No. 330834

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

CITY OF AIRWAY HEIGHTS AND BRIGITTA ARCHER,

Respondents.

v.

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

Appellants,

RESPONDENT CITY OF AIRWAY HEIGHTS' RESPONSE BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

I. INTRODUCTION

A. A JOINT LAND USE STUDY DEVELOPS STRATEGIES TO ACHIEVE LAND USE COMPATIBILITY WITH A MILITARY INSTALLATION.

In 2009, Spokane County received financial support from the Office of Economic Adjustment, Department of Defense to conduct a joint land use study for Fairchild Air Force Base ("**JLUS Study**"). Section 1.9 "JLUS Implementation" states:

> Once completed, it is important to note that this JLUS is not an adopted plan. It is a strategy guide that will be used by local jurisdictions, Fairchild AFB, state and federal agencies, and other identified stakeholders in the study area to guide their future compatibility efforts.

AR 424. The JLUS Study was a voluntary engagement between Spokane County, City of Spokane, Fairchild Air Force Base, Spokane International Airport, and the City of Airway Heights (the "City"). It is a planning, not regulatory document. Section 3.1 "Methodology and Evaluation" discusses "potential future compatibility factors that could impact lands." AR 462.

> This section provides a general technical background on the factors discussed based on available information. The intent is to provide an adequate context for awareness, education, and development of JLUS recommendations. As such, it is not

> designed or intended to be utilized as an exhaustive technical evaluation of existing or future conditions within the study area. (Emphasis added).

AR 462. Throughout their briefing, Appellants use the JLUS Study as if it were a regulatory document.

The JLUS process is controlled by two Department of Defense instructions: (1) Instruction Number 3030.3 "Joint Land Use Study (JLUS) Program" ("**JLUS Instruction**"), and (2) Instruction Number 4165.57 "Air Installation Compatible Use Zones (AICUZ)" ("**AICUZ Instruction**"), (jointly referred to as "**DOD Instructions**"). AR 1092. The DOD policy for a JLUS is to "work toward achieving compatibility between military installations and neighboring civilian communities." AR 1093. The JLUS process shall be coordinated with the AICUZ Instruction. AR 1093.

In reliance upon the DOD Instructions, Airway Heights adopted Ordinance C-771 entitled "JLUS Protections for FAFB," which is in full force and not affected by this appeal. Ordinance C-771 adopts by reference the Spokane County JLUS regulations. AR 1142. However, if there is a conflict between Ordinance C-771 and the Spokane County JLUS regulations, Airway Heights Ordinance C-771 controls. AR 1142. Land use permitting within the City of Airway Heights under Ordinance

C-771 is further governed by the standards set forth in the AICUZ Instruction. AR 1168. That instruction "promotes long-term compatible land use on and in the vicinity of air installations by [adopting] compatible land use regulations." AR 1170.

Subsequent to the adoption of Ordinance C-771, and after public hearings and comment, Airway Heights adopted Ordinances C-797 and C-798 (the "**Challenged Ordinances**"), which incorporate the requirements of Ordinance C-771. AR 1351, AR 1493. The Challenged Ordinances potentially allow the development of multi-family housing on certain commercial properties in the City pursuant to a Conditional Use Permit ("**CUP**") process. AR 1359 (Appendix A). The CUP process incorporates the AICUZ land use compatibility matrix (AR 1178, AR 1151) and requires a site specific noise study, housing needs study, execution of property covenants regarding noise and an avigation easement to benefit Fairchild Air Force Base ("**FAFB**") and Spokane International Airport ("**SIA**").

This appeal relates to approximately 29 acres of commercially zoned land in the southeastern portion of Airway Heights ("**Subject Property**"). The Subject Property is not contiguous to FAFB or SIA. AR 1689 (Map 2).

Appellants Spokane County, City of Spokane and Spokane Airport Board sought review of the Challenged Ordinances to the Eastern Washington Growth Management Hearings Board ("**Board**"). Following the adverse decision by the Board, judicial review was sought in Spokane County Superior Court. The Petition for Review challenged the Board's Decision, Findings of Fact 3-9, and Conclusions of Law 1-7. Following oral argument, Judge Michael Price, Spokane County Superior Court, reversed the Board's Decision and affirmed the City's adoption of the Challenged Ordinances.

II. STATEMENT OF THE CASE

A. ASSIGNMENTS OF ERROR.

Pursuant to RAP 10.3(h), Airway Heights asserts the Board's Findings of Fact 3-9 and Conclusions of Law 1-7 are in error.

1. For the purpose of defining "incompatibility," the Board erroneously interpreted or applied the law by failing to apply and consider DOD Instructions and FAA standards which are the basis for Ordinance Nos. C-797 and C-798. To the extent the Board determined that parties can agree to a statutory definition, the Board erroneously interpreted or applied the law.

2. The Board failed to properly grant deference to Airway Heights and improperly substituted its judgment with regard to the City enacting the Challenged Ordinances.

3. With regard to reliance upon the "Deer Creek Apartments" Hearing Examiner and appellate decision, the Board erroneously interpreted or applied the law insofar as the collateral estoppel effect or relevance of Deer Creek Apartments.

4. The Board improperly concluded that Airway Heights "prepared its own noise contours," and thereby made a decision that is not supported by substantial evidence because Airway Heights relied upon noise contours prepared by FAFB.

5. Findings of Fact Nos. 3 through 6 are not supported by substantial evidence to the extent they find the Challenged Ordinances allow an increase in the number and density of residential units because residential development is subject to the CUP process.

6. Findings of Fact Nos. 7 and 9 are not supported by substantial evidence given that the CUP process requires compliance with site specific criteria including federal standards that define and measure "incompatible" development. The comments relied upon by the Board are conjecture and speculation.

7. Finding of Fact No. 8 is not supported by substantial evidence to the extent it finds that SIA will be limited in the construction and operation of a future parallel runway because it does not take into consideration the CUP process.

8. Conclusion of Law No. 1 is not supported by substantial evidence and is an erroneous application of the law because through the CUP process incompatible development will not occur in the vicinity of FAFB.

9. Conclusion of Law No. 3 is not supported by substantial evidence and is an erroneous application of the law because the CUP process discourages the siting of incompatible uses adjacent to Spokane International Airport.

10. Conclusions of Law Nos. 4-6 are not supported by substantial evidence and are an erroneous application of the law for the reasons set forth in Subsections (8) and (9), above.

11. Conclusion of Law No. 7 is not supported by substantial evidence and is an erroneous application of the law given of the entire record and the goals and requirements of the GMA.

12 Further, the determination of invalidity is not supported by substantial evidence and is an erroneous interpretation and application of

the law to include the Board adopting Findings of Fact that fail to recognize the CUP process including the related federal standards.

