

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD  
2 CENTRAL PUGET SOUND REGION  
3 STATE OF WASHINGTON  
4

5 THE GEO GROUP, INC.,

6  
7 Petitioner,

Case No. 18-3-0005

8 v.

9 **FINAL DECISION AND ORDER**

10 CITY OF TACOMA,

11 Respondent.  
12  
13

14 **SYNOPSIS**

15 *The Geo Group, Inc. (Petitioner) challenged the City of Tacoma's (City) Ordinance*  
16 *No. 28491, arguing that the ordinance prohibited the siting or expansion of an essential*  
17 *public facility, in contravention of requirements of the Growth Management Act (GMA). The*  
18 *Board concluded that the GMA does not require that a federal detention facility be an*  
19 *essential public facility (EPF).*  
20

21  
22 **I. INTRODUCTION**

23 In February 2018, the Tacoma City Council adopted Ordinance No. 28491 that  
24 establishes a 'detention facility' use and prohibits both correctional and detention facilities  
25 within certain land use zones, including the Port Maritime and Industrial (PMI) district. The  
26 ordinance allows detention facilities as a conditional use in a single district (M-1) but within  
27 that district, only on properties zoned M-1 as of January 1, 2018. Further, the ordinance  
28 adds some requirements for modification or expansion of existing facilities under a  
29 conditional use permit process.  
30

31 Petitioner owns and operates the Northwest Detention Center (NWDC) on behalf of  
32 and pursuant to a contract with the United States Immigration and Customs Enforcement

1 Service (ICE) on property within the PMI zoning district. The ordinance renders NWDC a  
2 legal nonconforming use within its current zoning district, among other impacts. Petitioner  
3 asserts that, because NWDC is an essential public facility, Ordinance No. 28491 wrongfully  
4 precludes and prohibits its expansion.

5 Procedural history of the case is detailed in Appendix A. All legal issues as  
6 established in the Prehearing Order are set out in Appendix B.  
7

## 8 II. JURISDICTION AND STANDARD OF REVIEW

9  
10 The Board finds the Petition for Review was timely filed,<sup>1</sup> that Petitioner has standing  
11 to appear before the Board, and the Board has jurisdiction to review the issues stated for  
12 compliance with the GMA.<sup>2</sup>

13 Comprehensive plans and development regulations, and amendments to them, are  
14 presumed valid upon adoption. This presumption creates a high threshold for challengers as  
15 the burden is on the Petitioner to demonstrate that any action taken by the City fails to  
16 comply with the GMA.<sup>3</sup> The Board is charged with adjudicating GMA compliance and, when  
17 necessary, invalidating noncompliant plans and development regulations.<sup>4</sup>  
18

19 The scope of the Board's review is limited to determining whether a city has achieved  
20 compliance with the GMA only with respect to those issues presented in a timely petition for  
21 review.<sup>5</sup> The Board is directed to find compliance unless it determines that the challenged  
22 action is clearly erroneous in view of the entire record before the Board and in light of the  
23 goals and requirements of the GMA.<sup>6</sup>  
24  
25  
26  
27

28 <sup>1</sup> RCW 36.70A.290(2).

29 <sup>2</sup> RCW 36.70A.280.

30 <sup>3</sup> RCW 36.70A.320(2).

31 <sup>4</sup> RCW 36.70A.280, RCW 36.70A.302.

32 <sup>5</sup> RCW 36.70A.290(1).

<sup>6</sup> RCW 36.70A.320(3). In order to find the County's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

1 **III. APPLICABLE LAW**

2 The Petitioner argues that the ordinance violates the requirements of RCW  
3 36.70A.200 (1), (2) and (5), together with WAC 365-196-550(3), in that the Ordinance  
4 precludes the siting of an essential public facility. The City challenges the assumption that a  
5 federal detention facility is an EPF within the meaning of the RCW 36.70A.200(1) and WAC  
6 365-196-550(1).  
7

8 **RCW 36.70A.200 Siting of essential public facilities—Limitation on liability.**

9 (1) The comprehensive plan of each county and city that is planning under RCW  
10 36.70A.040 shall include a process for identifying and siting essential public facilities.  
11 Essential public facilities include those facilities that are typically difficult to site, such as  
12 airports, state education facilities and state or regional transportation facilities as defined in  
13 RCW 47.06.140, regional transit authority facilities as defined in RCW 81.112.020, state and  
14 local correctional facilities, solid waste handling facilities, and inpatient facilities including  
15 substance abuse facilities, mental health facilities, group homes, and secure community  
16 transition facilities as defined in RCW 71.09.020.

