
16 the time for such motions has long since passed.<sup>6</sup> Furthermore, not only had the Board  
17 concluded its deliberations but the Port's Motion was filed one week prior to the date the  
18 Final Decision and Order was due. Finally, the Board did not require supplementation as  
19 contemplated by WAC 242-02-540.

20  
21  
22 The Hearing on the Merits (HOM) was held on September 15, 2010. The Petitioner was  
23 represented by Eric S. Laschever. The City appeared through its attorney, Kathleen J.  
24 Haggard. Intervenor was represented by Courtney A. Kaylor. Board members James  
25 McNamara, Nina Carter and William Roehl were present with Mr. Roehl presiding.

26  
27  
28 **III. PRESUMPTION OF VALIDITY, BURDEN OF PROOF,  
29 AND STANDARD OF REVIEW**

30  
31 <sup>1</sup> Order Granting Intervention to Shelton Hills Investors, LLC dated May 25, 2010.

<sup>2</sup> WASAMA did not appear at the Hearing on the Merits.

<sup>3</sup> The Port of Shelton's Second Motion To Supplement the Record

<sup>4</sup> Shelton Hills Investors, LLC's And City of Shelton's Response

<sup>5</sup> The Port of Shelton's Reply. The Board's rules do not contemplate the filing of replies.

<sup>6</sup> The Prehearing Order established a cutoff date of July 2, 2010.

1 Comprehensive plans and development regulations, and amendments, are presumed valid  
2 upon adoption.<sup>7</sup> This presumption creates a high threshold for the Port of Shelton as the  
3 burden is on the Port to demonstrate that action taken by the City of Shelton is not in  
4 compliance with the GMA.<sup>8</sup>

5  
6 The Board is charged with adjudicating GMA compliance and, when necessary, invalidating  
7 noncompliant plans and development regulations.<sup>9</sup> The scope of the Board's review is  
8 limited to determining whether the City of Shelton has achieved compliance with the GMA  
9 only with respect to those issues presented in a timely petition for review.<sup>10</sup> The GMA  
10 directs the Board, after full consideration of the petition, to determine whether there is  
11 compliance with the requirements of the GMA.<sup>11</sup> The Board shall find compliance unless it  
12 determines that the challenged action is clearly erroneous in view of the entire record before  
13 the Board and in light of the goals and requirements of the GMA.<sup>12</sup> In order to find the City  
14 of Shelton's action clearly erroneous, the Board must be "left with the firm and definite  
15 conviction that a mistake has been committed."<sup>13</sup>

16  
17  
18 In reviewing the planning decisions of cities and counties, the Board is instructed to  
19 recognize "the broad range of discretion that may be exercised by counties and cities" and to  
20 "grant deference to counties and cities in how they plan for growth."<sup>14</sup> However, the City of  
21

22  
23 <sup>7</sup> RCW 36.70A.320(1) provides: [Except for the shoreline element of a comprehensive plan and applicable  
24 development regulations] comprehensive plans and development regulations, and amendments thereto,  
25 adopted under this chapter are presumed valid upon adoption.

26 <sup>8</sup> RCW 36.70A.320(2) provides: [Except when city or county is subject to a Determination of Invalidity] the  
27 burden is on the petitioner to demonstrate that any action taken by a state agency, county, or city under this  
28 chapter is not in compliance with the requirements of this chapter.

29 <sup>9</sup> RCW 36.70A.280, RCW 36.70A.302

30 <sup>10</sup> RCW 36.70A.290(1)

31 <sup>11</sup> RCW 36.70A.320(3)

32 <sup>12</sup> RCW 36.70A.320(3)

<sup>13</sup> *City of Arlington v. CPSGMHB*, 162 Wn.2d 768, 778, 193 P.3d 1077 (2008)(Citing *Dept. of Ecology v. PUD District No. 1 of Jefferson County*, 121 Wn.2d 179, 201, 849 P.2d 646 1993); See also, *Swinomish Tribe, et al v. WWGMHB*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007); *Lewis County v. WWGMHB*, 157 Wn.2d 488, 497-98, 139 P.3d 1096 (2006).

<sup>14</sup> RCW 36.70A.320(1) provides, in relevant part: 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 boards to grant deference to counties and cities in how they plan for growth, consistent with the requirements

1 Shelton's actions are not boundless; those actions must be consistent with the goals and  
2 requirements of the GMA.<sup>15</sup>

3  
4 Thus, the burden is on the Port to overcome the presumption of validity and demonstrate the  
5 challenged action taken by the City of Shelton is clearly erroneous in light of the goals and  
6 requirements of the GMA.  
7

#### 8 IV. BOARD JURISDICTION

9 The Board finds the Petition for Review was timely filed pursuant to RCW 36.70A.290(2); the  
10 Petitioner has standing to appear before the Board pursuant to RCW 36.70A.280(2), and; the  
11 Board has jurisdiction over the subject matter of the petition pursuant to RCW  
12 36.70A.280(1).<sup>16</sup>  
13

#### 14 V. PRELIMINARY MATTERS

15 At the commencement of the HOM, the Board announced it would take official notice of two  
16 documents - the 2008 draft Port of Shelton's Sanderson Field Master Plan<sup>17</sup> and the  
17 Washington State Department of Transportation Aviation Division's *Airports and Compatible*  
18 *Land Use, Vol. 1* pursuant to WAC 242-02-670.  
19

20  
21 The Petitioner presented no briefing in support of its Issues 7 and 9 and, consequently,  
22 those issues are deemed abandoned pursuant to WAC 242-02-570(1). Portions of some  
23

24  
25 and goals of this chapter. Local comprehensive plans and development regulations require counties and cities  
26 to balance priorities and options for action in full consideration of local circumstances. The legislature finds that  
27 while this chapter requires local planning to take place within a framework of state goals and requirements, the  
28 ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and  
29 implementing a county's or city's future rests with that community.

30 <sup>15</sup> *King County v. CPSGMHB*, 142 Wn.2d 543, 561, 14 P.2d 133 (2000)(Local discretion is bounded by the  
31 goals and requirements of the GMA). See also, *Swinomish*, 161 Wn.2d at 423-24. In *Swinomish*, as to the  
32 degree of deference to be granted under the clearly erroneous standard, the Supreme Court stated: The  
amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give  
the [jurisdiction's] actions a "critical review" and is a "more intense standard of review" than the arbitrary and  
capricious standard. *Id.* at 435, Fn.8.

<sup>16</sup> This finding of jurisdiction is further supported by the Board's July 20, 2010 Order on Motions.

<sup>17</sup> The Board recognized subsequent to the Hearing on the Merits that this 2008 Draft had not been officially  
adopted by the Port. Therefore, the Board determined it would not be of substantial assistance and it was not  
considered.

1 issues were either withdrawn or abandoned by Petitioner. Reference to the specific portions  
2 so withdrawn/abandoned are included below.

## 4 VI. ISSUES AND DISCUSSION

### 5 *The Challenged Action*

6 The Port owns and operates Sanderson Field, a regional general aviation airport (GAA)  
7 located within Mason County that operates 24 hours a day. Sanderson Field has two  
8 runways, one of which has been inactive since 1984. Runway 05/23, is the primary runway  
9 at 5000 feet in length, and Runway 17/35, the inactive runway, is a crosswind runway set at  
10 45° to Runway 05/23. Estimates in the Record suggest Sanderson Field experienced in  
11 excess of 35,000 flights in 2007.

12  
13  
14 In 2007 the City adopted an Airport Overlay which is comprised of six zones over and in the  
15 vicinity of the Sanderson Field runway.<sup>18</sup> Those zones include the following:

16 Zone 1	Runway Protection Zone
17 Zone 2	Inner Safety Zone
18 Zone 3	Inner Turning Zone
19 Zone 4	Outer Safety Zone
20 Zone 5	Sideline Safety Zone
21 Zone 6	Traffic Pattern Zone

22 Zone 1 is the most restrictive and uses within that zone are strictly limited. At the other  
23 extreme is Zone 6, which places the least restrictions on use. Neither new residential  
24 subdivisions nor new residential dwellings are allowed in Zone 1. Multi-family residential  
25 uses are not allowed in Zone 3 and residential single-family residential divisions are limited  
26 to one unit per five acres. The Shelton Municipal Code places no restrictions on residential  
27 use in Zone 6.

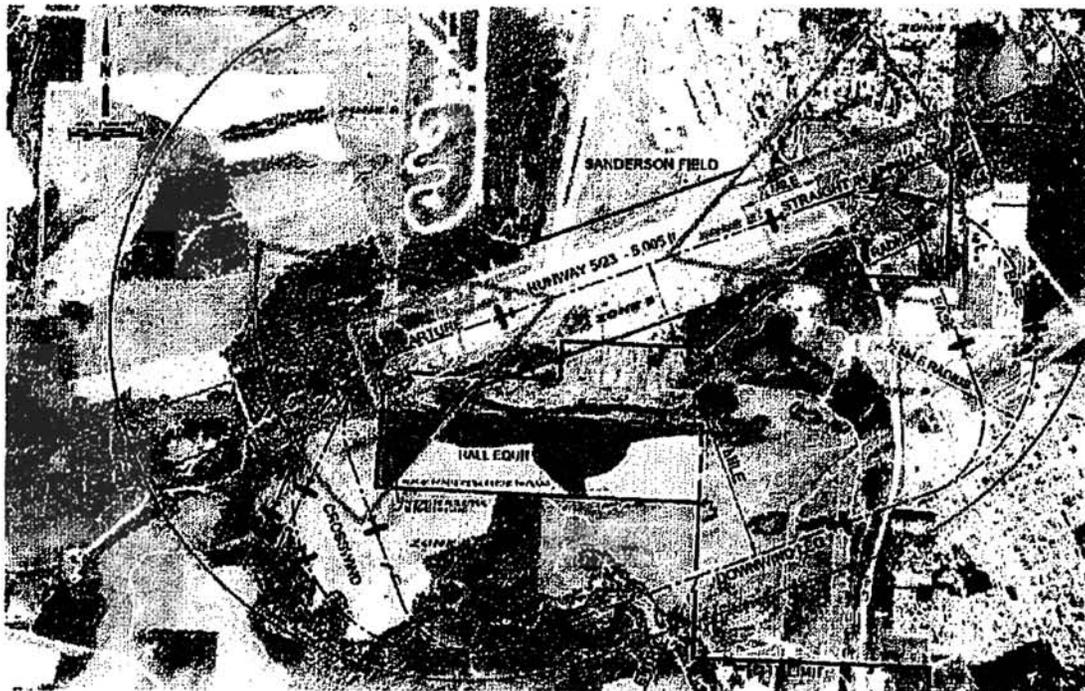
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29  
30 Intervenor is the owner of 764 acres which are being considered for a Planned Unit  
31 Development proposal within the vicinity of Sanderson Field. A portion of that property, 160  
32

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<sup>18</sup> SMC Chapter 20.70  
FINAL DECISION AND ORDER  
Case No. 10-2-0013  
October 27, 2010  
Page 5 of 41

1 acres located approximately one-half mile south of the airport, is subject to the Airport  
2 Overlay with all but 11 acres within Zone 6; the other acreage is within Zone 3.<sup>19</sup> The  
3 aforementioned Runway 05/23 traffic pattern also lies to the south of the airfield.<sup>20</sup>  
4

5 The air traffic pattern for Runway 05/23 is to the south of the airport as illustrated by  
6 the following diagram, which also depicts the location of the Property and area safety  
7 zones:<sup>21</sup>  
8



11

26 On April 19, 2010, the City of Shelton adopted Ordinance 1764-0310 (Ordinance) which  
27 amended the City's Comprehensive Plan and Future Land Use Map in regards to these 160  
28 acres, changing the land use designation from Commercial Industrial (C/I) to Neighborhood  
29 Residential (N/R). The gist of Petitioner's challenge is that the Ordinance allows residential  
30 land uses incompatible with airport operations in violation of GMA requirements. Petitioner  
31

32 <sup>19</sup> AR 005

<sup>20</sup> AR 243

<sup>21</sup> Scanned from Respondent's HOM Illustrative Exhibit.

1 also challenges compliance with the State Environmental Policy Act (SEPA) and the Shelton  
2 Municipal Code, as well as compliance with other GMA requirements.

3  
4 The Board determines the Petitioner's allegations fall within five categories which will be  
5 addressed as follows:

- 6 1) Incompatibility
- 7 2) Inconsistency
- 8 3) Public Participation
- 9 4) Environmental Review
- 10 5) Invalidity

11 The Board will address the Petitioner's issues within the context of these categories.

#### 12 13 **A. INCOMPATIBILITY**

14 Incompatibility is the foundation of Petitioner's argument in this matter, specifically the  
15 change in the land use designation and its impact on the continued viability of Sanderson  
16 Field. The Petitioner presents three issues which the Board sees as falling within this  
17 categorical context – Issues 1, 2, and 3.

#### 18 19 **1. Incompatible Land Uses**

20 Issue 2 as set forth in the Pre Hearing Order states:

21  
22 Does the Ordinance fail to comply with RCW 36.70A.510, which incorporates the  
23 requirements of RCW 36.70.547, by adopting amendments that allow incompatible land  
24 uses in the Airport Zone?

#### 25 Applicable Law

26 RCW 36.70A.510: [Emphasis added]

27  
28 Adoption and *amendment of comprehensive plan provisions* and development  
29 regulations under this chapter *affecting a general aviation airport are subject to*  
30 *RCW 36.70.547.*

31 Thus, RCW 36.70A.510 grants the Board authority to review an action for compliance with  
32 RCW 36.70.547 which provides: [In relevant part, Emphasis added]

1 Every county, city, and town in which there is located a general aviation airport  
2 that is operated for the benefit of the general public, whether publicly owned or  
3 privately owned public use, shall, through its comprehensive plan and  
4 development regulations, discourage the siting of incompatible uses adjacent  
5 to such general aviation airport.

6 Positions of the Parties

7 Petitioner asserts the Ordinance allows incompatible residential uses in close proximity to  
8 Sanderson Field. Petitioner's position is that the City is required to discourage incompatible  
9 uses and the Ordinance actually does the opposite.<sup>22</sup>

10 Petitioner refers to the position taken by the Washington State Department of Transportation  
11 Aviation Division's (Aviation Division) Compatibility Land Use Matrix<sup>23</sup> which recommends a  
12 maximum Zone 6 residential density of one unit per 2.5 acres (1 du/2.5 acre) and states the  
13 Ordinance requires a minimum density of three dwelling units per acre.<sup>24</sup> Petitioner further  
14 states the views of the Aviation Division should be given substantial weight.<sup>25</sup>

15  
16  
17 The Petitioner also argues aircraft noise impacts will lead to possible constraints on airport  
18 operations, again citing the Aviation Division's *Airports and Compatible Land Use, Volume 1*,  
19 which states "noise is the most common negative impact associated with airports".<sup>26</sup>

20 Petitioner asserts analyses conducted by the City focused on a noise level of 65 DNL - a  
21 level associated with actual physical harm - rather than lower level noise impacts, which lead  
22 to aggravation, complaints, and the resulting political pressure to constrain airport  
23 operations. The Petitioner again cites comments by the Aviation Division that a noise  
24 analysis focusing on the latter was necessary as levels well below 65 DNL would lead to  
25 conflicts between residential uses and airport operations.<sup>27</sup>

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<sup>22</sup> The Port of Shelton's Prehearing Brief at 11.

<sup>23</sup> Exhibit 7

<sup>24</sup> The Port of Shelton's Prehearing Brief at 12.

<sup>25</sup> Id, citing *Pruitt v. Town of Eatonville*, CPSPGMHB Case No. 06-3-0016 (FDO, 12/18/2006).

<sup>26</sup> Exhibit 7 at page 358

<sup>27</sup> The Port of Shelton's Prehearing Brief at 13, 14.