B. HISTORY OF THE JLUS STUDY ON THE WEST PLAINS.

For years, the Airway Heights Development Code has contained land use regulations to protect FAFB and SIA from encroachment.[1]

On March 15, 2012, Spokane County held a public hearing on its "New Fairchild Air Force Base Overlay Zone" regulations that were intended to implement the JLUS Study within unincorporated Spokane County. AR 1105. The key development at that point in time is that the JLUS Coordinating Committee, a body whose majority consisted of Spokane County, City of Spokane, and the Spokane Airport Board, made a recommendation to adopt development regulations that were not consistent with the final JLUS Study by combining Military Influence Areas ("**MIA**") 3 and 4.[2] AR 1109. As part of the public process, on March 22, 2012, Airway Heights provided comments on Spokane

[1] The Airway Heights Air Installation Compatibility Use Zone ("AICUZ") overlay zone was first enacted in 2008 and was based upon studies performed by Fairchild Air Force Base. Ordinance C-771 kept the AICUZ sound contours and incorporated the DOD Instruction (consistent with the FAFB AICUZ and FAA Regulations for SIA). (AR 1055 (Map 4) and AR 1170).

[2] After the conclusion of the JLUS Study, the parties were charged with enacting development regulations that would have regulatory effect within their jurisdictions. The Coordinating Committee modified the Military Influence Areas (MIAs) in a manner primarily affecting Airway Heights. AR 1113 and AR 1652.

County's proposed JLUS regulations.[3] AR 1112. In summary, Airway Heights disagreed with the proposed land use restrictions associated with the modeled 65 LdN noise contours because the regulations were excessively restrictive and disregarded the MIA strategy set forth in the JLUS Study. AR 1117. When the Coordinating Committee combined MIA 3 and 4, the effect was to suggest land use restrictions from a modeled 70 LdN noise area (MIA 4) be imposed on an area where the noise could range from 65-69 LdN (MIA 3). AR 592-593. There was no scientific reason for the combination of these two areas; a political judgment was substituted for actual noise studies.

Airway Heights promptly objected and disagreed with the unilateral modification of the JLUS.

> The City has repeatedly commented that it disagrees with the land-use restrictions associated with sound contours including the 65 LdN contours. The Department of Defense (DOD) AICUZ and JLUS report state that prohibitive land-use restrictions should not occur until the 70 LdN or indirect flight paths....Airway Heights would agree that allowing residential development beyond the 69 LdN sound contours should not be permitted....

AR 1113-114.

[3] While reference is to the Spokane County JLUS regulations, the City of Spokane adopted similar JLUS regulations.

The Coordinating Committee modified the MIAs in a manner that was "not supported by either the DOD, AICUZ or JLUS reports." AR 1113. Airway Heights went on to point out that the Spokane County/City of Spokane JLUS regulations should "mirror those requirements provided under the [FAFB]'s adopted AICUZ." Especially given the fact that the "KC-46 A's sound profile is even narrower than the current [mission] profile." AR 1114.

Given that Airway Heights was not willing to "carte blanche" adopt the proposed Spokane County/ City of Spokane JLUS regulations, the City, City of Spokane, and Spokane County entered into a "Memorandum of Understanding regarding Implementation of the Joint Land Use Study for Fairchild Air Force Base (JLUS)" on July 24, 2012. AR 1120. The purpose of the Memorandum was to "cooperate in good faith and attempt to reach an agreement . . . providing for . . . implementation of the 2009 [JLUS]." Following five months of meetings and negotiations, and upon the agreement of the parties, on December 17, 2012, Airway Heights adopted Ordinance C-771. AR 1140.

Significantly, and ignored by the Board in its Decision, is a resolution approved by the Spokane County Board of County Commissioners and the JLUS Coordinating Committee. The resolution passed and adopted on December 11, 2012, provided

> **NOW, THEREFORE, BE IT RESOLVED** by the Board of County Commissioners of Spokane County, Washington, pursuant to the provisions of RCW 36.32.120(6), RCW 36.70A.530, and RCW 36.70.547, that the Board does hereby acknowledge the cooperative efforts of the City of Spokane, the City of Airway Heights, Spokane Airports, FAFB and Spokane County which resulted in the preparation of Ordinance C-771 for the consideration by the City of Airway Heights which Ordinance will reduce the potential for military aviation hazards, prevent incompatible encroachments, optimize the potential mission profile, and protect the health and safety of persons within the military influence area identified therein. (Emphasis added)

AR 1162. The JLUS Coordinating Committee findings and recommendation state "be it further resolved that the Committee finds that the regulations listed in Airway Heights Ordinance C-771 will best protect the long term military mission of Fairchild Air Force Base from incompatible land uses." AR 1162.

An important and central document in the enactment of Ordinance C-771 and the Challenged Ordinances is Department of Defense Instruction, No. 4165.57 entitled "Air Installations Compatible Use Zones (AICUZ)" (AICUZ Instruction). AR 1170. This federal standard "establishes policy...on issues related to noise, safety, and compatible land use in and around air installations." AR 1168. When local

jurisdictions conduct a JLUS study, the Department of Defense requires coordination with the AICUZ Instruction. AR 1092.

Airway Heights' JLUS Ordinance C-771 mirrors the Land Use Compatibility Standards set forth in the AICUZ Instruction, Appendix 2 entitled "Recommended Land Use Compatibility in APZs" and Appendix 3 entitled "Recommended Land Use Compatibility in Noise Zones," except in some areas, it is more restrictive. AR 1191. Ordinance C-771 was reviewed and approved by the Appellants without any challenge.

C. BACKGROUND ON THE CHALLENGED ORDINANCES.

To address the multi-family housing deficiency[4] existing in Airway Heights, on March 12, 2012, the Planning Commission began considering a conditional use permit process to allow for residential development in certain commercial zones. The minutes reflect the following presentation from the City Planner:

> Though the City desires to maximize the housing alternatives for its current and future residents, any proposed multi-family developments in commercial areas will need to be highly regulated and reviewed, and done so in such a way as to ensure there is no conflict with FAFB operations.

AR 1219.

[4] The Subject Property was annexed into Airway Heights on January 1, 2012. Prior to annexation, Spokane County allowed residential developments to occur in areas which were zoned "light industrial."

The Commission asked whether projects would be reviewed by FAFB:

> Mr. Braaten [City Planner] replied that any projects within the 65 LdN-69 LdN contours would be required to be reviewed by FAFB, and as a general policy, the City provides FAFB notice and an opportunity to comment on any of these types of projects.

Id. Commissioner Brown asked about certain specific properties (including the Subject Property) and whether staff had considered their potential impact to SIA. *Id.* The following was explained:

> Those properties lie within [sic] [outside] the 65 LdN - 69-LdN sound contours, even based on the proposed alignment of the new [SIA] future runway.

Id. Finally, there was discussion concerning the sound contours with the statement by the City Planner that "the adopted sound contours are already significantly beyond the sound impact footprint concurrent with base activities, as well as the likely future mission profiles." AR 1237; Map 5 and AR 1222. The Planning Commission also received a memo which identified the sound contour documents, the AICUZ land use compatibility chart, and the 1995 AICUZ regarding how encroachment is defined by the Department of Defense. AR 1053 and AR 1160.