17 (2) Each county and city planning under RCW 36.70A.040 shall, not later than  
18 September 1, 2002, establish a process, or amend its existing process, for identifying and  
19 siting essential public facilities and adopt or amend its development regulations as  
20 necessary to provide for the siting of secure community transition facilities consistent with  
21 statutory requirements applicable to these facilities.

22 ...

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

25 **WAC 365-196-550 Essential public facilities**

26 **(1) Determining what facilities are essential public facilities.**

27 (a) The term "essential public facilities" refers to public facilities that are typically  
28 difficult to site. Consistent with county-wide planning policies, counties and cities should  
29 create their own lists of "essential public facilities," to include at a minimum those set forth in  
30 RCW 36.70A.200.

31 (b) For the purposes of identifying facilities subject to the "essential public facilities"  
32 siting process, it is not necessary that the facilities be publicly owned.

(c) Essential public facilities include both new and existing facilities. It may include  
the expansion of existing essential public facilities or support activities and facilities

1 necessary for an essential public facility.

2 (d) The following facilities and types of facilities are identified in RCW 36.70A.200 as  
3 essential public facilities:

4 (i) Airports;

5 (ii) State education facilities;

6 (iii) State or regional transportation facilities;

7 (iv) Transportation facilities of statewide significance as defined in RCW 47.06.140.

8 ...

9 (v) Regional transit authority facilities as defined under RCW 81.112.020;

10 (vi) State and local correctional facilities;

11 (vii) Solid waste handling facilities;

12 (viii) In-patient facilities, including substance abuse facilities;

13 (ix) Mental health facilities;

14 (x) Group homes;

15 (xi) Secure community transition facilities;

16 (xii) Any facility on the state ten-year capital plan maintained by the office of financial  
17 management.

18 (e) Essential public facility criteria apply to the facilities and not the operator. Cities  
19 and counties may not require applicants who operate essential public facilities to use an  
20 essential public facility siting process for projects that would otherwise be allowed by the  
21 development regulations. Applicants who operate essential public facilities may not use an  
22 essential public facility siting process to obtain approval for projects that are not essential  
23 public facilities.

24 (f) Regardless of whether it is a new, existing or an expansion or modification of an  
25 existing public facility, the major component in the identification of an essential public facility  
26 is whether it provides or is necessary to provide a public service and whether it is difficult to  
27 site.

28 ...

### 29 **(3) Preclusion of essential public facilities**

30 (a) Cities and counties may not use their comprehensive plan or development  
31 regulations to preclude the siting of essential public facilities. Comprehensive plan  
32 provisions or development regulations preclude the siting of an essential public facility if  
their combined effects would make the siting of an essential public facility impossible or  
impracticable.

1 **IV. ANALYSIS AND DISCUSSION**

2 Petitioner has identified four discrete issues raised by the passage of Ordinance No.  
3 28491, all of which are set out in Appendix A. Each issue challenges the effect of the  
4 Ordinance on an essential public facility. Petitioner argues that the federal detention facility  
5 that it operates in the City is an essential public facility, so the Board must first determine  
6 whether the federal detention facility is an essential public facility before taking up the issues  
7 raised in the petition.  
8

9 Petitioner asserts that the facility was the result of a “regional, public siting process  
10 carried out by ICE, in which the City, Pierce County, the Port of Tacoma, and other public  
11 and private parties participated ....” That siting process involved “actively lobbying for INS to  
12 site NWDC in Tacoma” and helping to secure financing through the Washington Economic  
13 Development Finance Authority.<sup>7</sup> The facility was consistent with the City’s existing zoning  
14 code at that time, so the question of whether NWDC was an “essential public facility” under  
15 the GMA was unaddressed. In a subsequent expansion, the then city attorney advised the  
16 City Council that the facility was an essential public facility and that the City could not  
17 preclude its siting.<sup>8</sup>  
18

19 Petitioner argues that the NWDC is an essential public facility based on interpreting  
20 the example of “state and local correctional facilities” mentioned in RCW 36.70A.200(1) to  
21 include federal facilities “associated with the implementation and enforcement of federal  
22 immigration laws” and thus “necessary to provide a public service,” as called out in WAC  
23 365-196-550. Further, Petitioner cites “the City’s current animosity” as proof that facilities like  
24 NWDC are difficult to site, per RCW 36.70A.200(1); WAC 365-196-550(2)(c).<sup>9</sup> And finally,  
25 Petitioner argues that the process led by the United States Immigration and Naturalization  
26 Service (INS) to site the facility falls within WAC 365-196-550(3)(e), which differentiates  
27 essential public facilities that are sited through a regional or state agency process and  
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30

31 <sup>7</sup> Petitioner’s Prehearing Brief at 3.