1 Finally, Petitioner states conflicts with Runway 17/35 would be even greater than those  
2 associated with Runway 05/23 as the Ordinance would allow incompatible residential  
3 development in Zones 2, 3, and 4 of Runway 17/35. Petitioner states that while Runway  
4 17/35 is currently inactive, potential airport growth includes reactivation of that runway with  
5 the resulting exacerbation of incompatibility.<sup>28</sup>  
6

7 The Respondents first state the Ordinance is presumed valid and the burden of proof lies  
8 with the Petitioner.<sup>29</sup> They characterize the Petitioner's argument as speculation and argue  
9 the facts fail to establish incompatibility.<sup>30</sup> Rather, Respondents assert concerns raised by  
10 the Petitioner, pilots, and the Aviation Division were analyzed and found to be without merit  
11 following a study conducted by Safety Services International, LLC (Safety Study)<sup>31</sup> and a  
12 noise study undertaken by Parametrix (Noise Study).<sup>32</sup> Respondents state the Safety Study  
13 concluded airplane passengers/pilots would face "virtually no increase in risk" and people on  
14 the property would see no "significant increase in risk".<sup>33</sup>  
15  
16

17 Respondents also state the Noise study concluded noise levels on the property were shown  
18 to be far below the levels the Federal Aviation Administration (FAA) considers to be  
19 incompatible with residential uses.<sup>34</sup> Respondent also refers to Petitioner's own planning  
20 documents which they argue state current and future Sanderson Field generated noise  
21 levels are compatible with all land-use categories.<sup>35</sup>  
22

23 Respondents dispute the Aviation Division's guidance document, which sets out a  
24 recommended maximum residential density for Zone 6 at 1du/2.5 acre.<sup>36</sup> They refer to that  
25 document's acknowledgment that "one size does not fit all"; that is, residential densities are  
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28 <sup>28</sup> Id. at 15

29 <sup>29</sup> Respondents Brief at 12, 13

30 <sup>30</sup> Id. at 13

31 <sup>31</sup> Id. at 13, 14

32 <sup>32</sup> AR 232-238

<sup>33</sup> Respondents Brief at 14

<sup>34</sup> Id.

<sup>35</sup> Id. at 22

<sup>36</sup> Id. at 17

1 to be tailored to the specific facts applicable to each airport, its physical environment and the  
2 specific type, location and intensity of residential use.<sup>37</sup>

3  
4 The Respondents also dispute the Petitioner's allegations regarding the extent to which  
5 planes would fly over the property, citing the Safety Study which indicated very few planes in  
6 the Sanderson Field traffic pattern would ever fly over the property.<sup>38</sup>

7  
8 Respondents observe the Aviation Division's guidance offers a mere "menu of  
9 recommendations for compatible development" and that the City has incorporated many of  
10 the items from that menu.<sup>39</sup> They contend the Petitioner is suggesting any noise is *per se*  
11 incompatible with residential uses. To the contrary, the Respondents argue the Record  
12 establishes compatibility as it shows the noise generated will fall well below 65DNL, a level  
13 set by the FAA and the Petitioner as establishing compatibility.<sup>40</sup> Furthermore, Respondents  
14 state the Noise Study illustrated the noise level would not exceed 47DNL and that planes  
15 would not fly over the property if they used the FAA approved flight pattern.<sup>41</sup>

16  
17  
18 Board Analysis and Findings

19 The Board agrees fully with Respondents that the Ordinance is presumed valid and that  
20 Petitioner bears the burden to establish it is clearly erroneous in light of the goals and  
21 requirements of the GMA. The Board further agrees that no "bright line" residential density  
22 limit should be applied within Sanderson Field's Zone 6, or to any other airport's safety  
23 zones for that matter. As the Board found in its July 20 Order on Motions,<sup>42</sup> "one size does  
24 not fit all"; rather, the individual facts applicable to an airport, proposed uses in that airport's  
25 vicinity, and the record developed in each case are determinative.

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30 <sup>37</sup> Id.

31 <sup>38</sup> Id. at 18

32 <sup>39</sup> Id. at 19, 20

<sup>40</sup> Id. at 20

<sup>41</sup> Id. at 21

<sup>42</sup> Orders On Shelton Hills Investors, LLC/City of Shelton's Motion To Dismiss and Port of Shelton's Motion For  
Summary Judgment , pg. 5.

1 However, the Board is not a fact-finding body but rather acts in an appellate capacity. The  
2 Board's role is to review the Record that was before the local government, here the City of  
3 Shelton. As the Court noted in *Futurewise v. CPSGMHB*, the Board's role is to determine  
4 whether the challenged action is a clearly erroneous violation of the GMA, not to substitute  
5 its judgment for that of the local government's decision-makers:

6 [T]he Board may reject the ordinance only if the ordinance itself is "clearly  
7 erroneous," not because one stated reason for enacting it lacks merit.<sup>43</sup>

8  
9 In *RD Merrill Co. v. PCHB*, the Court held:<sup>44</sup> [Emphasis added]

10 On appeal from a decision of the [PCHB], the superior court must uphold agency  
11 findings unless "the order is not supported by evidence that is substantial when  
12 viewed in light of the whole record before the court . . . ."

13 Thus, the Board's role is to determine if substantial evidence exists to support the City's  
14 action.

15  
16 When considering issues of fact (such as whether a use is compatible), the courts have held  
17 that an appellate court (in the context of this matter, the "appellate court" is the Board)  
18 should review evidence submitted to determine whether it constituted substantial evidence  
19 to support the factual findings of the agency (again, in this context, the "agency" is the  
20 City).<sup>45</sup> The Courts have articulated several variations of the meaning of substantial  
21 evidence, all of which essentially establish a similar standard:

- 22  
23
- 24 • [T]hat which is sufficient to persuade a fair-minded person of the truth of  
the declared premise.<sup>46</sup>
  - 25 • Substantial evidence is evidence in sufficient *quantum* to persuade a  
26 fair-minded person of the truth of the declared premise.<sup>47</sup>
  - 27 • Substantial evidence is that sufficient "to persuade a fair-minded person  
28 of the *truth or correctness of the order*."<sup>48</sup>
- 29

30 <sup>43</sup> 141 Wn. App. 202, 218 (2007)

31 <sup>44</sup> 137 Wn.2d 118, 135 (1999)

32 <sup>45</sup> *Ames v. Dept. of Health*, 166 Wn.2d 255, 261 (2009).

<sup>46</sup> *Ames v. Dept. of Health*, 166 Wn.2d 255, 261 (2009).

<sup>47</sup> *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819 (1992)[Emphasis added]

<sup>48</sup> *Ferry County v. CFFC*, 155 Wn.2d 823, 833 (2005)

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- Substantial evidence [is defined] as *that character of evidence which would convince an unprejudiced thinking mind of the truth of the fact to which the evidence is directed.*<sup>49</sup>
- Substantial evidence exists where there is a *sufficient quantity of evidence in the record* to persuade a fair-minded, rational person of the truth of the finding.<sup>50</sup>

In *Sunderland Services v. Pasco*<sup>51</sup> the Court applied the substantial evidence test to findings of the Pasco City Council when it stated: [emphasis added]

*Issues of fact are reviewed to determine whether they are supported by competent and substantial evidence. This review is deferential and requires the court to view the evidence and reasonable inferences therefrom in the light most favorable to the party who prevailed in the highest forum that exercised fact-finding authority. We apply this standard to the city council's findings of fact.*

In accordance with the holding in *RD Merrill*, this Board should uphold the City's decision unless it is ". . . not supported by evidence that is substantial when viewed in light of the whole record . . .". The finding in dispute in this matter is Shelton's determination that development of the Property for residential purposes at a density of 2 dwelling units per gross acre is compatible with the continued operation of Sanderson Field. Whether or not this finding is supported by substantial evidence such that a fair-minded person would agree with the City's conclusion is the first question the Board must resolve as the Petitioner asserts the Ordinance will result in incompatibility due to safety concerns as well as noise, light, fumes, and vibration from airport operations. Substantial evidence exists where there is *a sufficient quantity of evidence in the record* to persuade a fair-minded, rational person of the truth of the finding.<sup>52</sup>

RCW 36.70.547 requires cities and counties to "discourage the siting of incompatible uses." The term "incompatible" was not defined by the Legislature, but its common meaning refers

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<sup>49</sup> *Bland v. Mentor*, 63 Wn.2d 150, 154 (1963)  
<sup>50</sup> *Hilltop Terrace HOA v. Island County*, 126 Wn.2d 22, 34 (1995)  
<sup>51</sup> 127 Wn.2d 782, 788 (1995)  
<sup>52</sup> 126 Wn.2d 22, 34 (1995)

1 to something that cannot subsist with something else.<sup>53</sup> In terms of land uses and airport  
2 operations, the Board sees two types of potential incompatibility: those which arise or are  
3 created by impacts of the land use itself on airport operations and those which may arise or  
4 be created by the operation of the airport and affect surrounding uses. An example of land  
5 uses which could affect airport operations, including aircraft safety, would be the height or  
6 location of buildings, transmission lines, and the like. An example of airport activities which  
7 could negatively impact adjacent land uses is excessive noise.  
8

9  
10 In this matter, the City concluded residential uses in Zone 3 at 1du/5 acres and in Zone 6 at  
11 2 du/acre would be compatible. The two primary areas of alleged incompatibility in the  
12 matter before the Board involve noise and safety (safety of pilots/passengers and safety of  
13 people on the ground). Concerns about both noise and safety were brought to the City's  
14 attention by the airport community.<sup>54</sup> In response, the City commissioned two studies, the  
15 Safety Study and the Noise Study.  
16

17 • **Safety Study**

18 The Safety Study was conducted by Safety Services International, LLC (SSI) and assessed  
19 the change in land use designation's effect on safety to both pilots and passengers as well  
20 as to people on the ground. The primary author's resume established him as well  
21 experienced in air traffic safety.<sup>55</sup> SSI's analysis involved flying "touch and go" patterns at  
22 Sanderson Field. Those flights led the author to draw two relevant conclusions: some  
23 planes will fly over the property when using Sanderson Field<sup>56</sup> and most of the time those  
24 flights would be 1000 feet or more above the ground.<sup>57</sup> The Safety Study analyzed  
25 Sanderson Field's traffic patterns, various hazard scenarios, and statistically evaluated the  
26 risk to persons on the ground and to pilots and their passengers.  
27  
28  
29

30 <sup>53</sup> Webster's New Twentieth Century Dictionary

31 <sup>54</sup> The Board uses this term to reflect organizations and individuals interested in airport activities, including, the  
32 Port of Shelton, pilots/pilot associations, WSDOT Aviation, and the Federal Aviation Administration (FAA).

<sup>55</sup> AR 253-255

<sup>56</sup> Apparently, one flight in four flew over the property. AR 243

<sup>57</sup> AR 243

1 The conclusions reached by SSI were that the change in the land use designation would  
2 result in:

3  
4 "[V]irtually no increase in risk to the GA (general aviation) pilot and his passengers  
5 using Sanderson Field, and would not pose a significant increase in risk to persons  
6 on the property".<sup>58</sup>

7 Although the Safety Study was criticized by the Petitioner's Executive Director and the  
8 Aviation Division, the Record does not disclose any fatal flaws in SSI's methodology or  
9 conclusions. The Record established the Property was not in the direct runway paths, there  
10 was no indication of structure height concerns and there was no evidence presented  
11 regarding the location of proposed residential densities which would have a bearing on  
12 safety. Based on the Record in this case, the Board concludes the City's determination that  
13 the change in land use designation from C/I to NR would be compatible with Sanderson  
14 Field in regards to safety concerns, was not clearly erroneous.<sup>59</sup>

15  
16  
17 • **Noise Study**

18 The second aspect of alleged incompatibility was noise, specifically whether residential uses  
19 on the property would be incompatible with airport-generated noise. Again, and to the City's  
20 credit, it sought to obtain information on noise levels so as to make an informed decision.  
21 Parametrix was engaged to evaluate "existing sound levels at and near Sanderson Field,  
22 and compare that to typical sound levels in the community and to regulatory standards used  
23 by the FAA to determine land-use compatibility with airport operations".<sup>60</sup>

24  
25 While "noise" and "incompatibility" are subjective words, objective standards for measuring  
26 sound levels exist:

27  
28 Airport noise exposure is measured in a day-night average sound level (DNL) and  
29 is used to analyze and characterize multiple aircraft noise events, and for

30  
31 <sup>58</sup> AR 239

32 <sup>59</sup> The Board has not considered alleged safety or noise impacts resulting from possible future use of Runway  
17/35. The record indicates that runway has been inactive for approximately 26 years and there are no specific  
plans to reactivate it. See AR 007, 008

<sup>60</sup> AR 232

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determining the cumulative exposure of such noise to individuals around airports. DNL means the 24-hour average sound level, in decibels, for the period from midnight to midnight, obtained after the addition of ten decibels to sound levels for periods between midnight and 7:00 am, and between 10:00 pm and midnight. The yearly day-night average sound level means the 365-day average, in decibels.<sup>61</sup>

Parametrix installed two sound measuring devices, one in a residential subdivision and the second on the Property. The latter device was placed on the Property in a partly wooded area slightly more than one half mile south of Runway 05/23. Sound levels were monitored on January 11 and 12 in the subdivision and between February 12, 2010 and February 18, 2010 on the Property. On February 13, a chartered Lear 35 jet made two take-offs and landings. While on the ground at Sanderson Field, the pilot "spooled up" the engines to generate maximum noise levels. At the time of the test, weather conditions were generally overcast with periods of rain and temperatures were in the 30s-40s. Parametrix concluded sound levels on the Property averaged 45 dBA during the day, 39 dBA at night with a 47 DNL maximum level. Based on those findings, Parametrix stated the average day-night sound level (47 dBA) on the Property "was well below the FAA threshold of impact (65 DNL). The methodology, conclusions and the use of the FAA 65 DNL standard were severely criticized by the airport community.

As previously referenced, it is inappropriate for the Board to weigh the evidence; that was the role of the City. However, it is the Board's role to determine whether or not the jurisdiction's decision was supported by substantial evidence, evidence which would "persuade a fair-minded person".

In that regard, the Board acknowledges the Aviation Division and others argued strenuously that the proposed residential uses on the Property would be incompatible as a result of airport use generated noise. The Board finds, however, it would be inappropriate to

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<sup>61</sup> The Aviation Division's "Airports and Compatible Land Use, Vol. 1", pg. 24, AR360

1 "balance" those arguments with those of the City, or its contractor, Parametrix. To do so  
2 would constitute an inappropriate weighing of the evidence.<sup>62</sup>

3  
4 However, a criticism of the methodology employed by Parametrix is appropriate for  
5 consideration as that criticism relates to a determination of whether or not the City's noise  
6 analysis constitutes substantial evidence.

7  
8 The Aviation Division, as argued by Respondents, does not have land-use decision-making  
9 authority.<sup>63</sup> However, it is an agency division within the Department of Transportation which  
10 has been granted general supervision over aeronautics in Washington State and has  
11 developed specialized knowledge in that area:

12  
13 The department has general supervision over aeronautics within this state. It is  
14 empowered and directed to encourage, foster, and assist in the development of  
15 aeronautics in this state and to encourage the establishment of airports and air  
16 navigation facilities. It shall cooperate with and assist the federal government, the  
17 municipalities of this state, and other persons in the development of aeronautics,  
18 and shall seek to coordinate the aeronautical activities of these bodies and  
19 persons.<sup>64</sup>

20 Consequently, the Board concludes opinions expressed by the Aviation Division regarding  
21 Parametrix's methodology and conclusions should be given substantial weight.<sup>65</sup> For that  
22 matter, observations regarding methodology from others familiar with Sanderson Field  
23 operations are appropriate for consideration if they shed light on the question of whether or  
24 not the City's decision was supported by substantial evidence.

25  
26  
27  
28 <sup>62</sup> At oral argument, counsel for the Petitioner focused a considerable portion of his argument on "weighing" the  
29 evidence.

30 <sup>63</sup> RCW 47.68.110: Nothing contained in this chapter shall be construed to limit any right, power or authority of  
the state or a municipality to regulate airport hazards by zoning.

31 <sup>64</sup> RCW 47.68.070, in relevant part.

32 <sup>65</sup> See *Overlake Hospital, et al v. Dept. of Health*, Supreme Court Docket 82782-1 (Sept. 23, 2010), where the  
Court found that matters involving an agency's special knowledge and expertise are to be granted deference as  
the "agency has expertise and insight gained from administering the regulation that the reviewing court does  
not possess."