For the April 9, 2012, Planning Commission meeting, the Community Development Department Staff Report noted that the state-

wide occupancy average for multi-family housing is about 90%; however, in Airway Heights it averages between 97% and 99%. AR 1241. The Planning Commission Minutes of October 29, 2012, reflect a discussion regarding the "FAFB Protection & Community Empowerment Project" which is designed to relocate approximately 350 residential units that lie within the direct flight path of FAFB operations and Accident Potential Zone ("APZ") 2.[5] To support this project, a "needs assessment" indicated that nearly 80% of the existing housing in the APZ was substandard. Significantly, this study serves as support for a need to expand and add multi-family development within the City. *Id.*

D. ADOPTION OF THE CHALLENGED ORDINANCES.

The enactment of the Challenged Ordinances took nearly eighteen months with the third and final reading occurring on August 5, 2013. AR 1350 and 1492. The Staff Report states:

> Staff is recommending [these ordinances] because the City has a deficiency in alternative housing options, especially multi-family residential.

AR 1369. The City Council record contains the Community Development Staff Report, with the Planning Commission

[5] The Subject Property is not within an APZ.

recommendation and attachments that include comments received from FAFB, SIA, the City of Spokane, Spokane County and interested parties.

1. The Challenged Regulations Provide Protections for FAFB and SIA by Requiring Extensive Analysis at the time of a Project Application.

The Challenged Ordinances contain considerable protections for FAFB and SIA. First, Ordinance C-797 requires: (a) a conditional use permit for multi-family residential (AR 1355) and (b) sound mitigation based upon a site specific sound study (AR 1356). Next, Ordinance C-798 states the City JLUS Ordinance (C-771) takes precedence over and requires, that any such project may not be located within 100 feet of the 70 LdN sound contour. AR 1499. Finally, Ordinance C-771 which "potentially" allows a multi-family development in the 65-69 LdN area requires:

> (1) an evaluation to demonstrate a community need for residential use would not be met if the development were prohibited and there are no viable alternative locations;
>
> (2) a noise study demonstrating that 69 LdN is not exceeded over a prescribed period of time;
>
> (3) outdoor noise abatement of at least 25 dB with additional consideration for peak noise or vibrations;

(4) density not to exceed between 10 to 20 units per acre;

(5) residential units to be located on the section of property furthest from the operational flight path or runway center line alignment;

(6) the owner to sign an aviation easement and a real estate notice with a nuisance covenant waiving liability and damages resulting from noise; and

(7) a number of development conditions to include comment and recommendations from FAFB that uphold the purpose and intent of Ordinance C-771 and protect FAFB.

AR 1154, 1155 and 1158.

In response to the comments, the Development Services Director delivered a July 24, 2013 memo to the City Manager, City Council and file. He wrote

> Under MIA 3, as defined by DOD, within the 65 LdN contour, residential development should be discouraged. However, if a community has a need for residential uses in the area, such uses can generally be made compatible using appropriate sound mitigation, height limitations, and design.

AR 1653, AR 1195 (AICUZ Instruction, Appendix 3), and AR 1151.

> According to DOD recommendations, these properties would be located in MIA 3.... However, during the local JLUS process, the

> draft [Spokane County] regulations developed recommended consolidating MIAs in 3&4. This extended the land use restrictions recommended under DOD standards for MIA 4 out to the 65 LdN line. Due to how the proposed regulations would negatively affect Airway Heights' development, we did not agree to this recommendation. Instead, we implemented MIAs more closely based on the 1995 FAFB AICUZ sound contours, with the allowed land-use being very close to, but somewhat more restrictive, than DOD recommendations.

AR 1654. In summary, the Development Services Director points out that actual sound testing will be the basis to support the mix of uses, which may include multi-family development under a Conditional Use Permit. *See* Appendix I (which summarizes case law addressing the purpose and use of AICUZ modeling, including its practical limitations).

With regard to the Spokane International Airport Master Plan and the modeling for the proposed third runway, it was apparent that Ordinance C-771 did not conflict with FAA Regulations regarding Airport Noise Compatibility Planning. AR 1659 (the FAA Regulations at 14 CFR Part 150 and Appendix A essentially mirror the AICUZ Instruction). It is noted the Subject Properties are not within the clear zone or the APZ and would only be potentially subject to noise, if the

modeling reflects what is actually happening at the properties.[6] AR 1695 and AR 1697 (Maps 5 and 6).

III. ARGUMENT

A. STANDARD OF REVIEW.

RCW 34.05.570 contains the standard for judicial review. "[A] Court shall grant relief from and agency's adjudicative order if it fails to meet any of the nine standards delineated in RCW 34.05.570(3)." *Lewis County v. Western Washington Growth Management Hearings Board*, 157 Wn.2d 488, 498 (2006).

On appeal the Court applies the "standards of RCW Chapter 34.05 directly to the record before the agency." *Lewis County*, 157 Wn.2d at 497. "Thus, like the Board, [the Court] defer[s] to the [City's] planning action unless the action is clearly erroneous."[7] *Stewardship Foundation v. Western Washington Growth Management Hearings Board*, 166 Wn. App. 172, 187 (2012). The following standards are applied:

(a) Errors of law under RCW 34.05.570(3)(b) and (d) are reviewed *de novo*. *Kittitas County v. Eastern Washington*

[6] The Appellants have not submitted any modeling or actual information from FAFB or SIA that contradicts the standards which have been relied upon by Airway Heights with regard to the Challenged Ordinances.

[7] In *Quadrant v. the State Growth Management Hearings Board*, 154 Wn.2d 224, 110 P. 1132 (2005), the Court wrote: "We now hold that deference to [City] planning actions that are consistent with the goals and requirements of the GMA, supersedes deference granted by the APA and courts to administrative bodies in general." . . . Thus, a Board's ruling that fails to apply this "more deferential standard of review" to a [City's] action is not entitled to deference from [the] court. *Id.* at 238.

Growth Management Hearings Board, 172 Wn.2d 144, 155, 256 P.3d 1193 (2011).

(b) "An 'action' is clearly erroneous if the [Court] has a firm and definite conviction that the [City] made a mistake." *Id.* at 187.

(c) Under RCW 34.05.570(3)(e) the Board's findings are evaluated through the substantial evidence test which means "a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order." *City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).

(d) An order is "arbitrary or capricious," where there is "willful and unreasoned action, taken without regard to or consideration of the facts and circumstances surrounding the action." *Id.* at 47.

B. THE GROWTH MANAGEMENT ACT ("GMA") PROTECTS MILITARY INSTALLATIONS FROM INCOMPATIBLE DEVELOPMENT AND DISCOURAGES THE SITING OF INCOMPATIBLE USES ADJACENT TO GENERAL AVIATION AIRPORTS.

The Appellants and Board erroneously frame this case as a question of whether the Challenged Ordinances comply with the JLUS Study. There is no authority for this proposition as the Growth

Management Act ("GMA") only requires local regulations to comply with the GMA. Two statutes are at the center of this appeal. RCW 36.70A.530, related to military installations, states the following:

> A comprehensive plan...or a development regulation...shall not allow development in a vicinity of a military installation that is incompatible with the installation's ability to carry out its mission requirements.

RCW 36.70A.530(3). With respect to general aviation airports, the following applies:

> 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 publically 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.

RCW 36.70.547.

1. The Word "Incompatible" Should be Defined Through Adopted Standards.

The Board, in its Decision, found that the Challenged Ordinances (C-797 and C-798) "allow development in the vicinity of a military installation that is *incompatible with the installation's ability to carry out its mission requirements.*" *See* Decision, p. 18, ln. 2 (AR 1760). With regard to Spokane International Airport, the Board concluded Ordinances

C-797 and C-798 "allow the siting of incompatible development adjacent to a general aviation airport." *See* Decision, p. 22, ln. 28 (AR 1764).