32 <sup>8</sup> IR 63 at 1-2.

<sup>9</sup> Petitioner’s. Prehearing Brief at 11.

1 requires local jurisdictions to accommodate such regionally sited facilities.<sup>10</sup>

2 Petitioner's arguments are persuasive, as a matter of general cognizance and  
3 understanding. Certainly, the facility is necessary to the federal government's  
4 implementation of federal immigration law. It provides a public service in that it provides the  
5 federal government with a place to hold those whose immigration status, under the law, is in  
6 question. It has at some points in time been referred to as an essential public facility by City  
7 staff,<sup>11</sup> and is presently unpopular with the City's elected officials,<sup>12</sup> in stark contrast to the  
8 enthusiasm with which it was initially sited.  
9

10 The question before this Board, however, is whether the facility fits within the  
11 statutory definition of "essential public facility" such that we must analyze Ordinance No.  
12 28491 for compliance with the GMA's requirements for accommodation of these facilities.

13 To answer that question, we must look to the statute itself, in conjunction with  
14 consideration of the procedural criteria set forth in chapter 365-196 WAC<sup>13</sup> and any  
15 applicable case law.  
16

### 17 **Statute and regulation**

18 The statute itself in RCW 36.70A.200 states:

19 Essential public facilities include those facilities that are typically difficult to site, such  
20 as airports, **state** education facilities and **state or regional** transportation facilities as  
21 defined in RCW 47.06.140, **regional** transit authority facilities as defined in RCW  
22 81.112.020, **state and local** correctional facilities, solid waste handling facilities, and  
23 inpatient facilities including substance abuse facilities, mental health facilities, group  
24 homes, and secure community transition facilities as defined in RCW 71.09.020.  
25 [Emphasis added.]  
26  
27  
28

29 <sup>10</sup> Petitioner's Prehearing Brief at 12.

30 <sup>11</sup> IR 63, 65.

31 <sup>12</sup> For instance, IR 64, recitals to Interim Ordinance, IR 67, excerpts of IR 1 and 2.

32 <sup>13</sup> See WAC 365-196-030: ". . . Compliance with the procedural criteria is not a prerequisite for compliance with the act. This chapter makes recommendations for meeting the requirements of the act, it does not set a minimum list of actions or criteria that a county or city must take. Counties and cities can achieve compliance with the goals and requirements of the act by adopting other approaches. "

1 The legislature distinguishes state, local and regional facilities in this section, which  
2 suggests that the legislature carefully considered the types of facilities that would fall under  
3 the definition and receive special attention. We note that the statute calls out **state and**  
4 **local correctional** facilities, with no mention of federal correctional facilities.

5 Moving on to the procedural criteria, we find the same distinctions being made in  
6 WAC 365-196-550, with the facilities being called out as state, local and regional, including,  
7 yet again, **state and local correctional facilities**.

8  
9 The recommendations included in chapter 365-196 WAC expand on the statutory  
10 definition and give rise to arguments that support an analysis in which a federal detention  
11 facility could be considered an essential public facility, particularly WAC 365-196-550(1)(f):

12 Regardless of whether it is a new, existing or an expansion or modification of  
13 an existing public facility, the major component in the identification of an  
14 essential public facility is **whether it provides or is necessary to provide a**  
15 **public service and whether it is difficult to site.** [Emphasis added.]

16  
17 The problem facing this Board is one of statutory construction. Can we expand the  
18 statutory definition of essential public facility to include federal correctional (or detention)  
19 facilities, where the statute expressly describes correctional facilities as being **state and**  
20 **local**? The statute and WAC do not specifically exclude federal facilities, but is the absence  
21 of a specific exclusion sufficient to require inclusion of the federal facilities into the state  
22 definition by inference? We think not.

#### 23 24 **Case law**

25 No specific case law addresses this issue, but Petitioner does cite previous Board  
26 cases to suggest analogous treatment.