1 The Aviation Division's observations included the following provided by aviation planner  
2 Carter Timmerman at an April 5, 2010 City Commission public hearing (presented as set  
3 forth in a written transcript).<sup>66</sup>

4 WSDOT has reviewed the noise study and technical memorandum  
5 commissioned by the City of Shelton and performed by the consulting firm,  
6 Parametrix and offers the following observations regarding the study. In order to  
7 gather an adequate sampling scientific noise studies are generally performed  
8 over a longer duration of time. Most professional noise studies gather data  
9 between two and six years. The seven day monitoring period was inadequate  
10 and failed to accurately capture the airport's actual operation characteristics.  
11 This noise monitoring during February, the weather conditions during the  
12 monitoring period were not conducive to visual flight rules needed for airport  
13 operations. Weather conditions during the time frame included light rain, heavy  
14 rain, fog, overcast skies and poor visibility. . . Visibility at the airport was often at  
15 less than a mile. Most VFR operations need at least one mile visibility. . The  
16 majority of operations at Sanderson Field are executed under VFR conditions.  
17 As noted on page seven of the study it acknowledges, it is likely that sound levels  
18 will be higher at the airport during the summer when flying conditions would be  
19 improved over the weather that occurred during the monitoring period. . . Often  
20 residential outdoor activities occur during the same time period as VFR aircraft  
21 operations. This interaction will increase the resident's exposure to noise and  
22 other disruptions. The study only briefly two aircraft enroute to other airports and  
23 estimates their altitude to be higher than the recommended pattern altitude for  
24 airport. No documentation was provided in the technical mind of detailing the  
25 number of takeoffs or landings during this time frame. . . it is a basic expectation  
26 of scientific studies to document, archive and share all data and methodology.  
27 This allows other professionals to carefully scrutinize the data and methodology  
28 employed and the opportunity to duplicate results and/or refute findings. The  
29 noise monitoring study has failed to document the runways and used by the  
30 aircraft during the approach and departure phases of flight. Sanderson Field has  
31 two runways, 23 and 05; this basic information is not included in the study. Flight  
32 tracks or the flight not taken by the leer 35 due to their propulsion system jet  
aircraft often used a larger traffic pattern that piston driven aircraft. The majority  
of Sanderson Field's fleet is piston driven single or is piston driven single engine  
aircraft. The leer 35's pattern altitude in relation to proposed development during  
the various phases of flight was not documented. The distinction between the  
leer 35's and the leer 25's noise was not documented. The leer 35's noise  
footprint is substantially smaller than its counterpart. No consideration was given  
to the fleet makes operational characteristics or operational characteristics. And

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<sup>66</sup> The Port of Shelton's Prehearing Brief, Ex. 14, pgs. 6, 7  
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1 Sanderson Field has 102 based aircraft consisting of single engine, multi-engine,  
2 helicopter and ultra lights. None of these were taken to account. Many of  
3 Sanderson Field's operations are generated by sky diving activity; which means  
4 heavy and slow moving aircraft. These aircraft historically generate large  
5 amounts of noise. This was not documented either. In regards to noise, the City  
6 has also failed to under demonstrate its understanding of the FAA's part 150  
7 program and the use of the day night average sound level of 65 DNL. The 65  
8 DNL is an environmental threshold used to identify the level [at], which significant  
9 health impacts start to occur. And environmental mitigation is required. The  
10 program is designated to address liability rather than compatibility. The program  
11 fails to address the vast range of noise that fall below the 65 DNL level. This  
12 noise level constitutes a nuisance and continued irritant.

13 Further comment relevant to methodology was provided in an Aviation Division letter from  
14 Carter Timmerman addressed to the City's mayor dated November 12, 2009.<sup>67</sup>

15 The FAA's Part 150 Program addresses significant environmental noise impacts  
16 that are harmful to human health. The program, however, fails to address the  
17 vast range of noise impacts that fall below the 65 DNL. Noise levels below 65  
18 DNL levels have proven to be significant compatibility issues for noise sensitive  
19 uses such as single-family residential uses, 0-12 schools and other similar uses.  
20 Outdoor activity is a significant aspect of residential land use. Often residential  
21 outdoor activity occurs during the same time frame as VFR [visual flight rules]  
22 aircraft operations. This interaction will increase the residents' exposure to  
23 noise, vibration and other aeronautical disruptions.

24 Vegetation and the site's topography will not protect residents from overflight  
25 noise produced during the downwind leg and base leg execution of the traffic  
26 pattern for runway 05

27 The pattern altitude for aircraft approaching the airport is 1300 feet mean sea  
28 level ((MSL) or 1027 above ground level (AGL), but the pilot in command of the  
29 aircraft has discretion to fly at lower altitudes to ensure safe operations. Given  
30 the combination of the site's topography and airport's established aircraft traffic  
31 pattern altitude, aircraft will be traversing the property in the downwind leg at  
32 roughly 991feet. In the base leg portion of the pattern for runway 05, the aircraft  
altitude will change significantly as aircraft transition between phase of flight . . .

The subject area will also be impact[ed] by overflight noise from operations of  
runway 23.

33 The Executive Director for the Port of Shelton, John Dobson, also raised concerns regarding  
methodology in a letter addressed to the City Commission dated April 5, 2010.<sup>68</sup>

1 To test for airport noise during a one-week period in winter and make any claim  
2 of insignificance doesn't make much sense. What happens in the summer  
3 months when the residents are outside? We fly more. We practice "touch and  
4 go" operations . . . we fly in the pattern . . .

5 The Lear 35 is known to be one of the quietest aircraft. The test aircraft was on  
6 an instrument flight plan. That precluded it from flying in the pattern and over the  
7 subject property. Air traffic control vectored this aircraft to a straight in approach.  
8 That approach minimized any impact to the subject property.

9 Interestingly, a question posed by the Chairman of the Port Commission, Jay Hupp, gets to  
10 the heart of the matter from another direction but in laymen's terms:

11 "[Parametrix] have done a good job of answering the wrong question. The  
12 question is not whether or not there will be enough sound coming from the airport  
13 to cause aggravation to surrounding residents. The relevant question is whether  
14 or not residents will be aggravated by aircraft operating noise over their houses.  
15 Parametrix did not study that question, and so their findings are irrelevant."<sup>69</sup>

16 The Respondents ground their determination of the noise compatibility question on the  
17 Noise Study, application of the FAA 65DNL standard, and the Port's 2008 Draft Master Plan.  
18 First of all, reliance on a draft plan is generally inappropriate. The plan is just that- a draft -  
19 which has yet to receive final approval from the Port of Shelton. Plans are issued in draft  
20 form to allow comment, refinement, and amendment. Until adoption by a jurisdiction, plans  
21 do not represent the official findings, goals, policies and intentions of that jurisdiction.

22  
23 Furthermore, the Aviation Division contended the 65 DNL standard represents the level at  
24 which human health concerns arise. That contention was not contradicted by  
25 Respondents.<sup>70</sup> It is not the role of this Board to determine at what specific DNL sound level  
26 compatibility with the continued operation of Sanderson Field would occur in relationship to  
27 the Property. However, it is appropriate for the Board to observe and find that  
28 incompatibility, as envisioned by RCW 36.70.547 and as applied to the Property on the  
29

30  
31 <sup>68</sup> AR 36

32 <sup>69</sup> AR 32, 33

<sup>70</sup> In referring to the FAA Part 150 65 DNL standard, a planner for the City stated: "It doesn't mean a whole lot to me other than the fact that it established a threshold at which the FAA will fund mitigation . . ." Respondents'

Brief, Ex. 22, pg. 6.

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1 Record before the Board, is a sound level below that which is harmful to human health. In  
2 fact, the Record is clear that the 65 DNL level is one at which the FAA will consider  
3 mitigation for noise impacts.<sup>71</sup> That fact was stated by the Aviation Division and confirmed  
4 by a city planner and a Parametrix representative.<sup>72</sup> Consequently, the Board finds that the  
5 65 DNL level cannot be considered to be *per se* compatible with residential uses of two units  
6 per gross acre on the Property.  
7

8 However, and of greatest significance, the Board finds the Noise Study was gravely flawed:  
9

- 10 • The Noise Study was conducted over an approximately eight day period as  
11 opposed to the much longer period normally required for such analyses (2-6  
12 years)<sup>73</sup>
- 13 • The Noise Study was done in January and February when there was virtually no  
14 airport activity.<sup>74</sup>
- 15 • The Noise Study was done at a time when any airport activity would have been  
16 using instrument flight rules (IFR) due to inclement weather as opposed to visual  
17 flight rules (VFR).<sup>75</sup> IFR use would put any planes using the airport much further  
18 from the Property.<sup>76</sup> Most users of Sanderson Field use VFR.<sup>77</sup>
- 19 • The Noise Study failed to include any specific documentation regarding the flight  
20 path of the Lear 35 and thus accurate information regarding its location in  
21 relationship to the Property is unknown.<sup>78</sup>
- 22 • The Noise Study failed to include any documentation of the number of planes  
23 using Sanderson Field during the study period or the runways that were used.<sup>79</sup>
- 24 • The Noise Study based its conclusions on application of the FAA's 65 DNL  
25 standard.<sup>80</sup>

26 On the basis of this flawed study, Parametrix concluded the average day-night sound level  
27 at the Property was 47 dBA. The Board finds the City's determination that the land use  
28

29 <sup>71</sup> Mitigation would include such things as sound barriers, thermal pane windows and insulation. Resps' Brief,  
30 Ex.22, pgs 6 and 9.

31 <sup>72</sup> Respondents' Brief, Ex. 22, pgs. 6 and 9. Petitioner's Brief, Ex. 14, pg.7.

32 <sup>73</sup> Petitioner's Brief, Exhibit 14, pg. 6.

<sup>74</sup> AR 237

<sup>75</sup> Petitioner's Brief, Exhibit 14, pg. 6.

<sup>76</sup> AR 36

<sup>77</sup> Petitioner's Brief, Exhibit 14, pg. 6.

<sup>78</sup> Petitioner's Brief, Exhibit 14, pg. 7.

<sup>79</sup> Petitioner's Brief, Exhibit 14, pg. 6, 7.

<sup>80</sup> AR 238

1 redesignation would not result in allowance of an incompatible use is not supported by  
2 substantial evidence and therefore, results in a clearly erroneous action.

3  
4 Having secured data on ambient sound levels in the vicinity of Sanderson Field, the City of  
5 Shelton compounded its error by misapplying the data. RCW 36.70.547 requires  
6 consultation with, among others, the Aviation Division. While the City was not required to  
7 comply with the Aviation Division suggestions, the Aviation Division has a level of technical  
8 competence to be given due weight. While it was not clear error to ignore the Aviation  
9 Division's guidance, it was clear error to make decisions based on a misinterpretation of the  
10 evidence in the Record. For example, a Shelton city planner stated unequivocally:

11  
12       The number that is referenced in almost every document is 65 DNL . . . At 65  
13       DNL that is where it becomes an annoyance and it is considered incompatible . .  
14       . the 65 DNL threshold is noted and anything below 65 DNL is compatible with  
15       residential.<sup>81</sup>

16 Again relying on the Noise Study, the same planner advised the City Commission as follows:

17       We conclude that the subject property would not experience noise levels that  
18       would create an incompatible land use for airport operations. Noise from aircraft  
19       operations in the area will not be any more significant than noise regularly  
20       experienced in a typical Shelton neighborhood.<sup>82</sup>

21 A representative of Parametrix also advised the City Commission:

22       The average day/night sound there was 47 . . . So you can see we are below  
23       the threshold that FAA considers an impact.<sup>83</sup>

24  
25 The Board is left with the firm and definite conviction the City of Shelton's action was clearly  
26 erroneous. The Board can only conclude from the Record that the 65 DNL sound level is  
27 that which is harmful to human health. Sound levels resulting in negative impacts to human  
28 health are greater than those that would result in incompatibility as envisioned by RCW  
29 36.70.547. That conclusion is reached after reviewing the entire record and determining  
30

31  
32 <sup>81</sup> AR 156

<sup>82</sup> AR 134

<sup>83</sup> Respondents' Brief, Ex. 22, pg. 9, 10.

1 there is a lack of substantial evidence to support the City's conclusion regarding  
2 compatibility; the evidence is simply insufficient to convince a fair minded person of the "truth  
3 of the declared premise": that the residential uses allowed by the Ordinance would be  
4 compatible with continued operation of Sanderson Field.

5  
6 **Conclusion**

7 The Board concludes Petitioner has met its burden of proof in demonstrating the City's  
8 adoption of Ordinance 1764-0310 violated RCW 36.70A.510 as it was not supported by  
9 substantial evidence and therefore results in a clearly erroneous action.<sup>84</sup>

10  
11 **2. Incompatibility – Preclusion of Essential Public Facilities**

12 Issue 3, while also indirectly related to incompatibility, alleges the Ordinance violates RCW  
13 36.70A.200. As set forth in the Board's Prehearing Order, Issue 3 states:

14  
15 Does the Ordinance fail to comply with RCW 36.70A.200 because it fails to sufficiently  
16 protect the Airport, an essential public facility, from incompatible uses thereby making  
17 expansion of the Airport impracticable?

18 **Applicable Law**

19 RCW 36.70A.200 provides, in relevant part:

20 (1) The comprehensive plan of each county and city that is planning under RCW  
21 36.70A.040 shall include a process for identifying and siting essential public  
22 facilities. Essential public facilities include those facilities that are typically difficult to  
23 site, such as airports . . .

24 (5) No local comprehensive plan or development regulation may preclude the siting  
25 of essential public facilities.

26 **Positions of the Parties**

27 Petitioner argues the Ordinance conflicts with RCW 36.70A.200's preclusion of essential  
28 public facility (EPF) siting which, Petitioner contends, includes the continued operation and  
29

30  
31  
32 <sup>84</sup> The Board stresses its conclusion is based solely on the record before it in this matter. Furthermore, the Board's decision should not be considered as a determination that residential uses in Zones 3 and 6 are necessarily incompatible. Rather, the Board has merely concluded the Petitioner met its burden of proof on the basis of a lack of substantial evidence.

1 potential expansion of an EPF.<sup>85</sup> Petitioner cites a previous decision of this Board to the  
2 effect that residential zoning within a certain proximity of airports "precludes" siting of  
3 EPFs.<sup>86</sup>  
4

5 The Respondents counter the assertion by stating Petitioner has failed to show residential  
6 use would be incompatible.<sup>87</sup>  
7

8 Board Analysis and Findings

9 Airports, including general aviation airports, are essential public facilities.<sup>88</sup> The Board  
10 agrees with Petitioner that allowing incompatible uses within close proximity of an airport  
11 may preclude use resulting from complaints of nearby residents or expansion of such a  
12 facility, either in size or volume of use.<sup>89</sup> See *Des Moines v. PSRC*<sup>90</sup> which held that siting,  
13 as used in RCW 36.70A.200(5), includes "expansion" or "improvement". The record  
14 supports the potential conflict between residential uses and airport operations.<sup>91</sup> The record  
15 also supports the fact Sanderson Field will continue to grow in volume of use, that is, in the  
16 number of flights annually.<sup>92</sup> The court in *Des Moines* interpreted RCW 36.70A.200(5)'s  
17 wording to include a requirement to protect airport essential public facilities from uses which  
18 would impinge on use or future expansion.  
19  
20

21 The Board found *supra* that the City's determination (approving an NR designation on the  
22 Property would not create an incompatible land use adjacent to Sanderson Field) failed to  
23 be supported by substantial evidence. Issue 3 sets forth a similar allegation related to  
24 EPFs. By their very nature, incompatible uses have the propensity to adversely impact an  
25 EPF by interfering with its continued operation or frustrating future expansion or  
26  
27  
28

29 <sup>85</sup> The Port of Shelton's Prehearing Brief at 15.

30 <sup>86</sup> *Id.* at 15, 16. CCARE v. Anacortes, WWGMHB Case No. 01-2-0019c.

31 <sup>87</sup> Respondents' Brief at 23.

32 <sup>88</sup> RCW 36.70A.200(1)

<sup>89</sup> CCARE v. Anacortes, Case No 01-2-0019c, (FDO, 12/12/2001).

<sup>90</sup> 108 Wn. App. 836, 845

<sup>91</sup> *Airports and Compatible Land Use, Volume 1.*

<sup>92</sup> AR 173, AR 190

1 improvement, resulting in a preclusive effect prohibited by RCW 36.70A.200(5). Within the  
2 *Whereas* clauses of the Ordinance, the City determined the Ordinance complied with the  
3 GMA, which would necessarily include RCW 36.70A.200(5).<sup>93</sup>

4       Whereas, the proposed amendment is consistent with the Growth Management Act,  
5 the countywide planning policies and other applicable interjurisdictional policies and  
6 agreements, and /or other state or local laws . . .

7  
8 However, this conclusion as to consistency with the GMA necessarily follows from the City's  
9 faulty "compatibility" conclusion which, as the Board has previously determined, was  
10 reached without substantial evidence to support it. Therefore, the City's decision that the  
11 Ordinance would not preclude siting of an EPF is similarly not supported by substantial  
12 evidence.