With both findings, the Board failed to properly define the word "incompatible." Instead, the Board took the position, erroneously, that the City of Airway Heights, Spokane County, and the City of Spokane entered into an interlocal agreement where they agreed upon the definition of "incompatible development." Notably, the interlocal agreement was signed when only the *draft* JLUS Study existed and had not yet been modified in 2012 (by the JLUS Coordinating Committee) with the Spokane County and City of Spokane regulations adopted over the objection of the City of Airway Heights.

2. The Parties Did Not and Cannot "Agree" on a Statutory Definition.

First, the Board's reliance upon a stated definition in an interlocal agreement with regard to the draft JLUS Study is misplaced because of the superseding Memorandum of Understanding.[8] Second, the Board has

[8] The Board failed to recognize that subsequent to the interlocal agreement, the parties entered into a "Memorandum of Understanding Regarding Implementation of the Joint Land Use Study for Fairchild Air Force Base (JLUS)" dated August 2, 2012, which specifically recognized that the purpose of the Memorandum of Understanding was to attempt to reach agreement upon the terms and conditions providing for Airway Heights' implementation of the JLUS Study. Section "D" identified the actions to be taken, which were "consideration by Airway Heights City Council of the Joint Land Use Steering Committee recommendations, as those recommendations might be modified by the JLUS Coordinating Committee." AR 1122. Significantly, this MOU recognized the ability of the City to adopt its own regulations with respect to the specific circumstances within the City.

no jurisdiction to enforce an interlocal agreement or the MOU. *See* RCW 36.70A.280; *Anderson v. Board of County Commissioners*, 135 Wn.App. 541, 144 P.3d 1219 (2006). In sum, the Interlocal Agreement is an inappropriate measure to determine incompatibility under the Challenged Ordinances.

3. The Court Interprets the Meaning of a Statute.

The parties agree that the word "incompatible" is the measuring stick for the Challenged Ordinances. The City believes that the standards adopted by the Department of Defense and the Federal Aviation Administration ("FAA") must guide review of the Challenged Ordinances.

Appellants assert its "claims" of incompatibility, which are not based on recognized standards or any analysis, are sufficient to invalidate the Challenged Ordinances. This means that science, physical measurements, or any other objective evaluation is irrelevant. Thus, allegations control empirical standards. This position is not supported by case interpretations cited by Appellants. *See Pruitt v. Town of Eatonville*, CPSGHB Case No. 06-3-0016, FDO (December 18, 2006), *infra*, page 36.

The standard of review with regard to a question of statutory interpretation is the error of law standard, RCW 34.05.570(3)(d). *See*

Stewardship Foundation v. Western Washington Growth Management Hearings Board, 166 Wn. App. 172, 189, _____ P.3d _____ (2012).

> We accord a hearing board's interpretation of the GMA 'substantial weight.' But the interpretation does not bind us.

Spokane County v. Eastern Washington Growth Management Hearings Board, 176 Wash. App. 673, 678, 309 P.3d 673 (2013). Where the legislature has not specifically defined a term (such as "incompatible") a court will apply its common meaning which may be determined by reference to a dictionary:

> In addition to dictionary definitions, we also give careful consideration to the subject matter involved, the context in which the words are used, and the purpose of the statute.

Quadrant Corp. v. State Growth Management Hearings Board, 154 Wn.2d 224, 239, 110 P.3d 1132 (2005). With regard to terms used in statutes that are technical, "technical language should be given its technical meaning when used in its technical field." *City of Spokane v. Washington State Department of Revenue*, 145 Wn.2d 445, 452, 38 P.3d 1010 (2002). Finally,

> it should be noted that from the beginning the GMA was "riddled with politically necessary omissions, internal inconsistencies, and vague language." ... The GMA was spawned by controversy, not

> consensus. And, as a result, it is not to be liberally construed.

Thurston County v. Western Washington Growth Management Hearings Board, 164 Wn.2d 329, 342, 190 P.3d 38 (2008).

As shown above, the Board, by adopting a definition of "incompatible development" from a superseded interlocal agreement and writing that such term means "permitted land uses that are inconsistent with the Fairchild Air Force Base Joint Land Use Study ("JLUS")," is not applying an accepted method of statutory construction nor does it adhere to the language used by the legislature in RCW 36.70A.530(3) and RCW 36.70.547. *See* Decision, p. 15, ln. 26 (AR 1757). Ultimately, it is up to the Court to determine "the purpose and meaning of statutes." *See City of Redmond v. Central Puget Sound Growth Management Hearings Board*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998).

Nowhere in either statute (RCW 36.70A.530 and RCW 36.70.547) is the term "incompatible" defined. For the JLUS Study, it is reasonable to rely upon the recognized federal standards to provide subject matter meaning and context. The Department of Defense, through the JLUS Instruction establishes responsibilities, procedures and definitions to include "coordinat[ing] JLUS activity with the Services Air Installations Compatible Use Zones (AICUZ) Program in accordance with AICUZ Instruction. AR 1093 and AR 1098.

Stewardship Foundation observed that the legislature did not define the term "best available science," and thus the Court explained that the Growth Management Hearings Boards had "formulated considerations for determining whether best available science was included." 166 Wn. App. at 191. Which meant the Boards:

> [a]t least required local governments to produce valid scientific information and consider competing scientific information and other factors through analysis constituting a reasoned process.

Id.

Quite simply, the Supreme Court determined that the presented information did not employ scientific methods. *Id.* at 191, fn. 16. The information was "more similar to speculation or surmise." *Id.* Thus, the Supreme Court found with regard to "best available science" the information did not constitute a "reasoned process in the context of a critical area regulation." *Id.*

4. The Term "Incompatible" is Defined by DOD and FAA Standards.

The JLUS Instruction "implements policies, assigns responsibilities and prescribes procedures for executing the Joint Land Use Study (JLUS) Program as administered by the Department of

Defense...." AR 1092. When evaluating incompatible development reference is to the AICUZ Instruction. AR 1093.

The Board spent considerable time discussing and incorporating into its decision information found in the JLUS Study. Yet, there simply was no reasoned analysis to determine the meaning of incompatible in the context of the Challenged Ordinances. Nowhere did the Board employ the DOD Instructions. Given the context, if the Board is going to rely upon the JLUS Study (for any purpose) then it should accept the DOD Instructions. Thus, the Board's interpretation of the statute was an erroneous application of the law to the Challenged Ordinances. RCW 34.05.570(3)(d).

C. NOISE MODELING RELIED UPON BY FAFB SUPPORTS THE CHALLENGED ORDINANCES.

The current and historical Fairchild AFB modeled noise contours were used in the JLUS Study (AR 518) and adopted by Airway Heights in the Challenged Ordinances. AR 1359 and AR 1509. The Fairchild AFB AICUZ Study contains the following quote.