27  
28 For the proposition that the NWDC is a regionally-sited essential public facility,  
29 Petitioner cites *King County, et al. v. Snohomish County, et al*, CPSGMHB Case No. 04-3-  
30 0012, Order Finding Continuing Noncompliance and Continuing Invalidity and Notice of  
31 Second Compliance Hearing; Order of Dismissal (May 26, 2004). While that case does  
32 address the local jurisdiction's duty to accommodate regionally sited EPFs, the case does

1 not stand for the **expansion of the definition of EPFs** but rather involved the degree of  
2 regulation that a local jurisdiction could impose on an EPF that had been the subject of a  
3 regional siting process. No one in that case challenged whether the regional wastewater  
4 treatment facility was an EPF within the meaning of the statute; it resolved a conflict  
5 between local jurisdictions concerning their regional responsibilities.<sup>14</sup>

6  
7 For the proposition that the Ordinance wrongfully precludes or prohibits the siting or  
8 expansion of NWDC as an EPF, Petitioner cites, in addition to the case concerning the  
9 wastewater treatment facility, *City of Des Moines v. Puget Sound Regional Council*, 108  
10 Wash. App. 836, 843-46, 988 P.2d 27 (1999). That case also dealt with the degree of  
11 regulation that a local jurisdiction can impose on an existing regionally sited EPF; there, the  
12 Port was expanding runway facilities at the existing regional airport. The case did not  
13 involve a challenge as to whether the airport *as it existed* was an EPF; it only addressed the  
14 character of the expansion activities.

15  
16 In *Cascade Bicycle Club, et al v. City of Lake Forest Park*, CPSGMHB Case No. 07-  
17 3-0010c, Final Decision and Order (July 23, 2007), the case turned on the reasonable  
18 conditions and mitigation that a local jurisdiction might impose on a regionally sited EPF.  
19 The case did address, as an original question, whether a regional multi-modal trail is an  
20 essential public facility. The Board determined that the trail is an EPF, based on (1) its  
21 *regional* nature, (2) its importance in serving non-motorized transportation, and (3) its citing  
22 difficulties. The trail was identified in several *regional* plans as a regional recreation and  
23 transportation facility.<sup>15</sup> The case could stand for expansion of EPF status to *regional*  
24 facilities, but not to federal ones, as Petitioner would have us do.

25  
26 In sum, we don't find the cases offered to be sufficiently analogous to require that a  
27 federal detention facility be considered an 'essential public facility' as defined by RCW  
28 36.70A.200.

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31 <sup>14</sup> The case does involve Snohomish County's definition of EPFs, which included reference to federal facilities,  
32 but the reference is not germane to the holdings in the case.

<sup>15</sup> *Cascade Bicycle Club* at 12.



1           **Conclusion**

2           In sum, Petitioner has not carried its burden to show that the GMA *requires* federal  
3 detention facilities to be treated as essential public facilities. A close reading of the statute  
4 and the procedural criteria will not support extending the definition as Petitioner wishes. The  
5 facts in the cases cited by the Petitioner are not sufficiently analogous to support extending  
6 the definition. And, finally, this Board does not have the authority to make public policy by  
7 adding words to the statute that are not there and cannot be reasonably inferred. *Viking*  
8 *Props., Inc. v. Holm*, 155 Wn.2d 112, 118 P.3d 322 (2005):  
9

10           [T]he growth management hearings boards do not have authority to make  
11 “public policy” even within the limited scope of their jurisdictions, let alone to  
12 make statewide public policy. The hearings boards are quasi-judicial agencies  
13 that serve a limited role under the GMA, with their powers restricted to a  
14 review of those matters specifically delegated by statute. See RCW.  
15 36.70A.210(6), .280(1); *Sedlacek v. Hillis*, 145 Wn.2d 379, 385-86, 36 P.3d  
16 1014 (2001) (stating that public policy is set forth in constitutional, statutory  
17 and regulatory provisions, as well as prior judicial decisions). ... See also  
18 *Skagit Surveyors & Eng'rs, LLC v. Friends of Skagit County*, 135 Wn.2d 545,  
19 565, 958 P.2d 962 (1998) (stating that the GMA is not to be construed to  
20 confer upon a hearings board powers not expressly granted in the GMA).

21           In rendering this decision, the Board offers no opinion as to whether any federal  
22 facilities should be an EPF within the meaning of the GMA. At the beginning of our analysis,  
23 we made clear that the question before this Board is whether the facility fits within the  
24 statutory definition of “essential public facility” such that we must analyze Ordinance No.  
25 28491 for compliance with the GMA’s requirements for accommodation of these facilities.  
26 Our conclusion is that it does not.  
27

28           **The Board finds and concludes** that the GMA does not require that a federal  
29 detention facility, such as that operated by Petitioner, be accommodated as an essential  
30 public facility. Having determined that the City need not treat a federal detention facility as  
31 an essential public facility, all Petitioner’s remaining arguments must fail. **The Board finds**  
32

1 **and concludes** that Petitioner has not shown that Ordinance No. 28491 fails to comply with  
2 the GMA.