#### 13 14 **Conclusion**

15 The Board concludes Petitioner has met its burden of proof in demonstrating the City's  
16 adoption of Ordinance 1764-0310 violated RCW 36.70A.200 as it was not supported by  
17 substantial evidence and therefore results in a clearly erroneous action.

#### 18 19 **3. Incompatibility – Failing to Encourage Multi-Modal Transportation**

20 Issue 1 also involves incompatibility and contends:<sup>94</sup>

21       Does the Ordinance fail to comply with GMA Planning Goal 2, 3, 5, and 12 (RCW  
22 36.70A.020(2), (3), (5), and (12)) by designating property for uses within the Airport  
23 Zone in a manner that results in sprawling low density residential development, and  
24 discourages efficient multimodal transportation at a regionally significant facility?<sup>95</sup>

#### 25 26 **Applicable Law**

27  
28  
29

30 <sup>93</sup> Ordinance 1764-0310 *Whereas* clause. The Board finds no specific reference in the Ordinance to RCW  
31 36.70A.200(5) but interprets this *Whereas* clause to necessarily encompass consistency with all of the GMA's  
32 goals and requirements.

<sup>95</sup> As noted above Petitioner withdrew claims based on violations of RCW 36.70A.020(2), (5) and (12) and its  
Opening Brief addressing Issue 1 focused solely on Goal 3 (RCW 36.70A.020(3)).

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

Positions of the Parties

Petitioner's argument in regards to Goal 3 is that air travel is an important mode of transportation, that Goal 3 encourages efficient, multimodal transportation systems, and that the Ordinance threatens Sanderson Field thus conflicting with Goal 3.<sup>96</sup>

In response, the City and Intervenor simply state Petitioner has produced no evidence the Ordinance threatens Sanderson Field.<sup>97</sup>

Board Analysis and Findings

As the Board has previously stated, the City's NR designation of the subject property on the basis of compatibility was not supported by substantial evidence. Issue 1 raises a related allegation, that the City's decision discourages efficient multimodal transportation at a regionally significant facility. Incompatible uses adversely affect airports by interfering with their operations. The *Whereas* clause referenced *supra* would also necessarily include a determination that the City's action was guided by RCW 36.70A.020(3).

However, that conclusion is again directly related to the "compatibility" conclusion, a conclusion previously determined to have been made without substantial supporting evidence. Therefore, the Board cannot conclude the City's action was guided by RCW 36.70A.020(3).

Conclusion

The Board concludes Petitioner has met its burden of proof in demonstrating the City's adoption of Ordinance 1764-0310 failed to be guided by RCW 36.70A.020(3) as it was not supported by substantial evidence.

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<sup>96</sup> The Port of Shelton's Prehearing Brief at 16.

<sup>97</sup> Respondents' Brief at 23.

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**B. INCONSISTENCY**

Petitioner presents two issues related to inconsistency, Issue 4 and Issue 5. Issue 4 sets forth an alleged "internal" inconsistency within the City's Comprehensive Plan and Issue 5 sets forth an alleged "external" inconsistency between the City's Comprehensive Plan and the County-Wide Planning Policies applicable to all of Mason County's jurisdictions.

**1. Internal Inconsistency within Comprehensive Plan**

As set forth in the Board's Prehearing Order, Issue 4 states:

Does the Ordinance fail to comply with RCW 36.70A.070 because it is internally inconsistent with the following Comprehensive Plan Policies: LU1a, LU1b, LU1c, LU1d, LU1e, LU5e, LU6c, LU15c, LU15e, LU18a, LU19a, LU19b, LU19c, LU19d, UGA1b, UGA1c, UGA2b?<sup>98</sup>

Applicable Law

RCW 36.70A.070(Preamble), in relevant part, provides:

... The plan shall be an internally consistent document and all elements shall be consistent with the future land use map.. .

Petitioner asserts the City's adoption of the challenged Ordinance results in a future land use map (FLUM) that is inconsistent with the following policies:

LU1e. The City should review and revise the land use designations and development regulations in the zoning code to be consistent with the Vision Statement, Goals and Policies, and Future Land Use Map of this Comprehensive Plan

LU15c. The City shall work with the Port to ensure that there is an adequate supply of industrial zoned land for sale and lease

LU18a. The City will not preclude the siting of essential public facilities; however, it shall enforce its Comprehensive Plan and development regulations to ensure reasonable compatibility with other land uses.

<sup>98</sup> As previously noted, Petitioner withdrew claims based on LU1a, LU1b, LU1c, LU1d, LU5c, LU6c, LU15e, UGA1b, and UGA1c [Issue 4]. In its Opening Brief, Petitioner only addressed LU1e, LU15c, LU 18a, LU19a, LU19b, LU19c, and LU19d. In that Petitioner failed to argue inconsistency with Policy UGA2b it is deemed abandoned.

1 LU19a. The City shall restrict uses in airport areas that would create hazards or  
2 conflict with safe and effective airport operations. Prohibit uses in airport areas  
3 which attract birds, create visual hazards, discharge any particulate matter into  
4 the air which could alter atmospheric conditions, emit transmissions which  
5 would interfere with aviation communications and/or Instrument Landing  
6 Systems, otherwise obstruct or conflict with airport operations or aircraft traffic  
7 patterns, or result in potential hazard for off-airport land use.

8 LU19b. Encourage those land uses in airport areas that would benefit from  
9 aircraft locations and are least affected by noise and other annoyances.

10 LU19c. Discourage land uses in airport areas that are negatively impacted by  
11 airport operations. Decisions on zone reclassifications and land use  
12 development shall be partially based upon the noise hazards of aircraft  
13 operations and accident potentials

14 LU19d. The City should encourage continuing airport planning that considers  
15 expansion of existing airport facilities to meet changing needs.

16 Positions of the Parties

17 In its argument regarding this issue, Petitioner first refers to Shelton Comprehensive Plan  
18 Goal LU1e, a comprehensive plan goal which reiterates the RCW 36.70A.070 requirement  
19 that land-use designations be consistent with a comprehensive plan's goals and policies.  
20 Petitioner then sets forth the City's Comprehensive Plan Policies LU19a, LU19b, LU19c  
21 and LU19d and repeats allegations that the Ordinance allows uses which would conflict with  
22 airport operations (LU19a), encourages land uses that would be detrimentally affected by  
23 airport operations (LU19b and LU19c), and land uses that could lead to curtailment of such  
24 operations and possibly preclude expansion (LU 19d).<sup>99</sup>

25  
26  
27 The Petitioner also suggests the Ordinance conflicts with Policy LU18a, a policy intended  
28 not to preclude siting of EPFs. Finally, Petitioner states the Ordinance reduces industrial  
29 acreage in contravention of LU15c when the City already has inadequate industrial acre  
30 acreage.<sup>100</sup>

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<sup>99</sup> The Port of Shelton's Prehearing Brief at 17.  
<sup>100</sup> The Port of Shelton's Prehearing Brief at 18.  
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1 Respondents rely on their prior arguments regarding compatibility, stating the Petitioner has  
2 failed to establish the residential use authorized by the Ordinance is inconsistent or  
3 incompatible with airport operations or with operation/expansion of an essential public  
4 facility.<sup>101</sup> They dismiss allegations of inconsistency regarding LU15c (an inadequate supply  
5 of industrial lands), stating the Property is undevelopable for industrial purposes.<sup>102</sup>  
6  
7

8 Board Analysis and Findings

9 • Industrial Lands

10 As to the alleged inconsistency with Policy LU15c, the Record, in fact, includes a statement  
11 that it is the entirety of Mason County which has a shortfall of 804 acres of industrial land.<sup>103</sup>  
12 Whether or not there is a shortfall of such lands within the City so as to prevent it from  
13 accommodating its own projected needs is not addressed. LU15c itself merely requires the  
14 City to work with the Port to ensure an adequate supply of industrial zoned land. The Record  
15 fails to clarify whether compliance with this particular policy has or has not been met. The  
16 Board finds Petitioner has failed to meet its burden to establish inconsistency with  
17 Comprehensive Plan Policy LU15c.  
18  
19

20 • Airport/EPF Compatibility

21 Issue 4 raises an allegation the analysis of which is similar to that for Issues 1, 2 and 3 as it  
22 is necessarily tied to the City's determination of compatibility of the NR designation with  
23 Sanderson Field. In order for the City's action to be consistent with Comprehensive Plan  
24 Goals LU18a, LU19a, LU19b, LU19c and LU19d the City would have to determine the  
25 Ordinance would not allow conflicting uses, either adjacent uses impacting Sanderson Field  
26 or airport uses affecting the adjacent uses.<sup>104</sup> That determination was found to be  
27 unsupported by substantial evidence.  
28  
29

30  
31 <sup>101</sup> Respondents' Brief at 24.

32 <sup>102</sup> Id.

<sup>103</sup> AR 135

<sup>104</sup> One of the Ordinance's Whereas clauses is as follows: Whereas, the proposed amendment will not create an incompatible land use adjacent to Sanderson Field, a General Aviation Airport.

1 In addition to the Ordinance's *Whereas* clause referenced *supra* with which the City  
2 determined the Ordinance complied with the GMA, a conclusion which also encompasses  
3 RCW 36.70A.070(Preamble), the Ordinance also included the following clause:  
4

5       Whereas, the proposed amendment does not erode the purpose, goals, and  
6       policies of the comprehensive plan

7 Policies LU18a, LU19a, LU19b, LU19c and LU19d may indeed be "eroded" if the decision is  
8 not supported by substantial evidence.  
9

10 **Conclusion**

11 The Board concludes Petitioner has met its burden of proof in demonstrating the City's  
12 adoption of Ordinance 1764-0310 violated RCW 36.70A.070 (Preamble) as it was not  
13 supported by substantial evidence and therefore results in a clearly erroneous action.  
14

15  
16 **2. External Inconsistency – Comprehensive Plan to County-Wide Planning Policies**

17 As set forth in the Board's Prehearing Order, Issue 5 provides:

18       Does the Ordinance fail to comply with RCW 36.70A.210 because it is inconsistent with  
19       County Wide Planning Policies 6.3 and 6.7?<sup>105</sup>

20 **Applicable Law**

21 The relevant section of RCW 36.70A.210 is set forth below: [Emphasis added]  
22

23       (1) The legislature recognizes that counties are regional governments within their  
24       boundaries, and cities are primary providers of urban governmental services within  
25       urban growth areas. For the purposes of this section, a "countywide planning  
26       policy" is a written policy statement or statements used solely for establishing a  
27       countywide framework from which county and city comprehensive plans are  
28       developed and adopted pursuant to this chapter. This *framework shall ensure that*  
29       *city and county comprehensive plans are consistent as required in RCW*  
30       *36.70A.100.* Nothing in this section shall be construed to alter the land-use powers  
31       of cities.  
32

Mason County CWPP 6.7 appears under the heading "Housing" and provides:

<sup>105</sup> Petitioner withdrew its allegation regarding inconsistency with CWPP 6.3. See Petitioner's Brief at 18.

1 "Ensure an adequate supply of urban land and affordable housing by drawing  
2 growth area boundaries which accommodate the medium growth scenario for  
3 population into the year 2014, recognize environmentally sensitive constraints,  
4 provide for a market factor, accommodate supporting new commercial, industrial  
5 and public/quasi public uses and utility and infrastructure land needs.

6 Positions of the Parties

7 Petitioner states CWPP 6.7 requires local governments in Mason County, including the City,  
8 to ensure an adequate supply of urban land so as to accommodate industrial land needs.

9 The Petitioner reiterates its arguments regarding the alleged violation of Comprehensive  
10 Plan Policy LU15C above.

11  
12 The Respondents merely allege Petitioner failed to meet its burden of proof and state the  
13 Record indicates the contrary.<sup>106</sup>  
14

15 Board Analysis and Findings

16 Petitioner's sole argument as to CWPP 6.7 is that the Ordinance reduces the industrial land  
17 base and this policy directs Shelton to ensure an adequate supply of such land. Petitioner  
18 misreads CWPP 6.7 - this policy specifically states that UGA boundaries are to be drawn so  
19 as to ensure an adequate supply of all types of urban land needs. Not only was Shelton's  
20 UGA not impacted by the Ordinance but UGA boundaries are set by counties, not cities.

21 The Board does not find that CWPP 6.7 creates any duty for the City of Shelton and, thus,  
22 no inconsistency can be found.  
23  
24

25 Conclusion

26  
27 The Board concludes Petitioner has failed to carry its burden of proof in demonstrating the  
28 City's action in adoption of Ordinance 1764-0310 failed to comply with RCW 36.70A.210  
29 based on CWPP 6.7.  
30

31 **C. PUBLIC PARTICIPATION/CONSULTATION**  
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<sup>106</sup> Respondents' Brief at 25  
FINAL DECISION AND ORDER  
Case No. 10-2-0013  
October 27, 2010  
Page 30 of 41

1 As set forth in the Board's Prehearing Order, Issue 6 provides:

2 Did the City fail to comply with GMA Planning Goal 11 and RCW 36.70A.510 because it  
3 did not consult in a meaningful manner with the Port, airport pilots, and Washington  
4 Department of Transportation?

5 Applicable Law

6 RCW 36.70A.020(11) is the GMA public participation goal:

7 (11) Citizen participation and coordination. Encourage the involvement of  
8 citizens in the planning process and ensure coordination between communities  
9 and jurisdictions to reconcile conflicts.

10 RCW 36.70.510 makes the adoption and amendment of comprehensive plan provisions and  
11 development regulations affecting GAAs subject to RCW 36.70.547 which provides, in  
12 relevant part: [Emphasis added]

13 [Every city with a public GAA] shall, through its comprehensive plan and  
14 development regulations, discourage the siting of incompatible uses adjacent to  
15 such general aviation airport. *Such plans and regulations may only be adopted or*  
16 *amended after formal consultation with: Airport owners and managers, private*  
17 *airport operators, general aviation pilots, ports, and the aviation division of the*  
18 *department of transportation. . .*

19 Positions of the Parties

20 Petitioner asserts that by disregarding the concerns of the airport community the City failed  
21 to meaningfully consult. In addition, Petitioner contends the City failed to coordinate so as  
22 to reconcile conflicts.<sup>107</sup>

23 The Respondents dispute Petitioner's allegation, stating the City held a formal consultation  
24 with WSDOT Aviation, the Port of Shelton and interested pilots, took comment at public  
25 hearings and investigated and evaluated the concerns expressed.<sup>108</sup> The Respondents  
26 state that a failure to agree does not constitute a failure to consult.<sup>109</sup>

27 Board Analysis and Findings

28 <sup>107</sup> The Port of Shelton's Prehearing Brief at 18.

29 <sup>108</sup> Respondents Brief at 25.

30 <sup>109</sup> Id.

1 RCW 36.70A.020(11) is the public participation goal of the GMA and, in regards Petitioner's  
2 claim, seeks to ensure coordination between jurisdictions to reconcile conflicts. It is clear in  
3 this matter that the City provided opportunity for public participation and the airport  
4 community, including Petitioner, availed themselves of these opportunities. Public meetings  
5 and hearings were held by the Planning Commission and City Commission on May 4, 2009,  
6 August 25, 2009, March 22, 2010 and April 5, 2010.<sup>110</sup> In addition, the City facilitated both  
7 an informal consultation and a formal consultation with the Petitioner, the WSDOT Aviation  
8 Division, and interested pilots. Written submissions were accepted throughout the adoption  
9 process.  
10

11  
12 It is Petitioner's position that the City "failed to coordinate with the Aviation Division, the  
13 FAA, the Port (another municipal entity), and the community of pilots . . . to reconcile  
14 conflicts" as it "disregarded" the concerns of those entities and individuals and, as a result, it  
15 argues the City violated RCW 36.70A.020(11).<sup>111</sup>  
16

17 Ultimately, the GMA grants the legislative body of the jurisdiction with land-use planning  
18 authority the final decision on comprehensive plans, development regulations and  
19 amendments to them. "Ensuring coordination" as used in RCW 36.70A.020(11) and  
20 "consultation" as used in RCW 36.70. 547 do not shift the decision-making authority to  
21 others; in this instance, to the Port or WSDOT Aviation.<sup>112</sup> Rather, it was incumbent upon  
22 the City to: 1) encourage public involvement in the planning process and actively consult  
23 with the entities/individuals listed in RCW 36.70.547 and; 2) substantively consider the  
24 comments it received. The Board concludes public comment was allowed, formal  
25 consultation took place, and the Record reflects the City considered the information and  
26 opinions it received.  
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32 <sup>110</sup> Ordinance No.1764-0310, pg. 2.