> The Department of Defense's Air Installations Compatible Use Zones (AICUZ) Program is intended to promote compatible land uses in non-government areas surrounding military air fields. This AICUZ study for Fairchild Air Force Base (FAFB), in Spokane County, Washington, is designed to aid in the development of local

> planning mechanisms that will protect the public safety and health, and preserve the operational and mission capabilities of Fairchild AFB.

AR 1055. (Emphasis added). The Fairchild AFB AICUZ study continues:

> Each AICUZ study contains general land use guidelines related to safety and noise associated with aircraft operations. **Table 3-1** lists the USAF - recommended land use compatibility guidelines in relation to noise zones and APZs. (Emphasis added).

AR 1066. Table 3-1 of the Fairchild AFB AICUZ at "SLUCM No. 11.31"[9] for a modeled noise zone of 65-69 dBA finds multi-family "[l]and use and related structures generally compatible" with noise level reduction and additional evaluation. AR 1067, AR 1070. Note 11 to Table 3-1 provides that "although local conditions might require residential use, it is discouraged in DNL of 65-69 dBA noise zones." AR 1071. However, prior to permitting the use, local conditions should demonstrate the absence of viable alternative development options, with an evaluation conducted to demonstrate community need, and, depending upon the study, development and building measures will be imposed to achieve "outdoor to indoor NLR for the DNL of 65-69 dBA noise zones to include building location, site planning, and design." AR 1071.

[9] SLUCM refers to the Federal Highway Administration's standard land use coding manual, which describes land uses.

The DOD Instructions contain compatibility guidelines for aircraft noise zones in Appendix 3. AR 1191. For JLUS and AICUZ, the land use compatibility guidelines for 65-69 DNL are identical. AR 1191. Importantly, and apparently misunderstood by the Board, are the "table notes" related to apartment or multi-family use which allow for permitting determinations by the local jurisdiction (Airway Heights) according to actual studies and sound measurements. AR 1195. City Ordinance C-771, which is incorporated into the Challenged Ordinances, specifically adopts the standards contained in the AICUZ Instruction. AR 1151. In essence, the City incorporated the federal standards that recognize development occurring in areas with between 65 and 69 dBA is not automatically incompatible.

For general aviation airports, the FAA regulations state "compatible land use" means:

> The use of land that is identified under this part as normally compatible with the outdoor noise environment (or an adequately attenuated noise level reduction for any indoor activities involved) at the location because of the yearly day-night average sound level is at or below that identified for that or similar use under Appendix (Table 1) of this part.

AR 1661. Table 1, entitled "Land Use Compatibility" identifies types of residential land use. AR 1672. For the 65-70 LdN sound level, Table 1

shows "N(1)."[10] AR 1673. Note "1" provides where the community determines that residential uses must be allowed measures to achieve noise level reduction should be incorporated. AR 1673. Again, this is similar to the AICUZ Instructions.

D. CONTRACTUALLY AGREEING TO DEFINE A STATUTE IS NOT A RECOGNIZED CANNON OF CONSTRUCTION.

By taking the position that parties can agree to a statutory definition, the Board has rendered both RCW 36.70.530 and RCW 36.70.547 void for vagueness because the Board's construction renders a statute susceptible to various interpretations depending upon agreement between parties. By failing to interpret the word "incompatible" in the context of the above statutes and the DOD Instruction, the Board has not only misapplied the statutes, but has also potentially rendered them void for vagueness, at least insofar as Archer and other property owners are concerned. Where people must guess at the meaning of a statue and differ as to its application, there is a violation of due process. *See Anderson v. City of Issaquah*, 70 Wash.App. 64, 851 P.2d 744 (1993). Moreover, the Board has no jurisdiction to determine whether the Challenged Ordinances complied with the Memorandum of

[10] Where the letter "Y" is displayed in the table, this means that "land use and related structures [are] compatible without restrictions." AR 1673. Where the letter "$N^{(x)}$" is displayed, it is recognized that land use and related structures can be made compatible subject to the notes in parenthesis. *Id.*

Understanding as their sole jurisdiction lies with reviewing ordinances for compliance with the GMA. RCW 36.70A.280(1)(a).

E. THE JLUS STUDY HAD NO REGULATORY EFFECT WITHIN ANY OF THE PARTICIPATING JURISDICTIONS AND THE CHALLENGED ORDINANCES WERE NOT REQUIRED TO COMPLY WITH ITS RECOMMENDATIONS.

The Decision treats the JLUS Study as though it had regulatory effect within Airway Heights. It does not. The Board wrote:

> Here a Joint Land Use Study was undertaken to determine the parameters for land use in the vicinity of Fairchild. In zones designated MIA 4, increasing the number and density of residential uses was determined to be incompatible with Fairchild's mission and should not be approved. The subject properties lies within MIA 4.

Decision, p. 17, ln. 17. Not only does the above misrepresent the purpose of the JLUS Study (*see supra*, p. 1), make a finding contrary to the 2012 joint resolution of Spokane County, the City of Spokane and SIA, but it is an erroneous determination by the Board that the City could take no future legislative action that was not fully consistent with the JLUS Study (as amended). The Development Services Director wrote:

> The easiest way to describe the differences between the regulations is that under the County JLUS MIA ¾ is a bubble that incorporates land-use restrictions based on a property location within the bubble. If it is within the bubble, then the restrictions

> apply. In our version, we define what land-uses are allowed based upon planning sound contours. (Emphasis added).

AR 1129.

The City, both through the MOU and state law, has independent legislative discretion to adopt its own JLUS regulations (Ordinance C-771) and thus provide for the protection of the military and civilian installations. Airway Heights, operating pursuant to RCW Title 35A, has sole authority to enact its own laws to protect the public health and safety. Wash. Const., Article XI, § 11. See also *State of Washington v. City of Seattle*, 94 Wn.2d 162, 615 P.2d 461 (1980) ("municipal police [land use] power is as extensive as that of legislature, so long that subject matter is local and regulation does not conflict with general laws."). The City's obligation is to ensure that its development regulations are compliant with its Comprehensive Plan and the GMA. RCW 36.70A.130. The Board has no jurisdiction to hear a challenge other than one alleging compliance between a [City] development regulation and the GMA. RCW 36.70A.280.

In addition, by using the superseded definition in the interlocal agreement to trump the standards set forth in Ordinance C-711 and the Challenged Ordinances, the Board wrongly took the position that an interlocal agreement could be used to contract away the future legislative

authority of Airway Heights. Washington law recognizes that a legislature cannot bind a future legislature. *Wash. State Hosp. Ass'n v. State,* 175 Wn. App. 642, 648, 309 P.3d 534 (2013). "To hold otherwise would burden legislative bodies with a duty to legislate consistently with the promises of previous office holders." *Fabre, et. al. v. Town of Ruston*, 180 Wn.App. 150, 160, 321 P.3d 1208 (2014).

F. APPELLANTS HAVE FAILED TO SHOW THE CHALLENGED ORDINANCES ARE INCOMPATIBLE WITH FAFB'S MISSION REQUIREMENTS.

Appellants have not presented any evidence to show that potential residential development in the 65LdN to 69LdN sound contour is incompatible, will be exceeded or is contrary to FAFB's mission requirements. Because the City JLUS Ordinance C-771, is based upon the DOD Instructions, it will ensure that no incompatible development occurs. And the Challenged Ordinances incorporate expansive sound contours developed through the 1995 AICUZ that provide protection from incompatible development as determined by FAFB. AR 1053 (Map 4).[11] The Appellants position is that there *may* be potential development at some indefinite point in the future that *may* result in an incompatibility.