<sup>111</sup> Petitioner's Brief at 18.

<sup>112</sup> See *Butler vs. Lewis County*, WWGMB Case No. 99-2-0017.

1 On July 21, 2009, the City's Community Development Director met informally with  
2 Petitioner's Executive Director, the President of the Washington Pilots Association, and a  
3 local pilot. A representative of the Intervenor provided an overview of its planned  
4 development and the rationale behind the requested zoning change.<sup>113</sup> Thereafter, on  
5 August 25, 2009, a formal consultation occurred attended by the three Port of Shelton  
6 Commissioners, the Port's Executive Director and planning manager, a representative from  
7 WSDOT Aviation, and approximately 11 local pilots.<sup>114</sup> On September 22, 2009, the City's  
8 Senior Planner flew the flight pattern with Petitioner's Executive Director for approximately 2  
9 hours.<sup>115</sup> The City received 15 letters expressing noise and safety concerns following  
10 issuance of a Mitigated Determination of Nonsignificance (MDNS).<sup>116</sup> And, as stated above,  
11 four public meetings or hearings were held where public comments were accepted.  
12

13  
14 The City responded to incompatibility concerns by commissioning two studies: Parametrix  
15 Noise Study, issued March 16, 2010<sup>117</sup> and Safety Services International, LLC (SSI) Safety  
16 Study, issued March 11, 2010.<sup>118</sup>  
17

18 While it is clear that the airport community emphatically disagrees with aspects of the  
19 methodologies employed by Parametrix and SSI, as well as conclusions drawn from those  
20 studies, the final decision-making authority was the City Commission. Public participation  
21 and consultation occurred. The Board cannot conclude the City "disregarded" concerns  
22 expressed as alleged by Petitioner. It commissioned the two studies previously referenced.  
23 This matter is dissimilar to the decision in *Pruitt v. Town of Eatonville*<sup>119</sup> as in that case the  
24 decision makers of Eatonville clearly ignored the existence of serious safety concerns.  
25  
26

27 **Conclusion**  
28

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29  
30 <sup>113</sup> Record at 126

<sup>114</sup> Id. at 126, 127

31 <sup>115</sup> Id. at 127

<sup>116</sup> Id.

32 <sup>117</sup> Record at 232

<sup>118</sup> Record at 239

<sup>119</sup> CPSGMHB Case No. 06-3-0015 (FDO, Dec. 18, 2006).

1 The Board concludes Petitioner has not met its burden of proof in demonstrating the City's  
2 adoption of Ordinance 1764-0310 failed to be guided by RCW 36.70A.020(11) and/or  
3 violated RCW 36.70A.510 due to a failure to formally consult with the Port, airport pilots, and  
4 the Washington State Department of Transportation Aviation Division.  
5

#### 6 **D. STATE ENVIRONMENTAL POLICY ACT (SEPA)**

7 As set forth in the Board's Prehearing Order, Petitioner's Issue 8 is framed as follows:  
8

9 Did the City fail to comply with chapter 43.21C, the State Environmental Policy Act  
10 (SEPA) and Shelton Municipal Code 20.53.110B, by failing to review the impact of  
11 development of the subject property to the maximum extent allowed by the new land  
12 use designation and the impacts of Hall Equities' anticipated development which is the  
justification for the Amendments and, therefore, a connected action?

#### 13 Applicable Law

14 Petitioner's Issue 8 raises two allegations, a lack of compliance with SEPA and a failure to  
15 comply with provisions of the Shelton Municipal Code related to environmental review. The  
16 Petitioner, either within its issue statement or its briefing, fails to reference specific sections  
17 of SEPA. The Shelton Municipal Code section referenced states as follows:  
18

19 20.53.110 SEPA review. The city is required to conduct a coordinated and  
20 concurrent SEPA review of all proposed amendments being considered in the  
21 current annual review period. Proposed comprehensive plan amendments are  
22 subject to the following:

23 ...  
24 B. Assessment of Impacts. Except for those land use map amendments  
25 associated with a developer's agreement that limit development to specified  
26 uses and floor areas, the most intense use and development of the site allowed  
27 under the proposed zoning designation will be assumed when reviewing  
potential impacts to the environment and to public facilities

#### 28 Positions of the Parties

29 Petitioner's argument regarding SEPA is based on its suggestion that environmental review  
30 of Intervenor's entire 760 acre future development was required when considering the  
31 Ordinance, as opposed to solely considering impacts from the 160 acres affected by the  
32

1 Ordinance.<sup>120</sup> Petitioner contends *King County v. Washington State Boundary Review*  
2 *Board*<sup>121</sup> and *Norway Hill v. King County Council*<sup>122</sup> support this conclusion.

3  
4 Additionally, Petitioner states the City failed to comply with its own SEPA regulations which  
5 require consideration of "the most intense use and development of the site allowed under  
6 the proposed zoning". This argument is based on the fact the City issued a Mitigated  
7 Determination of Non-Significance (MDNS) partially on the basis of proposed mitigation of  
8 impacts limiting residential development on the 160 acre site to a maximum gross density of  
9 2 du/acre rather than on the most intense density provided by the residential zoning  
10 applicable to the property: not less than 3 du/net acre.<sup>123</sup>

11  
12 Respondents assert analysis of the future development of its entire 760 acres was not  
13 required and the Petitioner's reliance on *King County* and *Norway Hill* is misplaced.<sup>124</sup>

14 Respondents further argue environmental review of a larger project would only be required  
15 under SEPA when the principal features of the proposal and its environmental impacts can  
16 reasonably be identified.<sup>125</sup> It is Respondents' position that no development application has  
17 been submitted for the 760 acre area and it is still in the "conceptual study" stage.<sup>126</sup> Finally,  
18 Respondents state the burden is on Petitioner to demonstrate significant adverse  
19 environmental impacts and that Petitioner has failed to meet that burden.<sup>127</sup>

20 Respondents also take issue with the Petitioner's criticism of the City's MDNS condition  
21 which limits development on the property to 2 du/gross acre. While the Petitioner argued  
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28  
29 <sup>120</sup> Petitioner's Opening Brief at 20, 21.

30 <sup>121</sup> 122 Wn. 2d 648 (1993)

31 <sup>122</sup> 87 Wn. 2d 267 (1976)

32 <sup>123</sup> SMC 20.08.020 A

<sup>124</sup> Respondents' Brief at 26

<sup>125</sup> Id., citing WAC 197-11-055 (2)

<sup>126</sup> Id. at 27

<sup>127</sup> Id. at 28

1 that condition was not binding as it is not incorporated into the Ordinance, the Respondents  
2 state the mitigating condition would limit future development.<sup>128</sup>

3  
4 Board Analysis and Findings

- 5 • Environmental Review pursuant to Shelton Municipal Code

6 The Board agrees with Petitioner that, pursuant to SMC 20.53.110B, the City was to review  
7 the Ordinance based on the most intense use and development allowed under the new land  
8 use designation. However, Petitioner fails to support this claim with any argument, including  
9 what would be the most intense use and development allowed under the NR land use  
10 designation. It is not the Board's role to research the applicable code provisions and make  
11 the necessary mathematical calculations to determine if the City erred. That is for the  
12 Petitioner and this it failed to do.

13  
14  
15 Therefore, the Board finds and concludes the Petitioners, having failed to provide supporting  
16 argument, effectively abandoned this aspect of Issue 8.

- 17  
18 • Environmental Review pursuant to SEPA

19 Issue 8 also alleges the change in the land use designation for the Property was a  
20 "connected action" in relationship to the anticipated development of Intervenor's entire 760  
21 acres. However, Petitioner presents no argument, no legal citation, and no case law to  
22 support this claim. Rather, Petitioner's argument is founded on a claim that a non-project  
23 action must review the effects of potential development even if no specific proposal for  
24 development has been presented. The Board would concur that non-project actions may be  
25 subject to environmental review even if there is no proposal before the local government,  
26 but that was not the issue presented to the Board for resolution. Petitioner simply did not  
27 brief the issue it presented - connected action. This, in combination with the fact Petitioner  
28 provided the Board with no RCW provisions to support a violation, leads the Board to the  
29 conclusion that Petitioner failed to demonstrate a violation of SEPA.  
30  
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<sup>128</sup> While the Board questions whether the MDNS condition would apply to a subsequent owner of the property should Intervenor transfer ownership, that issue is not before the Board. RCW 36.70A.290(1).

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**Conclusion**

The Board concludes that Petitioner has failed to carry its burden of proof in demonstrating the City's adoption of Ordinance 1764-0310 violated SEPA, RCW 43.21C or SMC 20.53.110B.

**E. INVALIDITY**

Issue 10 requests a Determination of Invalidity and, as set forth in the Board's Prehearing Order, states:

Does the City's lack of compliance with the GMA, as addressed in the above issues, warrant a determination of invalidity under RCW 36.70A.302 and WAC 242-02-831(2)?

**Applicable Law**

Pursuant to RCW 36.70A.302, the Board has the authority to invalidate all or part of a development regulation. RCW 36.70A.302(1) provides:

A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:

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

WAC 242-02-831 is the Board's Rules of Practice and Procedure and essentially restates the provisions of RCW 36.70A.302 verbatim.

1 The language of RCW 36.70A.020(3) Transportation and 36.70A.020(11) Citizen  
2 Participation and Coordination are set forth *supra*.<sup>129</sup>

3  
4 Positions of the Parties

5 Petitioner argues the City's "alleged lack of GMA compliance warrants a finding of invalidity  
6 under RCW 36.70A.302 as the Ordinance's continued validity would substantially interfere  
7 with fulfillment of GMA Goals 3 and 11."<sup>130</sup> The Petitioner alleges substantial interference  
8 with Goal 11, the public participation goal, as "the City . . . ignored the concerns . . ." of the  
9 aviation community as well as the policies of its own Comprehensive Plan.<sup>131</sup> It again cites  
10 the *Pruitt* decision in support of its argument.  
11

12 Substantial interference with Goal 3 is tied by the Petitioner to what it asserts is the  
13 allowance by the City of incompatible residential development adjacent to Sanderson Field,  
14 thus threatening its long-term survival, as well as a disregard of its Comprehensive Plan  
15 policies.<sup>132</sup> Finally, invalidity is also requested by Petitioner based on the alleged failure to  
16 comply with SEPA.<sup>133</sup>  
17

18  
19 The Respondents argue invalidity is not warranted as the Ordinance fully complies with the  
20 GMA and, even if noncompliance were to be found, they state Petitioner has failed to  
21 establish substantial interference.<sup>134</sup> Respondents state the Ordinance merely changes the  
22 land-use designation of the Property and did not authorize development.<sup>135</sup> Furthermore,  
23 they allege Sanderson Field is well protected due to application of the City's Airport Overlay  
24 zones and project specific conditions would likely mitigate any concerns of the Petitioner.<sup>136</sup>  
25  
26  
27

28  
29 <sup>129</sup> The text of Goal 3 is set forth in the Applicable Law section of Issue 1. The text of Goal 11 is set forth in the  
Applicable Law section of Issue 6.

30 <sup>130</sup> Petitioner argues the Ordinance "sets back" Goals 3 and 11.

31 <sup>131</sup> Petitioner's Brief at 22.

32 <sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> Respondents' Brief at 29.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 29, 30

1 Board Analysis and Findings

2 Invalidity is authorized only after the Board has made a finding of non-compliance and is  
3 based on a determination that the challenged action, in whole or in part, would substantially  
4 interfere with the fulfillment of the goals of the GMA.  
5

6 The Board concluded the City provided various opportunities for public participation, formally  
7 consulted with the airport community, and considered the comments/information received  
8 when it engaged in the final decision-making process; thus non-compliance was not found.  
9 Since the Board did not find non-compliance in regard to RCW 36.70A.510's consultation  
10 requirements or Goal 11, a determination of invalidity is not authorized.  
11

12 Nor was the alleged failure of the City to comply with SEPA established by the Petitioner  
13 and thus a determination of invalidity is not authorized on that basis.  
14

15  
16 However, as to Goal 3 Transportation, the Board is persuaded that "the continued validity of  
17 part or parts of the plan [during the period of remand] would substantially interfere with  
18 fulfillment of [GMA] goals." The Board concluded the City's adoption of Ordinance No. 1764-  
19 0310 violated RCW 36.70A.510, RCW 36.70A.200 and RCW 36.70A.070 (Preamble) as it  
20 was not supported by substantial evidence and therefore resulted in a clearly erroneous  
21 action. The continued viability of Sanderson Field may very well be threatened if up to 320  
22 residences are ultimately authorized within Zone 6 based on a lack of substantial evidence  
23 to support a finding of compatibility. The Board concludes Ordinance No. 1764-0310 was  
24 not guided by GMA Goal 3 – Transportation, and will substantially interfere with fulfillment of  
25 that Goal.  
26

27  
28 Conclusion

29 The Board imposes an order of invalidity on the Ordinance in its entirety.  
30

31 **VI. ORDER**  
32

1 Based on the foregoing, the Board determines the City of Shelton's adoption of Ordinance  
 2 No. 1764-0310 fails to comply with the GMA. The ordinance is remanded to the City to take  
 3 the necessary action to achieve compliance as set forth in this Order within 180 days.  
 4 Ordinance No. 1764-0310 is found invalid in its entirety. The following schedule shall apply:  
 5

6 Item	Date Due
7 Compliance Due on identified areas of noncompliance	April 25, 2011
8 Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	May 9, 2011
9 Objections to a Finding of Compliance	May 23, 2011
10 Response to Objections	June 6, 2011
11 Compliance Hearing (Telephonic) 12 360 407-3780 pin 206433#	June 14, 2011 @ 10:00 a.m.

13  
 14 So ORDERED this 27<sup>th</sup> day of October, 2010.



15  
 16 William P. Roehl, Board Member



17  
 18 James McNamara, Board Member



19  
 20 Nina Carter, Board Member

21  
 22 Pursuant to RCW 36.70A.300 this is a final order of the Board.

23  
 24  
 25 Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this  
 26 Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out  
 27 in WAC 242-02-832. The original and three copies of the petition for reconsideration, together with  
 28 any argument in support thereof, should be filed by mailing, faxing or delivering the document directly  
 29 to the Board, with a copy to all other parties of record and their representatives. Filing means actual  
 30 receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-330. The filing of a  
 petition for reconsideration is not a prerequisite for filing a petition for judicial review.

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

1 Enforcement. The petition for judicial review of this Order shall be filed with the appropriate court and  
2 served on the Board, the Office of the Attorney General, and all parties within thirty days after service  
3 of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in  
4 person, by fax or by mail, but service on the Board means actual receipt of the document at the  
Board office within thirty days after service of the final order.

5 Service. This Order was served on you the day it was deposited in the United States mail. RCW  
6 34.05.010(19).  
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## **APPENDIX B**



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## I. BURDEN OF PROOF

Following a finding of non-compliance, the local jurisdiction is given a period of time to adopt legislation to achieve compliance.<sup>4</sup> After the period for compliance has expired, the board is required to hold a hearing to determine whether the local jurisdiction has achieved compliance.<sup>5</sup> For purposes of board review of the comprehensive plans and development regulations adopted by local governments in response to a non-compliance finding, the presumption of validity applies and the burden is on the challenger to establish the new adoption is clearly erroneous.<sup>6</sup>

In order to find the City's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made".<sup>7</sup> Within the framework of state goals and requirements, the Board must grant deference to local governments in how they plan for growth:

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. . . . 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.<sup>8</sup>

However, where a finding of invalidity has been entered the burden is on the local jurisdiction to demonstrate the ordinance or resolution adopted in response to the finding of invalidity no longer substantially interferes with the goals of the GMA.<sup>9</sup>

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<sup>4</sup> RCW 36.70A.300(3)(b)

<sup>5</sup> RCW 36.70A.330(1) and (2)

<sup>6</sup> RCW 36.70A.320(1), (2) and (3)

<sup>7</sup> *Department of Ecology v. PUD1*, 121 Wn.2d 179, 201, 849 P.2d 646 (1993)

<sup>8</sup> RCW 36.70A.3201, in part

<sup>9</sup> RCW 36.70A.320(4)

<sup>9</sup> FDO at 39

1 In this case, the Board concluded the City's adoption of Ordinance No. 1764-0310 violated  
2 RCW 36.70A.510, RCW 36.70A.200 and RCW 36.70A.070 (Preamble) as it was not  
3 supported by substantial evidence and resulted in a clearly erroneous action.<sup>10</sup> The Board  
4 then found Ordinance No. 1764-0310 was not guided by GMA Goal 3 –Transportation, and  
5 concluded it would substantially interfere with fulfillment of that Goal.<sup>11</sup> The City thus bears  
6 the burden of demonstrating its actions no longer substantially interfere with GMA Goal 3  
7 and, if it does so, the Port then has the burden to overcome the presumption of validity of  
8 the City's action.  
9

## 10 II. DISCUSSION AND ANALYSIS

### 11 Issue to be Discussed

12 Whether the City of Shelton's action in response to the Board's FDO appropriately  
13 addresses the violations of RCW 36.70A.510, RCW 36.70A.200, RCW 36.70A.070  
14 (Preamble) and no longer substantially interferes with the fulfillment of Goal 3?