[11] The Board improperly concluded that Airway Heights "prepared its own noise contours." Decision, p. 13, ln. 16. The noise contours used by Airway Heights come from the City of Spokane and the 1997 AICUZ (prepared by FAFB) which is a more expansive sound profile than the current mission. Regardless, the CUP process under C-771 requires a property owner/applicant to perform an actual noise study at the site, in order to ensure that the noise levels do not exceed 69 LdN. Decision, p. 13, ln. 16.

These allegations are site specific claims that should be addressed at the time there is an actual project application.

G. THE DECISION IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE WHEN VIEWED IN LIGHT OF THE ENTIRE RECORD.

The Decision and Appellants rely on only three pieces of evidence: (1) a letter from the FAFB Colonel; (2) the Spokane Airport Board Chief Executive Officer; and (3) the 2008 Spokane County Hearing Examiner Decision (regarding a portion of the Subject Property (Deer Creek Apartments)) with the related Washington State Court of Appeals Decision. [12] The above 3 items do not address the DOD Instructions, FAA regulation, contest any noise modeling or demonstrate the Challenged Ordinances will allow incompatible development.

Thus, the Board's conclusion "Ordinances C-797 and C-798 potentially allow residential uses in MIA 4 creating an incompatibility with Fairchild's mission in violation of RCW 36.70A.530(3)" (emphasis added) is not supported by substantial evidence and is clearly erroneous. *See* Decision, p. 17, ln. 25 (AR 1759).

[12] Significantly, the facts and ordinances have changed since the 2008 Spokane County decision. There is no pending multi-family development proposed nor do any of Appellants' comments specifically address the Challenged Ordinances and the potential for a CUP under guidelines established by the federal government.

1. FAFB Recognized that Mitigated Development Is Not Incompatible.

In this matter, Colonel Newberry wrote:

> Based on the 1995 Fairchild AFB (FAFB) Air Installation Compatible Use Zone (AICUZ) Study, the highlighted parcel on the attached C-2 map [Subject Property] is located in the 65-70 Ldn Noise Zone. Based on our 2007 AICUZ Study, the property is now outside of the 65 Ldn contour line. This change demonstrates that noise zones expand and contract as missions change.

Decision p. 8, ln. 24. Given the Colonel's knowledge of AICUZ, the Challenged Ordinances may not be allowing objectionable multi-family development because the answer will depend on actual (not modeled) information obtained through the CUP process. The Colonel concludes the Subject Properties will be "susceptible to aircraft noise" and "potentially incompatible for multi-residential development," But neither of these statements conclude that any permitted development will automatically be considered "incompatible." Decision, p. 9, lns. 1-5. Significantly, Appellants and the Board chose to omit the following sentence in their quote of Colonel Newberry.

> If AH has no choice other than to include these parcels in the C2 amendment, we request that the City mandate a thirty dB outdoor-to-indoor noise reduction as a condition of approval. Further, we would ask the developer to provide the City of

> Airway Heights and FAFB with its plans to reach the 30 dB reduction threshold. This will allow the Air Force to properly comment on the compatibility of the posed development.

AR 1478. The Colonel recognizes that compatibility may be achieved subject to empirical standards and mitigation. The letter does not identify an adverse impact on the training or readiness missions of FAFB as set forth in the DOD Instructions and RCW 37.70A.530. AR 1098. Under the Challenged Ordinances, incompatibility will be evaluated when there is a project permit application.

The letter from the Washington State Department of Transportation repeats the fact that residential developments are "discouraged" under airport traffic pattern areas. AR 374. Notably, the Challenged Ordinances and Federal Standards contain language that discourages such development. Again, careful reading of Colonel Newberry's letter shows the use of speculative terms such as "could be" and a "potential" cumulative noise impact area. Speculative evidence is not "substantial."

The comments from Spokane International Airport ("SIA") first invited Airway Heights to "provide specific evidence as to how the [Challenged Ordinances] are consistent with the JLUS Study and the master plan for SIA." AR 666. As previously discussed, the JLUS Study

was a planning document that does not bind Airway Heights' ability to legislate. The remainder of the letter uses speculative phrases such as "may ultimately create situations," certain areas are a "cause for concern," and a statement that in the 65-70 DnL sound attenuation is a "remedial mitigation measure and will not resolve complaints." AR 667. Such conditional language should not supplant the Federal Standards, nor be deemed "substantial."

H. THE DEER CREEK DECISION IS A SITE SPECIFIC LAND USE DECISION RELATED TO THE EXPANSION OF A NON-CONFORMING USE.

The Appellants claim that the denial of the application by Deer Creek Developers, LLC, for a conditional use permit to allow the expansion of a non-conforming, multi-family dwelling use, under the Spokane County Code is dispositive ("Deer Creek Decision"). The decision is solely related to the evaluation of the expansion of a non-permitted use and not subject to the same standards as the City's exercise of police power authority. The following are excerpts, not mentioned by Appellants, from the Spokane County Hearing Examiner's Decision on July 3, 2008.

> - Fairchild AFB requested that if the County approves the project, it mandate a 30 dB indoor-to-outdoor noise reduction as a condition of approval; and also require the

applicant to incorporate specified exterior sound-absorbing materials and techniques in order to reduce the exterior noise exposure. AR 317.

- The Airport (SIA) observed that the project site was "possibly" located outside the FAA Part 77 Navigable Airspace (obstructions) for the proposed runway. AR 318.

- The FAA conceded that the project appeared to be located below the FAA Part 77 surfaces, and outside the 65 Ldn noise contour for the Airport, based on the Airport Master Plan Study. However, the FAA commented that the noise contours derived for the Airport in the study were generated only for planning purposes.... AR 319.

- The Applicant advised that the takeoffs and landing of aircraft at the Airport (SIA) and Fairchild AFB cannot be heard onsite; the Applicant had received no noise complaints from the 130 persons residing in the Phase I Development; 25% of the residents in the Phase I Development were military personnel from Fairchild AFB; the Airport was currently building a hotel on Airport property to the south, which it indicated was similar to a multi-family use.... AR 000324.

With regard to the SEPA environmental determination accompanying the application, conclusion of law number 30 states the following.

> The noise mitigation measures specified in the MDNS issued for the current project are appropriate, even though the site is located outside the 65 LdN noise zone defined in the Fairchild AFB 2007 [AICUZ] Study; considering the site is located in the 65-70 LdN noise zone defined in the 1995 Fairchild AFB AICUZ Study, the potential for mission changes at Fairchild AFB in the future, the exposure of the site to increased levels of noise from both Fairchild AFB and the proposed runway at Spokane International Airport, and the Applicant's consent to such mitigation in the MDNS. (Emphasis added).

AR 31.

The Deer Creek Decision did not involve the City of Airway Heights or the Challenged Ordinances. No consideration was given to the federal standards relied upon by the City in adopting the Challenged Ordinances. The Deer Creek Decision was premised entirely upon the Spokane County regulations, which have no effect in the City of Airway Heights. As for the determination of "incompatible" set forth in the Deer Creek Decision, the term was not defined. Still, numerous findings support the Challenged Ordinances.

1. Appellants are Attempting to Use the Deer Creek Decision as Res Judicata or Collateral Estoppel.

In effect, the Board (and Appellants) seek to impose the doctrine of collateral estoppel with regard to the effect of Deer Creek on the

Challenged Ordinances. Collateral estoppel requires (i) identical issues, (ii) a final judgment, (iii) same parties and (iv) the application of the doctrine will not work on an injustice on the parties. *City of Arlington v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 164 Wn.2d 768, 791-92, 193 P.3d 1077 (2008). In *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 222 P.3d 791 (2009), the Washington State Supreme Court addressed the applicability of preceding litigation on subsequently adopted amendments to the Whatcom County Comprehensive Plan. *Gold Star Resorts, Inc. v. Futurewise*, 167 Wn.2d 723, 222 P.3d 791 (2009). The Court ruled that because the earlier case preceded the current legislative action that "it did not (and could not) involve the same subject matter and issues as the present case" and therefore collateral estoppel was not appropriate. *Id.* at 738. Such doctrine is not applicable to the City's legislative proceeding or this appeal, especially when the City was not a party and did not participate in the Deer Creek matter.

I. TO THE EXTENT APPLICABLE, AIRWAY HEIGHTS COMPLIED WITH THE REQUIREMENTS OF RCW 36.70A.530(4)

It does not appear that the Board made any findings or conclusions regarding subsection (4) of the above statute. To the extent necessary Airway Heights reserves the right to provide authority and argument if it is pursued by Appellants.

J. *McHugh v. Spokane County, et. al.* Is Not Dispositive

The Board's reading of *McHugh v. Spokane County* is inapposite as it stands for the proposition that when a jurisdiction containing a military installation within its boundaries fails to consider the comments of the base commander, whatsoever, it fails to comply with the Growth Management Act. *McHugh et. al. v. Spokane County, et. al.*, EWGMHB Case No. 05-1-0004, FDO, p. 14 (Dec. 16, 2005). Reports and the emails between the City and FAFB demonstrate the constant interaction with the base. AR 1284.

K. Airway Heights Complied with RCW 36.70A.510 and RCW 36.70.547

RCW 36.70A.547 requires jurisdictions that contain a civilian airport to "discourage" the potential development of incompatible uses. RCW 36.70A.547 states in pertinent part:

> Every county, city, and town in which there is located a general aviation airport shall, through its comprehensive plan and development regulations, discourage the siting of incompatible uses adjacent to such general aviation airport.

Id. In its analysis, the Board looked to comments from Greater Spokane Inc., (dated 2008), WSDOT, Aviation Division as well as Spokane International Airport (dated 2013). *See*, Decision, p. 21, ln. 15 (AR 1763). WSDOT stated it "does not support the encroachment of

residential development adjacent to [SIA]." *Id.* SIA wrote that the Subject Property "may present an incompatible land use related to the future parallel runway." *See*, Decision, p. 22, ln. 10.

In reviewing compliance with RCW 36.70.547, the Board is to continue to give substantial deference to the local jurisdiction, unless it "clearly erred." *Kittitas County v. Eastern Washington Growth Management Hearings Bd.*, 172 Wn.2d 144, 175, 256 P.3d 1193 (2011). *Kittitas County* involved consideration of an airport overlay zone and "whether the County's failure to prohibit residential uses and densities higher than recommended densities by [WSDOT] violates the GMA." *Id.* Similar to this matter, the EWGMHB wrongly found because the Kittitas County regulation differed from WSDOT, it violated the GMA. *Id.* The Court wrote "the Board should have deferred to the County." *Id.*

> The County's regulation differs from WSDOT recommendations by allowing higher densities and not flatly prohibiting residential uses in safety zones. The Board gave substantial weight to WSDOT's recommendations. The Board, however, is supposed to give deference to the County unless the County clearly erred. The statutory scheme requires that County's "discourage" incompatible uses. Discouragement is not the same as prohibition.

Id. at 175. The Court concluded that the statutory scheme does not suggest that counties must follow the advice of WSDOT. *Id.* Furthermore, "considering the loose statutory language and the requirement of Boards to defer to County's planning choices, the record before the Board does not establish firmly and definitely that the County erred." *Id.* RCW 36.70.547 does not prohibit incompatible uses; it discourages them. *Id.*

L. THE CASE OF *PRUITT V. TOWN OF EATONVILLE* SUPPORTS THE CHALLENGED ORDINANCES.

Without addressing *Kittitas County,* the Board relies upon *Pruitt v. Town of Eatonville,* CPSGMHB Case No. 06-3-0016, FDO (Dec. 18, 2006) for the assertion that merely adopting ordinances that did not address the concerns of WSDOT Aviation Division and the FAA were *de facto* non-compliant with RCW 36.70.547.

Pruitt challenged the Town of Eatonville's comprehensive plan policies, alleging the Town "encouraged incompatible uses." *Id.* at p. 1. The Town had adopted an overlay district and height restrictions that did not "protect the airport from height hazards because it allowed structures to penetrate federally established height limitations." *Id.* at 8. The Town acknowledged that existing residences exceeded the federal height limits. *Pruitt* also asserted that state and federal comment letters were ignored

by the Town, and because the Town had not defined "incompatible uses," it could not discourage such uses. *Id.* at p. 9. The Board's analysis began with the following.

> Likewise, the FAA's expertise and decades of experience, as reflected in FAR Part 77, cannot be summarily ignored.

Id. at 10. The Board continued:

> We are seriously concerned that the [Town] of Eatonville is not taking the appropriate steps to address incompatible land use proposals and are ignoring federal regulations.... Federal Aviation Regulation Part 77 is not something that can be arbitrarily modified to match a particular development proposal. FAR Part 77 has been in existence for over 50 years...and it should be recognized accordingly.

Id. at 16. The Board concluded:

> It is clear that the Town's height restrictions are contrary to, and conflict with, FAR Part 77 height provisions.

Id. at 17. Furthermore:

> The limited definition of incompatible uses in the Town's regulations is contrary to the Town's own plan policies and contrary to WSDOT Aviation Division and FAA comments on incompatible uses.

Id. The Board held:

> These development regulations are not in accord with FAR Part 77 height restrictions.

Id. at 19. A finding of "clearly erroneous" was made by the Central Puget Sound Growth Management Hearings Board. *Pruitt* supports the actions taken by the City because the CPSGMHB struck down actions taken by the Town of Eatonville that were not supported by federal standards.

Ordinance C-711 and the Challenged Ordinances contain significant hurdles prior to any development on the Subject Property. This "discourages" incompatible development. The Board's reliance upon comments that occurred prior to the JLUS Study and the speculative testimony is not sufficient to persuade a fair minded person of the correctness of the Decision considering the facts and circumstances surrounding this process. RCW 35.05.570(3)(e).