### 15 Discussion

16  
17 The City's decision addressed in the FDO was a Comprehensive Plan and Future Land Use  
18 Map (FLUM) redesignation of Intervenor's 160 acre parcel (Property) from Commercial  
19 Industrial (C/I) to Neighborhood Residential (N/R).  
20

21 The Property lies in close proximity to the Port's Sanderson Field, a general aviation facility.  
22 The critical issue before the Board was "compatibility" of the residential use with airport  
23 operations as that word is used in RCW 36.70.547, as referenced in RCW 36.70A .510.  
24

25 RCW 36.70A.510:

26  
27 Adoption and amendment of comprehensive plan provisions and development  
28 regulations under this chapter affecting a general aviation airport are subject to  
29 RCW 36.70.547.

30 RCW 36.70.547 (in relevant part):  
31  
32

1 Every county, city, and town in which there is located a general aviation airport  
2 that is operated for the benefit of the general public, whether publicly owned or  
3 privately owned public use, shall, through its comprehensive plan and  
4 development regulations, discourage the siting of incompatible uses adjacent to  
5 such general aviation airport. Such plans and regulations may only be adopted or  
6 amended after formal consultation with: Airport owners and managers, private  
7 airport operators, general aviation pilots, ports, and the aviation division of the  
8 department of transportation.

9 With adoption of Ordinance 1764 – 0310, the City determined the change to a residential  
10 use would be compatible with Sanderson Field, basing that decision primarily on a noise  
11 study undertaken by Parametrix which concluded noise levels on the Property would be well  
12 below noise levels the FAA considers compatible with residential uses. The City had argued  
13 the appropriate noise level was one not exceeding 65 DNL<sup>12</sup> and amended its  
14 Comprehensive Plan and FLUM from C/I to N/R, allowing a density of two dwelling units per  
15 gross acre.

16 In concluding the Petitioner met its burden of establishing a violation of RCW 36.70A.510,  
17 the Board found the 65 DNL sound level could not be considered per se compatible with the  
18 residential use of the property at the density proposed and that the Parametrix study, which  
19 concluded the average day-night sound level on the property was 47 DBA, was fatally  
20 flawed. On those bases the Board found the City's conclusion that the land-use  
21 redesignation would be compatible with airport operations was not supported by credible  
22 evidence and was therefore clearly erroneous.

23  
24  
25 For the same reasons, the Board concluded the City was in violation of RCW 36.70 A.200,  
26 RCW 36.70A.070 (Preamble) and was not guided by RCW 36.70A.020(3). However, the  
27 Board did not hold residential use of the Property was necessarily incompatible with airport  
28 operations.

29  
30  
31 Positions of the Parties  
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<sup>12</sup> Respondent City of Shelton's Prehearing Brief at 20  
COMPLIANCE ORDER  
Case No. 10-2-0013  
July 13, 2011  
Page 4 of 20

1  
2 Following the Board's remand, the City retained BRC Acoustics and Technology Consulting  
3 (BRC) to again study "current and future sound levels on the property resulting from airport  
4 operations".<sup>13</sup> The City states the question it sought to answer was that of compatibility:

5       The question before the City was not what numerical standard – if any – should  
6       generally be applied, but rather whether existing and future sound levels on this  
7       particular Property are compatible with residential development.<sup>14</sup>

8  
9 The City considered two options to achieve compliance with the Board's order: 1) amending  
10 its Comprehensive Plan to change the land use designation to C/I and retaining the existing  
11 C/I zoning or; 2) maintain the N/R land use designation and rezone the property to N/R.<sup>15</sup>

12 The decision ultimately made by the City was to follow the second option by adopting  
13 Ordinance No. 1784 - 0411. That Ordinance includes a provision that it would take effect  
14 upon a decision by the Board that the City was in compliance with the GMA or by a decision  
15 of the Thurston County Superior Court overturning the Board's FDO, whichever came first.<sup>16</sup>

16 The City states its choice was based on the analysis provided by BRC.

17  
18 The following is a summary of the key points the City makes to support its decision to  
19 accept the conclusions of the BRC study which determined " . . . from a noise standpoint,  
20 the Shelton Hills site conforms with FAA Part 150 guidelines for compatibility with residential  
21 land uses without restrictions."<sup>17</sup>

- 22  
23       1. The BRC analysis was conducted by experienced, qualified experts in acoustical  
24       analysis.<sup>18</sup>  
25       2. BRC calculated current and future projected sound levels resulting from airport  
26       operations using the FAA Integrated Noise Model 7.0 (INM), a computer model  
27       developed by the FAA for assessing airport operations.<sup>19</sup>  
28       3. The INM produces sound level contours using DNL and DNL is the industry  
29       standard for evaluating airport operations sound levels.<sup>20</sup>

30 <sup>13</sup> Statement of Actions Taken to Comply With FDO at 1.

31 <sup>14</sup> Id. at 2

32 <sup>15</sup> Id.

<sup>16</sup> IR 2002

<sup>17</sup> AR 2341 and AR 2372

<sup>18</sup> Statement of Actions Taken to Comply With FDO at 4.

<sup>19</sup> Id.

- 1 4. The industry standard is to consider all noise levels below 65 DNL as compatible  
2 with residential use.<sup>21</sup>  
3 5. Criticisms of the prior (Parametrix) study, including duration of sound monitoring,  
4 time of year, and number of overflights, are not relevant when using INM.<sup>22</sup>  
5 6. BRC was conservative in its assumptions regarding the number of operations,  
6 aircraft type and flight patterns.<sup>23</sup>  
7 7. BRC concluded the worst-case noise scenario (the highest aircraft activity level,  
8 in the year 2027) indicated the entire Property is outside the 60 DNL contour and  
9 most of the Property is beyond the 55 DNL contour. Further, that portion of the  
10 Property where the DNL was between 55 and 60 is primarily within Airport  
11 Overlay Zone 3 where residential development is limited to one unit per 5  
12 acres.<sup>24</sup>

11 The Port takes strong exception to the BRC study, arguing the City's action poses a threat  
12 to Sanderson Field due to the incompatibility of nearby residential uses. It references  
13 observations of annoyance at DNL significantly lower than 65 and recommendations that  
14 lower standards be applied.<sup>25</sup> It states DNL is not the appropriate standard the Washington  
15 State Department of Transportation Aviation Division (WSDOT) uses to ascertain land-use  
16 compatibility and that complaints are frequently generated "beyond the 55 DNL contours".<sup>26</sup>  
17 It also states the Board "rejected" DNL as an industry-standard in its Final Decision and  
18 Order.<sup>27</sup> The Port states DNL measures the average of noise levels over time, and therefore  
19 fails to adequately address individual noise events measured in decibels. The Port also  
20 references WSDOT's expressed concerns regarding vibration, light, fumes/smell, aircraft  
21 frequency, low flying aircraft and future aircraft operations which are all influences on  
22 compatibility.  
23  
24

25  
26 The Port disputes the relevance of the City's argument that a DNL of 56 was measured in a  
27 developed, residential area distant from Sanderson Field resulting from typical residential  
28

29 <sup>20</sup> Id. at 6

30 <sup>21</sup> Id. at 17

31 <sup>22</sup> Id. at 5

32 <sup>23</sup> Id.

<sup>24</sup> Id. at 6

<sup>25</sup> Id. at 12

<sup>26</sup> Id. at 4 and 10-11

<sup>27</sup> Id. at 10

1 noise.<sup>28</sup> The Board understands that argument is based primarily on the Port's observation  
2 that such a neighborhood would not be subject to the high decibel, more annoying, sound of  
3 low-flying aircraft.<sup>29</sup>  
4

5 The Port's final point regarding noise levels concludes the record shows the City's planned  
6 residential use would be incompatible with Sanderson Field, referencing comments from  
7 WSDOT (the "proposed changes in land use will create incompatibility") and its own sound  
8 consultant, Environ ("the proposed rezone . . . could result in both an unsatisfactory  
9 acoustical environment for residential uses and a long-term detriment to airport  
10 operations").<sup>30</sup>  
11

12 The Port also argues the City failed to comply with the GMA's requirement for "formal  
13 consultation" with the Port prior to the adoption of Ordinance No. 1784 - 0411. It observes  
14 the City and its consultant, BRC, conducted the new noise analysis without any input or  
15 analysis from the Port and did not inform the Port of the study until it was completed.<sup>31</sup> It  
16 was only then the City told the Port of an upcoming BRC briefing to the City, and of the date  
17 of a public hearing scheduled less than three weeks thereafter.<sup>32</sup> The Port observes that  
18 had it been consulted regarding the planned BRC study, it would have advised the City to  
19 not focus on 65 DNL and could have suggested more appropriate analyses.<sup>33</sup>  
20  
21

22 Board Analysis and Findings  
23

24 In its FDO, the Board concluded the City's 2010 adoption of Ordinance No. 1764 – 0310  
25 violated RCW 36.70A.510, RCW 36.70A.200 and RCW 36.70A.070 (Preamble) as it was  
26 clearly erroneous for the City to base its finding that the proposed residential use of  
27 Intervenor's Property would be compatible with the continuing operation of Sanderson Field  
28  
29

30 <sup>28</sup> Id. at 12

31 <sup>29</sup> Id. at 13

32 <sup>30</sup> Id.

<sup>31</sup> Id. at 14

<sup>32</sup> Id. at 3

<sup>33</sup> Id. at 15

1 solely on the conclusions of a flawed study. Based on that conclusion, the Board  
2 determined the following:

3 The continued viability of Sanderson Field may very well be threatened if up to  
4 320 residences are ultimately authorized within Zone 6 based on a lack of  
5 substantial evidence to support a finding of compatibility. The Board concludes  
6 Ordinance No. 1764-0310 was not guided by GMA Goal 3 – Transportation, and  
7 will substantially interfere with fulfillment of that Goal.<sup>34</sup>

8 The Board's rationale was further clarified in its Order on Reconsideration:

9 Unfortunately, the record failed to establish just what sound level would result on  
10 the property from airport operations. Furthermore, there are no "established  
11 industry standards" for land use compatibility under the GMA. "Compatibility"  
12 under the GMA would depend on local circumstances. In this case, the City  
13 could not reach a determination of compatibility when it had no data measuring  
14 the sound levels at the Property. The Board was left with the firm conviction that  
15 a mistake had been made.<sup>35</sup>

16 Here the City has the burden to show its actions no longer substantially interfere with Goal  
17 3.<sup>36</sup> The City chose not to amend the original ordinance found noncompliant, Ordinance No.  
18 1764-0310. Instead, following completion and review of the BRC analysis, the City passed  
19 Ordinance No. 1784-0411 which rezoned the property to N/R so as to be consistent with the  
20 Comprehensive Plan and FLUM designations originally established by Ordinance No. 1764-  
21 0310.

22  
23 The Parametrix Noise Study was found to be deficient for use in ascertaining sound levels  
24 and consequently determining compatibility for several reasons, including:

- 25 1. The Noise Study was a decibel- measuring "snapshot in time" analysis.  
26  
27 2. The Noise Study was conducted over an eight day period during January and  
28 February when there was little aircraft activity.  
29  
30  
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32  
<sup>34</sup> FDO at 39 (Oct. 27, 2010)  
<sup>35</sup> Order on Reconsideration at 6  
<sup>36</sup> WAC 242-02-632(2)

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- 3. The Noise Study was conducted when most aircraft would have been employing Instrument Flight Rules which would put planes at a distance from the Property.
- 4. The Noise Study measured sound of a Lear 35 aircraft but its flight path in relationship to the Property was unknown.
- 5. The Noise Study lacked documentation of the amount of aircraft activity or the relationship of their flight paths to the Property.
- 6. No sound contours were included in the record.

In reaching its decision on compliance, the City again concluded the proposed residential use of the Property would be compatible with the continued operation of Sanderson Field based this time upon the analysis and findings of the BRC study. In reaching this conclusion the City adopted a different methodology in assessing airport compatibility, moving from a measure of "single event noise" as measured by Parametrix, to BRC's use of DNL (day-night level) as described below.

BRC used the FAA's Integrated Noise Model 7.0 (INM), a computer model employed by the FAA to generate sound level contour maps of DNL.<sup>37</sup> BRC's analysis primarily differed from that conducted by Parametrix in that the latter simply measured sound levels at one point in time,<sup>38</sup> while BRC's use of INM produced DNL noise contours at three projected aircraft activity levels for the years 2011, 2017 and 2027. The INM indicates that even under the "worst case scenario" (the heaviest projected aircraft activity in 2027) sound levels on the Property from Sanderson Field are all lower than 60 DNL. Furthermore, under the "worst case scenario" two thirds of the property is below 55 DNL.<sup>39</sup> The record also establishes the BRC analysis was based on conservative projected information, including:

- 1. It assumed all types of aircraft capable of performing tight turns flew directly over the Property. BRC states this is unlikely.<sup>40</sup>

<sup>37</sup> 4 and AR2341  
<sup>38</sup> Id.

<sup>39</sup> A 10 dB sound level increase corresponds to a perceived doubling of loudness. See AR 2343.

<sup>40</sup> AR 2342

- 1 2. It assumed all the departure and approach patterns would take place to the
- 2 South of Sanderson Field, where the Property is located, notwithstanding FAA
- 3 recommendations that departure/approach patterns could also occur North of the
- 4 runway.
- 5 3. The INM results do not depend on noise monitoring but rather on the assumed
- 6 information entered into the Model, which in this case was conservative.<sup>41</sup>
- 7 4. INM includes pre-programmed data, including the latitude, longitude, and
- 8 elevation of Sanderson Field, information on operational characteristics of most
- 9 commercial and general aviation aircraft and sound emissions of those aircraft.<sup>42</sup>
- 10 5. The database determines approach altitudes and engine thrust settings of
- 11 aircraft, leaving only the horizontal location of the aircraft to the individual
- 12 employing the model.<sup>43</sup> In that regard, BRC's analysis asserts it used a
- 13 conservative estimate of the horizontal plane location so as to place a higher
- 14 percentage of aircraft over the Property than would be expected.<sup>44</sup>
- 15 6. The INM produced DNL contours indicating the 65 DNL is contained within the
- 16 Port's property under all scenarios, all of the Property is outside the 60 DNL
- 17 contour and, again, in the worst-case scenario, two thirds of the Property is
- 18 beyond the 55 DNL contour.<sup>45</sup>

15 The Port argues the City and the BRC analysis focused on the FAA's 65 DNL standard,  
 16 which was never intended to be an industry standard controlling local land-use decisions.<sup>46</sup>  
 17 It references FAA regulations which state "[t]he designations contained in this table do not  
 18 constitute a Federal determination that any use of land covered by the program is  
 19 acceptable or unacceptable under Federal, State, or local law".<sup>47</sup>

21 WSDOT Aviation's Airports and Compatible Land Use Guidebook on the other hand  
 22 suggests that "DNL is based on a year-long average and therefore may not reflect seasonal  
 23 adjustments or increase aircraft operations or frequency during peak hour events".<sup>48</sup> The  
 24 Guidebook further notes that "[A]ircraft noise is mainly characterized by single events", that  
 25 "Single noise events, especially in areas where the background noise level is very low,  
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 29 <sup>41</sup> Id.  
 30 <sup>42</sup> 2358  
 31 <sup>43</sup> Id.  
 32 <sup>44</sup> 2359, 2360  
<sup>45</sup> 2362, 2372  
<sup>46</sup> Port of Shelton's Response on Statement of Compliance at 10.  
<sup>47</sup> Id.  
<sup>48</sup> Airports and Compatible Land Use Guidebook, at B-5.

1 contributing (sic) disproportionately to adverse responses<sup>49</sup> and that "The argument that  
2 single event noise is a substantial compatibility factor is supported by research regarding  
3 the spatial distribution of noise complaints at Naples Municipal Airport, Hanscom Field, and  
4 San Francisco International Airport. The research shows that most aircraft noise complaints  
5 are received from geographic areas outside traditional noise exposure contours."<sup>50</sup> This is  
6 not to say that the City and its consultants erred in using a DNL approach rather than  
7 focusing on single event noise. Instead, it highlights the different perspective on evaluating  
8 airport noise compatibility maintained by WSDOT, an agency with expertise in this area, and  
9 one of the several interests groups with whom the City was obligated to formally consult.<sup>51</sup>  
10 Had the City engaged in formal consultation with WSDOT Aviation and had the benefit of its  
11 perspective on the effect of single event noise on land use compatibility, it may well have  
12 reached a different conclusion. However, the City's failure to engage in the statutorily  
13 mandated formal consultation process following remand, and before it pursued a  
14 fundamentally different approach to assessing airport noise compatibility following the  
15 flawed Parametrix study prevents this Board from finding that it has achieved compliance  
16 with the GMA.  
17  
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19  
20 It is not in dispute that WSDOT commented during the consultation and public participation  
21 process prior to adoption of the original, non-compliant ordinance. WSDOT opined that the  
22 contemplated action would encourage an incompatible use.<sup>52</sup> By way of support for that  
23 assertion, it stated the "vast majority" of aircraft would be over the Property.<sup>53</sup> WSDOT  
24 urged the City to adopt a significantly lower residential density.<sup>54</sup> It also observed 65 DNL  
25 was the sound level at which "significant health impacts start to occur".<sup>55</sup> WSDOT again  
26 commented following issuance of the BRC analysis. WSDOT criticized the 65 DNL noise  
27  
28

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30 <sup>49</sup> Id. at B-8  
31 <sup>50</sup> Id. at B-9  
32 <sup>51</sup> RCW 36.70A.547  
<sup>52</sup> AR 112  
<sup>53</sup> Id.  
<sup>54</sup> Id.  
<sup>55</sup> Id. at 114  
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1 metric and the use of noise contours themselves, stating conflicts " . . . have more to do  
2 with fleet mix, event times and operational characteristics than projected noise contours".<sup>56</sup>

3  
4 However, it is clear the City did not notify the Port or WSDOT of the fact it was conducting a  
5 new sound analysis based upon a fundamentally different approach, one that did not focus  
6 on single event noise. Instead, the City provided but three weeks notification for review and  
7 comment following issuance of the BRC analysis.  
8

9 The City stated at the Compliance Hearing that it provided WSDOT notice of its proposed  
10 action and opportunity to comment. It argues that this was sufficient. It was not. RCW  
11 36.70.547 creates a requirement for formal consultation with airport owners and managers,  
12 private airport operators, general aviation pilots, ports and the aviation division of the  
13 department of transportation. This requirement, incorporated in the GMA via RCW  
14 36.70A.510, goes beyond GMA's public participation requirements. Further, while  
15 undefined by the GMA or the Planning Enabling Act, a dictionary definition of "consultation"  
16 clearly indicates that it means more than an 11<sup>th</sup> hour opportunity to comment.  
17  
18

19 "Consultation" means, among other things "to ask the advice or opinion of; to deliberate  
20 together".<sup>57</sup> The Board notes that WSDOT Aviation has a formal consultation process, laid  
21 out in Appendix A of its Airports and Compatible Land Use Guidebook. That process  
22 includes, among other things, a step in which the local government seeks technical  
23 assistance from the airport and WSDOT Aviation, followed by a request for a formal  
24 consultation, and a later "Formal Consultation Meeting" in which all parties identify issues  
25 and concerns regarding the proposal in an effort to reach a consensus and an attempt  
26 made to "avoid, minimize or resolve potential incompatible land uses adjacent to the airport  
27 consistent with applicable laws and local land use planning activity".<sup>58</sup> While use of the  
28 specific formal consultation process laid out in WSDOT Aviation's Guidebook is not  
29  
30

31  
32 <sup>56</sup> AR 2102

<sup>57</sup> Merriam Webster's Collegiate Dictionary , 10<sup>th</sup> Ed.

<sup>58</sup> Airports and Compatible Land use Guidebook, at A-6.

1 mandatory, it more closely resembles the "formal consultation" required by the statute than  
2 the City's "notice and comment" process.

3  
4 The City conceded at hearing that it did no more than engage in the notice and comment  
5 procedures provided for elsewhere in the GMA. Clearly, WSDOT did not believe it had been  
6 consulted with. In its April 18, 2011 comment letter to the City, John Shambaugh, Acting  
7 Director of Aviation, wrote: "We respectfully suggest the City of Shelton work with the Port of  
8 Shelton and WSDOT Aviation to engage in a formal consultation process as set forth in  
9 state laws as well as WSDOT's Airports and Compatible Land use Guidelines. We request  
10 that formal consultation take place before taking any actions regarding the subject  
11 rezone and comprehensive plan changes."<sup>59</sup> (emphasis added).

12  
13  
14 Also, on April 18, 2011, the Port's attorney wrote to the City Commission and requested that  
15 the City and the Port jointly request additional time for compliance from the Board in order to  
16 "allow the City to consult with the Port and the Aviation Division as required by RCW  
17 36.70.547."<sup>60</sup> The Port's attorney pointed out, in reference to RCW 36.70.547, that:

18 "The Port and the Aviation Division have testified that the City did not engage in  
19 this consultation. The Division has requested that the City postpone its action in  
20 order to conduct this consultation. The Division new Guidelines on implementing  
21 RCW 36.70.547 in January. (*sic*) The consultation that the City engaged in last  
22 year does not take into account this new Guidance. Consultation is particularly  
23 warranted because the New Guidance specifically states that the 65 DNL  
24 standard, relied on by the BRC Associates study, is not the applicable standard."

25 WSDOT's and the Port's request that the City comply with the mandate of RCW 36.70.547  
26 was not heeded. Instead, the City, on the advice of its City Attorney that prior consultation  
27 in 2009 and 2010 combined with present opportunities for notice and comment were  
28 sufficient,<sup>61</sup> took final action on the rezone ordinance one week later.

31  
32 <sup>59</sup> AR 2381

<sup>60</sup> AR 2383-2385

<sup>61</sup> Partial minutes of April 18, 2011 City Council meeting, Ex. J to May 23, 2011 Declaration of Eric Laschever.  
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1 The Board concludes the City has failed to meet its burden of demonstrating its action no  
2 longer substantially interferes with fulfillment of Goal 3, RCW 36.70A.020(3). The City's  
3 action on remand was based on a fundamentally different approach to determining the  
4 compatibility of the land to be rezoned with the nearby Sanderson Field Airport. In so doing  
5 it was obligated to comply with RCW 36.70.547, which it plainly failed to do.  
6

7 **III. ORDER**

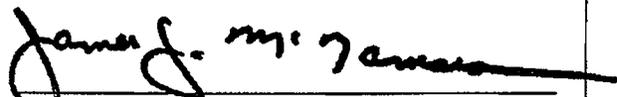
8 The Board finds the City of Shelton has failed to achieve compliance with the Goals and  
9 requirements of the GMA and continues to substantially interfere with the fulfillment of Goal  
10 3. This case is remanded to the City for compliance with the provisions of RCW 36.70A.510  
11 and RCW 36.70.547 and the following compliance schedule shall apply:  
12

13

Item	Date Due
Compliance Due on identified areas of noncompliance	January 13, 2012
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	January 27, 2012
Objections to a Finding of Compliance	February 10, 2012
Response to Objections	February 17, 2012
Compliance Hearing – Telephonic 360 407-3780 pin 182640#	February 23, 2012 @ 10:00 a.m.

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22 Dated this 13th day of July, 2011

  
James McNamara, Board Member

  
Nina Carter, Board Member

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27  
28 **DISSENTING OPINION**

29 I forcefully dissent from the majority's decision which bases its conclusions on a requirement  
30 for additional "consultation". The Board's determination of GMA violations of RCW  
31 36.70A.510, RCW 36.70A.200, and RCW 36.70A.070 (Preamble) and the further conclusion  
32

1 that the City's action was not guided by RCW 36.70A.020(3), all as set forth in the FDO,  
2 was based on a lack of credible information supporting a finding of compatibility of  
3 residential uses with the continuing operation of Sanderson Field.

4 The Board finds the City's determination that the land use redesignation would  
5 not result in allowance of an incompatible use is not supported by substantial  
6 evidence and therefore, results in a clearly erroneous action.<sup>62</sup>

7 . . . there is a lack of substantial evidence to support the City's conclusion  
8 regarding compatibility; the evidence is simply insufficient to convince a fair  
9 minded person of the "truth of the declared premise": that the residential uses  
10 allowed by the Ordinance would be compatible with continued operation of  
11 Sanderson Field.<sup>63</sup>

12 Furthermore, the decision to impose invalidity on the City's action was similarly based on  
13 that same absence of credible information-the flawed Parametrix Noise Study:

14 The Board concluded the City's adoption of Ordinance No. 1764-0310 violated  
15 RCW 36.70A.510, RCW 36.70A.200 and RCW 36.70A.070 (Preamble) as it was  
16 not supported by substantial evidence and therefore resulted in a clearly  
17 erroneous action. The continued viability of Sanderson Field may very well be  
18 threatened if up to 320 residences are ultimately authorized within Zone 6 based  
19 on a lack of substantial evidence to support a finding of compatibility. The Board  
20 concludes Ordinance No. 1764-0310 was not guided by GMA Goal 3 –  
Transportation, and will substantially interfere with fulfillment of that Goal.<sup>64</sup>

21 As the Board's decision was clearly based on a lack of information supporting a finding of  
22 compatibility, the question becomes whether or not the City now has that supporting  
23 information. That question can only be answered in the affirmative.

24  
25 The criticisms of the Parametrix Noise Study are set forth in the majority opinion.<sup>65</sup>

- 26 1. The Noise Study was a decibel- measuring "snapshot in time" analysis.  
27 2. The Noise Study was conducted over an eight day period during January and  
28 February when there was little aircraft activity.

31  
32 <sup>62</sup> FDO at 20, 21

<sup>63</sup> Id. at 22

<sup>64</sup> Id. at 39

<sup>65</sup> Compliance Order at pgs. 8, 9

- 1 3. The Noise Study was conducted when most aircraft would have been
- 2 employing Instrument Flight Rules which would put planes at a distance from the
- 3 Property.
- 4 4. The Noise Study measured sound of a Lear 35 aircraft but its flight path in
- 5 relationship to the Property was unknown.
- 6 5. The Noise Study lacked documentation of the amount of aircraft activity or the
- 7 relationship of their flight paths to the Property.
- 8 6. No sound contours were included in the record.

8 While the majority states the City did not necessarily err " . . . in using a DNL approach  
9 rather than focusing on single event noise", it implies the contrary. Additionally, the majority  
10 suggests the " . . . adopt[ion] of a different methodology in assessing airport compatibility  
11 moving from a measure of "single event noise" . . . to . . . use of DNL . . ." necessitated  
12 further "consultation".<sup>66</sup> However, the methodology employed by BRC addresses all of the  
13 Board's criticisms of the Parametrix noise study and many of WSDOT Aviation's earlier  
14 criticisms. In fact, use of single event noise was one of the significant criticisms of the  
15 Parametrix analysis.

17 Furthermore, it appears the Port's focus on 65 DNL is misplaced as is WSDOT Aviation's  
18 comment letter stating the 65 DNL standard should not be used. While it is true the City and  
19 BRC both assert 65 DNL is the level below which residential use is considered compatible, it  
20 is an undisputed fact from the record that the 65 DNL contour lies entirely within the Port's  
21 property boundaries. Intervenor's Property lies entirely beyond the 60 DNL contour and,  
22 under the BRC assumptions producing the worst-case (highest) aircraft activity level, two  
23 thirds of the property is below the 55 DNL contour. Those facts, combined with the  
24 understanding that an increase from 55 to 65 DNL is perceived as a doubling of loudness  
25 support the City's conclusion that the proposed residential use of the Property would be  
26 compatible with the continuing operation of Sanderson Field. In addition, while the Port  
27 criticizes the use of DNL,<sup>67</sup> neither it nor WSDOT Aviation offer an alternative for  
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29  
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31 <sup>66</sup> Id. at pg. 10

32 <sup>67</sup> Pg. 2 & pg 4 of Brief. WSDOT Aviation stated "experience at other airports in the state and around the nation shows that intrusive noise events, and noise complaints, are frequently generated outside of 55 DNL contours." (AR 2381) The criticism is based on single event noise. While DNL may be the same in two different

1 determining compatibility.<sup>68</sup> In fact, the Port argued DNL at both the Hearing on the Merits  
2 and on compliance, asserting on compliance that DNL as low as 50 should be the  
3 standard.<sup>69</sup> WSDOT Aviation does suggest jurisdictions should consider single event noise  
4 when assessing compatibility.<sup>70</sup> However, review of WSDOT Aviation's Airports and  
5 Compatible Land Use Guidebook does not disclose an appropriate, accepted method or tool  
6 for use in relating single event noise to compatibility. Inexplicably, the majority remands this  
7 matter to the City so that it might engage in further consultation with WSDOT Aviation  
8 regarding single event noise notwithstanding the fact there is no recognized industry  
9 methodology.<sup>71</sup> Rather, the record indicates the use of DNL remains the most appropriate  
10 standard available for predicting noise annoyance.<sup>72</sup>

11  
12  
13 Consideration of the Port's argument regarding a failure to consult with it and WSDOT  
14 Aviation should not be separated from the prior consultation process. The City's initial  
15 decision was to amend its Comprehensive Plan and FLUM to allow residential use of the  
16 Property at a density of two units per gross acre. The decision made on compliance was to  
17 amend the City zoning code to coincide with the prior decision; that is, allow residential use  
18 on the Property at two units per gross acre. The Comprehensive Plan/FLUM amendment  
19 was thus inextricably linked to the zoning change.  
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23

24 situations, one scenario may include significantly higher dB during "single events" although the DNL, being a  
25 day-night average, would produce the same DNL result.

26 <sup>68</sup> Correspondence in the record from the Port's Director observed " [DNL] remains the best single measure for  
27 assessing the effects of airport noise on communities . . ." AR 2019

28 <sup>69</sup> Contrary to the Port's assertion, the Board did not reject DNL as an industry-standard in its Final Decision  
29 and Order. It stated that in the context of this case, based on the record before it, that a 65 DNL level could not  
30 be considered to be *per se* compatible with the proposed residential density on the Property.

31 <sup>70</sup> WSDOT Aviation's Airports and Compatible Land Use Guidebook, Appendix B, pgs. B-8 to B-10.

32 <sup>71</sup> AR 588. California Airport Land Use Planning Handbook (pg. 7-34): "Perhaps the most salient point which  
can be made with regard to single-event noise level criteria for land use compatibility planning is that no  
definitive, widely recognized, single-event noise level guidelines currently exist."

<sup>72</sup> AR 2110: "DNL (YDNL) is the descriptor of choice for assessments of the long-term annoyance caused by  
individual noise source types." Schomer, Criteria for assessment of noise annoyance, Noise Control  
Engineering, July-August, 2005.

See also 65 CFR 43819 (July 14, 2000) of which the Board could take official notice pursuant to WAC 242-02-  
660(1). Federal Register materials were submitted by the parties.

COMPLIANCE ORDER

Case No. 10-2-0013

July 13, 2011

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Growth Management Hearings Board

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1 Extensive consultation occurred during the process leading to the City's adoption of the  
2 original Ordinance addressed in the FDO. As the Board found in the FDO:

3 It is clear in this matter that the City provided opportunity for public participation  
4 and the airport community, including Petitioner, availed themselves of these  
5 opportunities. Public meetings and hearings were held by the Planning  
6 Commission and City Commission on May 4, 2009, August 25, 2009, March 22,  
7 2010 and April 5, 2010.<sup>73</sup> *In addition, the City facilitated both an informal  
8 consultation and a formal consultation with the Petitioner, the WSDOT Aviation  
9 Division, and interested pilots. Written submissions were accepted throughout  
10 the adoption process.*<sup>74</sup>

11 *... on August 25, 2009, a formal consultation occurred attended by the three  
12 Port of Shelton Commissioners, the Port's Executive Director and planning  
13 manager, a representative from WSDOT Aviation, and approximately 11 local  
14 pilots.*<sup>75</sup>

15 WSDOT Aviation views were clearly and forcefully articulated to the City. As the Board  
16 observed in the FDO, "consultation" does not equate with "agreement".<sup>76</sup> Ultimately,  
17 decisions on compatibility are the responsibility of the local jurisdiction, as WSDOT Aviation  
18 concedes.<sup>77</sup> In addition, many of the suggestions it put forth were addressed by use of the  
19 INM, including taking into account fleet mix and operational characteristics. It does not  
20 appear additional "consultation" would have served any useful purpose, particularly in light  
21 of the fact there is no recognized methodology for relating single-event noise to residential  
22 compatibility.