M. NOTHING WITHIN THE ORDINANCE PRECLUDES THE SITING OR EXPANSION OF AN ESSENTIAL PUBLIC FACILITY

RCW 36.70A.200(5) prohibits a local jurisdiction from enacting or amending their comprehensive plan or development regulations to preclude the siting or expansion of an essential public facility. RCW 36.70A.200(5). In *Port of Seattle v. City of Des Moines,* CPSGMHB Case No. 97-3-0014, FDO p. 8 (August 13, 1997), the Central Puget Sound Growth Management Hearings Board interpreted the City's outright prohibition on expansion related activities for Seattle-Tacoma

International Airport and opposition to future supporting activities as violating RCW 36.70A.200. *Port of Seattle v. City of Des Moines*, CPSGMHB Case No. 97-3-0014, FDO p. 8 (August 13, 1997). The City of Des Moines included goals and policies that "expresses the [City's] clear intent to exercise its municipal authority to prevent the expansion of SEATAC, not to mitigate its impacts." *Id.* The CPSGMHB ruled that the prohibition on construction of support facilities for Seattle-Tacoma International Airport and opposition to expansion of the facility violated RCW 36.70A.200. *Id.*

Furthermore, the Washington State Court of Appeals reviewed the CPSGMHB's decision *Port of Seattle v. City of Des Moines* in *City of Des Moines v. Puget Sound Regional Council,* 98 Wn. App. 23, 34, 988 P.2d 27 (1999) and considered whether "preclude" meant an outright prohibition on expansion or whether it meant "incapable of being performed or accomplished by the means employed or at command." *City of Des Moines v. Puget Sound Regional Council,* 98 Wn. App. 23, 34, 988 P.2d 27 (1999). The Court of Appeals determined that mere compliance with "reasonable permitting and mitigation requirements" did not equal prohibition. *Id.*

The Challenged Ordinances do not preclude or impact the siting or expansion of either FAFB or SIA.[13] If in the future there is an application for development on the Subject Property, Appellants and other interested parties will be afforded the right to participate in the CUP process and advance their "concerns" through an objective, fact-finding forum with the opportunity for judicial review. This supports regional coordination to mitigate against potential incompatible uses. SIA presented no conclusive evidence establishing that it would be prohibited from expanding its facility in any manner by the Challenged Ordinances.

IV. CONCLUSION

The City of Airway Heights reasonably exercised its independent legislative discretion and enacted the Challenged Ordinances, which by definition under the DOD Instruction and FAA Regulation restrict incompatible development. The JLUS planning process was not intended to be an exhaustive technical evaluation of future existing conditions within the study area and create a land use regulation binding upon all jurisdictions. While the JLUS Study identified potential impact areas, its modification through a political process removed empirical analysis that must be employed to determine incompatible uses within an area subject to aircraft noise. The City's justified reliance upon the federal land use

[13] Certainly, Appellants would agree that if actual measured noise for the Subject Property does not exceed 65 DNL, then there is no claim under RCW 36.70A.200(5).

planning regulations justifies the adoption of the Challenged Ordinances and specifically prevent and discourage incompatible uses.

The established CUP process by the City sets up significant requirements prior to a multi-family use being located within the Subject Property. These requirements will ensure the protection of the military and civilian air force bases, provide due process to property owners and the required site specific studies will support the opportunity for further administrative and judicial review of any multi-family land use application.

The legislature has provided and the courts have recognized that when planning for growth, cities are granted a broad range of discretion, "because clear error is such a high standard." *City of Arlington v. Cent. Puget Growth Mgmt. Hearings Bd.*, 164 Wash. 2d 768, 793, 193 P.3d 1077 (2008). In recognition of the broad range of discretion that may be exercised by ... cities consistent with the requirements of [GMA] the legislature intends for the Boards to grant great deference to ... cities and how they plan for growth consistent with the plans and goals of [GMA]. *Id.* at 794. Citing RCW 36.70A.3201.

Given the City's reliance on the AICUZ Instruction, plus adding additional permit review criteria, Airway Heights has discouraged incompatible development adjacent to FAFB and SIA. The speculative

comments, which are not based on a recognized standard, do not show that the City has committed clear error.

The Court is requested to set aside the Decision for the reasons set forth herein and affirm the decision of the Superior Court.

RESPECTFULLY SUBMITTED this 11th day of May, 2015.

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APPENDIX I

The following cases from the United States Court of Federal Claims provide background and clear statements concerning the AICUZ program.

1. *Lengen v. United States*, 100 Fed.Cl. 317 (2011) involved an allegation that frequent low altitude flight by supersonic jets affected a physical taking of property through an avigational easement in violation of the 5th Amendment. Beginning on page 340, the Court recites the following from a declaration.

- The Air Force established the Air Installation Compatible Use Zones (AICUZ) Program in 1972. Under AICUZ the Air Force prepares reports "to assist state and local governments with planning compatible development." *Id.*

- As part of the AICUZ report, the "Air Force uses a program known as NOISEMAP to create a noise contour map for the surrounding area." *Id.* 341. "The noise contour map indicates the average sound level exposure for areas near the base." *Id.*

- With regard to the *Lengen* plaintiff, it was noted that in 1977, plaintiff's property was mapped as being within DNL 65. In 1980, 1984, and 1998, the property was located in the DNL 70 contour. *Id.*

- In 2008, Plaintiff's consultant performed a study to report on noise levels.

> In short, the consultant...evaluated the noise level at the measurement site on a typical day, and the results of those measurements indicated that the current noise level was lower than it was at any time between 1977 and 1998.

Id. at 341-42. The consultant's report further stated that the noise level on the measurement site might reach between 70 and 75 DNL depending on certain scenarios. *Id.* at 342. The Court concluded "the report does not provide substantial support for plaintiff's allegation that overall noise levels on the property have increased significantly in recent years." *Id.*

2. *Stephens v. United States*, 11 Cl.Ct 352 (1996), again involved allegation of a 5th Amendment taking of an aviation easement in airspace. *Id.* at 363.

The Court's discussion of noise recognizes that flight activities create noise which can be measured. *Id.* at 362. As part of the AICUZ program, the Air Force has developed noise contour maps. The maps contain contour lines, ranging in 5 dB increments, which are termed "Compatible Use Districts" (CUD). "Each CUD is described in terms of its compatibility with development in the surrounding community." *Id.*

The least impacted area is CUD 13 which contains half of plaintiff's property and is subject to 65-70 dB.

The AICUZ report recognizes that local conditions may require residential development in CUDs but it "is...discouraged in CUDs 11 and 13." *Id.*

"The reports are advisory only, however, a determination to build is ultimately left to a local jurisdiction." *Id.* One impact of AICUZ reports is the residential loan funding policies of Department of Housing and Urban Development. "Before providing mortgage insurance for residential housing loans, HUD requires certain noise attenuation measures, such as additional insulation, to be taken when houses are built in the 60-70 dB zone." *Id.* "HUD has insured loans in CUD 13 zones." *Id.* at 363.

Also noted as of 1986, "nearly 28 million people in America are exposed to LdN levels of more than 65, and 63.6 million people are exposed to LdN levels of over 60." *Id.* at 365.

> Finally, the documentary evidence and HUD regulations referred to earlier all show that levels between 60 and 70 LdN are at least marginally compatible with residential development, although sound attenuation should be used.

Id.

[*End of Appendix I*]