23 It is true the City did not notify the Port or WSDOT Aviation of the fact it was conducting a  
24 new sound analysis. It is also true the City provided but three weeks notification for review  
25 and comment following issuance of the BRC analysis. However, it is unclear what additional  
26 benefit further consultation would have produced. Concerns of the Port, WSDOT Aviation  
27 and airport users were well articulated during the earlier process. The Port's statement that  
28  
29  
30

31 <sup>73</sup> Ordinance No.1764-0310, pg. 2.

32 <sup>74</sup> FDO at 32

<sup>75</sup> FDO at 33

<sup>76</sup> FDO at 31, 32

<sup>77</sup> WSDOT Airports and Compatible Land Use Guidebook, pg. 2-4

1 it would have advised the City during further consultation that the City not "waste time or  
2 resources rearguing the use of 65 DNL as an industry standard"<sup>78</sup> involves a point  
3 previously made and, as referenced above, the facts indicate DNL on the Property does not  
4 approach 65. The Port also states WSDOT Aviation would have been able to suggest the  
5 site specific analysis contemplated by its 2011 Guidebook.<sup>79</sup> While the Guidebook urges site  
6 specific analysis, that is what appears to have been applied in this instance, using  
7 conservative assumptions. INM is site specific as the data entered into the model accounts  
8 for the characteristics of Sanderson Field, the mix and projected number of aircraft using the  
9 field, flight paths and other factors specific to Sanderson Field.<sup>80</sup>

11  
12 Neither does the provision of only three week's notice for comment appear to have been  
13 detrimental to the Port. Significant review of the BRC report was undertaken and resulted in  
14 extensive written comment from Environ<sup>81</sup> (the Port's expert), as well as from the Port  
15 itself<sup>82</sup>, its attorney<sup>83</sup> and WSDOT Aviation<sup>84</sup>. I cannot agree with the majority's conclusion  
16 that further consultation under RCW 36.70A.510 and RCW 36.70.547 was required.  
17

18 Based on review of the BRC sound analysis including its April 18, 2011 response  
19 comments<sup>85</sup>, the City's argument, the Port's lack of criticism of the analysis methodology,  
20 including the conclusion of the Port's consultant that the BRC analysis "appears to have  
21 been conducted correctly"<sup>86</sup>, the undersigned can only conclude BRC produced scientifically  
22 defensible results. In reviewing the City's initial determination of compatibility of the  
23 proposed residential use with airport operations, the Board found the City lacked credible  
24 information to make such a determination. It was on that basis the Board found violations of  
25 RCW 36.70A.510, RCW 36.70 A.200, and RCW 36.70A.070 (Preamble). However,  
26  
27

28 <sup>78</sup> Port of Shelton's Response at 15

29 <sup>79</sup> Id.

30 <sup>80</sup> AR 2353

31 <sup>81</sup> AR 2069-2073

32 <sup>82</sup> AR 2074-2077

<sup>83</sup> AR 2105-2122

<sup>84</sup> AR 2101-2103

<sup>85</sup> AR 2033-2040

<sup>86</sup> AR 2069

1 following the BRC analysis, I conclude that underlying concern is no longer present.  
2 Furthermore, the fact the City based its initial decision on information produced by a flawed  
3 study was the basis upon which the Board made a determination of invalidity. That no  
4 longer being the case, I would conclude the City has met its burden of proof to establish its  
5 actions no longer substantially interfere with fulfillment of Goal 3-RCW 36.70A.020(3) and  
6 that the Port has failed to carry its burden to establish violations of RCW 36.70A.510, RCW  
7 36.70A.200, and RCW 36.70A.070 (Preamble).  
8

9  
10 

11 

---

William Roehl, Board Member

12  
13 Note: The parties are reminded that the Board is now a section of the Environmental and Land Use  
14 Hearings Office – ELUHO – with a new e-mail address [western@eluhho.wa.gov](mailto:western@eluhho.wa.gov). The Board's Rules  
15 of Practice and Procedure have been updated effective July 21, 2011, and are now found at Chapter  
16 242-03 WAC.

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

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

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

27 Enforcement. The petition for judicial review of this Order shall be filed with the  
28 appropriate court and served on the Board, the Office of the Attorney General, and all parties within  
29 thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may  
30 be accomplished in person or by mail, but service on the Board means actual receipt of the  
document at the Board office within thirty days after service of the final order. A petition for judicial  
review may not be served on the Board by fax or by electronic mail.

31  
32 Service. This Order was served on you the day it was deposited in the United States mail. RCW  
34.05.010(19).



## **APPENDIX C**



1 of 1 DOCUMENT

ANNOTATED REVISED CODE OF WASHINGTON  
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\*\*\* STATUTES CURRENT THROUGH 2011 REGULAR AND 1ST SPECIAL SESSION \*\*\*

TITLE 36. COUNTIES  
CHAPTER 36.70B. LOCAL PROJECT REVIEW

**GO TO REVISED CODE OF WASHINGTON ARCHIVE DIRECTORY**

*Rev. Code Wash. (ARCW) § 36.70B.030 (2011)*

§ 36.70B.030. Project review -- Required elements -- Limitations

(1) Fundamental land use planning choices made in adopted comprehensive plans and development regulations shall serve as the foundation for project review. The review of a proposed project's consistency with applicable development regulations, or in the absence of applicable regulations the adopted comprehensive plan, under *RCW 36.70B.040* shall incorporate the determinations under this section.

(2) During project review, a local government or any subsequent reviewing body shall determine whether the items listed in this subsection are defined in the development regulations applicable to the proposed project or, in the absence of applicable regulations the adopted comprehensive plan. At a minimum, such applicable regulations or plans shall be determinative of the:

(a) Type of land use permitted at the site, including uses that may be allowed under certain circumstances, such as planned unit developments and conditional and special uses, if the criteria for their approval have been satisfied;

(b) Density of residential development in urban growth areas; and

(c) Availability and adequacy of public facilities identified in the comprehensive plan, if the plan or development regulations provide for funding of these facilities as required by chapter 36.70A RCW.

(3) During project review, the local government or any subsequent reviewing body shall not reexamine alternatives to or hear appeals on the items identified in subsection (2) of this section, except for issues of code interpretation. As part of its project review process, a local government shall provide a procedure for obtaining a code interpretation as provided in *RCW 36.70B.110*.

(4) Pursuant to *RCW 43.21C.240*, a local government may determine that the requirements for environmental analysis and mitigation measures in development regulations and other applicable laws provide adequate mitigation for some or all of the project's specific adverse environmental impacts to which the requirements apply.

(5) Nothing in this section limits the authority of a permitting agency to approve, condition, or deny a project as provided in its development regulations adopted under chapter 36.70A RCW and in its policies adopted under *RCW 43.21C.060*. Project review shall be used to identify specific project design and conditions relating to the character of development, such as the details of site plans, curb cuts, drainage swales, transportation demand management, the payment of impact fees, or other measures to mitigate a proposal's probable adverse environmental impacts, if applicable.

(6) Subsections (1) through (4) of this section apply only to local governments planning under *RCW 36.70A.040*.

**HISTORY:** 1995 c 347 § 404.

**NOTES: INTENT -- FINDINGS --** 1995 C 347 §§ 404 AND 405: "In enacting *RCW 36.70B.030* and *36.70B.040*, the legislature intends to establish a mechanism for implementing the provisions of chapter 36.70A RCW regarding compliance, conformity, and consistency of proposed projects with adopted comprehensive plans and development regulations. In order to achieve this purpose the legislature finds that:

(1) Given the extensive investment that public agencies and a broad spectrum of the public are making and will continue to make in comprehensive plans and development regulations for their communities, it is essential that project review start from the fundamental land use planning choices made in these plans and regulations. If the applicable regulations or plans identify the type of land use, specify residential density in urban growth areas, and identify and provide for funding of public facilities needed to serve the proposed development and site, these decisions at a minimum provide the foundation for further project review unless there is a question of code interpretation. The project review process, including the environmental review process under chapter 43.21C RCW and the consideration of consistency, should start from this point and should not reanalyze these land use planning decisions in making a permit decision.

(2) Comprehensive plans and development regulations adopted by local governments under chapter 36.70A RCW and environmental laws and rules adopted by the state and federal government have addressed a wide range of environmental subjects and impacts. These provisions typically require environmental studies and contain specific standards to address various impacts associated with a proposed development, such as building size and location, drainage, transportation requirements, and protection of critical areas. When a permitting agency applies these existing requirements to a proposed project, some or all of a project's potential environmental impacts will be avoided or otherwise mitigated. Through the integrated project review process described in subsection (1) of this section, the local government will determine whether existing requirements, including the applicable regulations or plans, adequately analyze and address a project's environmental impacts. *RCW 43.21C.240* provides that project review should not require additional studies or mitigation under chapter 43.21C RCW where existing regulations have adequately addressed a proposed project's probable specific adverse environmental impacts.

(3) Given the hundreds of jurisdictions and agencies in the state and the numerous communities and applicants affected by development regulations and comprehensive plans adopted under chapter 36.70A RCW, it is essential to establish a uniform framework for considering the consistency of a proposed project with the applicable regulations or plan. Consistency should be determined in the project review process by considering four factors found in applicable regulations or plans: The type of land use allowed; the level of development allowed, such as units per acre or other measures of density; infrastructure, such as the adequacy of public facilities and services to serve the proposed project; and the character of the proposed development, such as compliance with specific development standards. This uniform approach corresponds to existing project review practices and will not place a burden on applicants or local government. The legislature intends that this approach should be largely a matter of checking compliance with existing requirements for most projects, which are simple or routine, while more complex projects may require more analysis. *RCW 43.21C.240* and *36.70B.030* establish this uniform framework and also direct state agencies to consult with local government and the public to develop a better format than the current environmental checklist to meet this objective.

(4) When an applicant applies for a project permit, consistency between the proposed project and applicable regulations or plan should be determined through a project review process that integrates land use and environmental impact analysis, so that governmental and public review of the proposed project as required by this chapter, by development regulations under chapter 36.70A RCW, and by the environmental process under chapter 43.21C RCW run concurrently and not separately.

(5) *RCW 36.70B.030* and *36.70B.040* address three related needs with respect to how the project review process should address consistency between a proposed project and the applicable regulations or plan:

(a) A uniform framework for the meaning of consistency;

(b) An emphasis on relying on existing requirements and adopted standards, with the use of supplemental authority as specified by chapter 43.21C RCW to the extent that existing requirements do not adequately address a project's specific probable adverse environmental impacts; and

(c) The identification of three basic land use planning choices made in applicable regulations or plans that, at a minimum, serve as a foundation for project review and that should not be reanalyzed during project permitting." [1995 c 347 § 403.]

## JUDICIAL DECISIONS

### ANALYSIS

Comprehensive plan

Preemption

### COMPREHENSIVE PLAN.

Property owner was entitled to a requested rezone because (1) a hearing examiner's findings that the rezone was consistent with a comprehensive plan and the policies were binding because a board of county commissioners did not disagree with them; (2) the owner established that the board failed to follow a prescribed process under *RCW 36.70C.130(1)(a)* because the board failed to provide a statement listing the facts it found showing the appealed decision did not comply with applicable approval criteria, under Clark County, Wash., Code 40.510.030(I)(3)(b)(3); and (3) the board's reliance on nonconforming use rights ignored *RCW 36.70B.030(2)*'s requirement that the board look to the comprehensive plan as determinative of the type of land use permitted at a site. *J.L. Storedahl & Sons, Inc. v. Clark County*, 143 Wn. App. 920, 180 P.3d 848 (2008).

### PREEMPTION.

When underlying zoning regulations explicitly prohibit a commercial PUD, but the comprehensive plan allows the development, the zoning regulations must govern the land use decision. *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 947 P.2d 1028 (1997).

## OPINIONS OF THE ATTORNEY GENERAL

### WETLAND MITIGATION BANK.

Growth Management Act provisions relating to the maintenance and enhancement of the agriculture industry and the protection of agricultural lands of long-term commercial significance do not directly apply to siting or permitting a wetland mitigation bank, but are reflected in the regulations that do apply. AGO 2008 No. 1; 2008 Op. Atty Gen. Wash. No. 1.

USER NOTE: For more generally applicable notes, see notes under the first section of this heading, part, article, chapter or title.

## **APPENDIX D**

**17.04.020 Purpose.**

In enacting this title, the city commission intends to establish a mechanism for implementing the provisions of RCW Chapter 36.70A regarding compliance, conformity and consistency of proposed projects with the comprehensive plan, related plans, and implementing development regulations. In order to achieve this purpose, the commission finds that:

A. Given the extensive investment of time and effort that both public agencies and local citizens are making, and will continue to make, in the plans and development regulations for their community, it is essential that project review start from the fundamental land use planning choices made therein. If the plans or implementing regulations identify type of land use, specific residential density, design standards and/or identify and provide for funding of public facilities needed to serve the proposed development and site, these decisions at a minimum provide the foundation for further project review unless there is a question of code interpretation. The project review process, including the environmental review process under RCW Chapter 43.21C and the consideration of consistency, should start from this point and not reanalyze these land use planning decisions in making a permit decision.

B. Comprehensive plans and development regulations adopted by the city under RCW Chapter 36.70A and environmental laws and rules adopted by state and federal government have addressed a wide range of environmental subjects and impacts. These provisions typically require environmental studies and contain specific standards to address various impacts associated with a proposed development, such as building size and location, drainage, transportation requirements and protection of critical areas. When a permitting agent applies these existing requirements to a development proposal, some or all of the projects potential environmental impacts will be avoided or mitigated. Through the integrated project review process described in this title, the city administrator or designee will determine whether these plans, regulations or rules adequately analyze and address a project's potential environmental impacts. Project review should not require additional studies or mitigation under RCW Chapter 43.21C where existing regulations have adequately addressed a project's probable specific adverse environmental impacts.

C. Consistency with existing plans, regulations and rules should be determined in the project review process by considering four factors found in applicable regulations and plans: the type of land use allowed; the level of development allowed, such as residential density; adequacy of infrastructure; and the character of the proposed development, including compliance with development standards, and specific design standards. This approach is consistent with current city practice and represents no additional burden on applicants or local government. The city intends that this approach should be largely a matter of checking compliance with existing requirements for most projects, while more complex projects may require more analysis.

D. A determination of consistency between the proposed project and existing applicable plans and regulations, should allow project review under development regulations and environmental regulations to run concurrently. (Ord. 1443-496 § 1 (part), 1996)

NO. 41851-7 II  
IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION II

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CITY OF SHELTON, a municipal corporation; HALL EQUITIES  
GROUP dba HALL EQUITIES GROUP, a California corporation; and  
SHELTON HILLS INVESTORS LLC,

*Appellants,*

v.

THE PORT OF SHELTON,

*Respondent.*

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PROOF OF SERVICE

---

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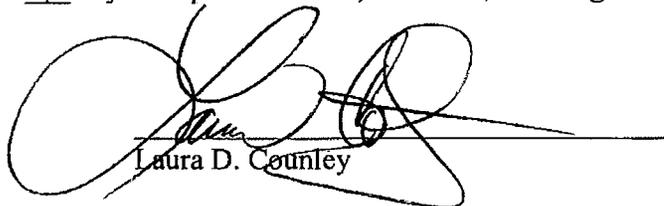


I, LAURA D. COUNLEY, under penalty of perjury under the laws of the State of Washington, declare as follows:

I am employed with McCullough Hill Leary, PS, attorneys for Hall Equities Group and Shelton Hills Investors, LLC. On the date indicated below, I caused an executed copy of the RESPONSE BRIEF OF THE CITY OF SHELTON, HALL EQUITIES GROUP AND SHELTON HILLS INVESTORS LLC and this PROOF OF SERVICE to be served electronic mail and via legal messenger on the following party:

ERIC S. LASCHEVER  
K&L Gates LLP  
925 Fourth Avenue, Suite 2900  
Seattle, WA 98104-1158  
Email: [eric.laschever@klgates.com](mailto:eric.laschever@klgates.com)

DATED this 14<sup>th</sup> day of September 2011, at Seattle, Washington.



Laura D. Counley