3  
4 **V. ORDER**

5 Based upon review of the petition, the briefs and exhibits submitted by the parties,  
6 the GMA, prior Board orders and case law, having considered the arguments of the parties,  
7 and having deliberated on the matter, the Board finds that the Petitioner has not met the  
8 burden of proof required to find the City has violated the GMA. The Board further finds that  
9 Ordinance No. 28491 complies with the GMA and orders this case to be dismissed.  
10

11 SO ORDERED this 20<sup>th</sup> day of September 2018.  
12

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14 \_\_\_\_\_  
Deb Eddy, Board Member

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16 \_\_\_\_\_  
17 Cheryl Pflug, Board Member

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19 \_\_\_\_\_  
20 William Roehl, Board Member  
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22 **Note: This is a final decision and order of the Growth Management Hearings Board**  
23 **issued pursuant to RCW 36.70A.300. A motion for reconsideration must be filed with**  
24 **the Board and served on all parties within ten days of mailing of the final order. WAC**  
25 **242-03-830(1), WAC 242-03-840. A party aggrieved by a final decision of the Board**  
26 **may appeal the decision to Superior Court within thirty days as provided in RCW**  
27 **34.05.514 or 36.01.050. The petition for review of a final decision of the board shall be**  
**served on the board but it is not necessary to name the board as a party. See RCW**  
28 **36.70A.300(5) and WAC 242-03-970.**  
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1 **Appendix A: Procedural matters**

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3 On March 28, 2018, The Geo Group, Inc. (Petitioner) filed a petition for review,  
4 which was assigned Case No. 18-3-0005.

5 The Presiding Officer held a Prehearing Conference telephonically on April 30, 2018.  
6 On May 4, 2018, the parties filed a Stipulated Joint Motion to Extend Filing Deadline of  
7 Agreed Index, and that motion was granted. On June 12, 2018, the parties filed a Stipulated  
8 Joint Motion to Amend Briefing Schedule, and the motion was partially granted. On June 29,  
9 2018, the parties filed a Stipulated Joint Motion to Supplement Index. This motion was  
10 granted. On July 30, 2018, a Second Stipulated Joint Motion to Supplement Index was filed  
11 and the motion was granted.  
12

13 The Briefs and exhibits of the parties filed as follows:

- 14 • Petitioner’s Prehearing Brief filed on June 29, 2018.
- 15 • City’s Response Brief filed on July 20, 2018.
- 16 • Petitioner’s Reply Brief filed on July 30, 2018.

17  
18 Hearing on the Merits

19 The board panel convened a Hearing on the Merits August 14, 2018. The hearing  
20 afforded each party the opportunity to emphasize the most important facts and arguments  
21 relevant to its case. Board members asked questions to understand the history of the  
22 ordinances, the facts in the case, and the legal arguments of the parties.  
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## Appendix B: Legal Issues

Per the Prehearing Order, legal Issues in this case were as follows:

1. Does Ordinance No. 28491, which redefines “correctional facility” under the City’s code and adds a definition of “detention facility” (seemingly applicable only to federal immigration detention facilities while prohibiting detention facilities in all zoning districts, except for M-1 as its boundaries existed on January 1, 2018), wrongfully preclude or prohibit the siting and/or expansion of NWDC as an **essential public facility** in violation of RCW 36.70A.200(2) and (5), and WAC 365-196-550(3)?
2. Does Ordinance No. 28491, which redefines “correctional facility” under the City’s code and adds the definition of “detention facility” (seemingly applicable only to federal immigration detention facilities) and prohibits detention facilities in all zoning districts, except for M-1 as its boundaries existed on January 1, 2018), wrongfully fail to accommodate the siting and/or expansion of NWDC, which resulted from a federal site selection process, as an **essential regionally sited public facility** in violation of RCW 36.70A.200(2) and (5), and WAC 365-196-550(3)?
3. Does Ordinance No. 28491, which renders NWDC a legal nonconforming use in perpetuity, make the siting, expansion, and/or modification of NWDC, an **“essential public facility”** under the GMA, so “impossible” or “impracticable” as to effectively preclude the siting of “essential public facilities” in violation of RCW 36.70A.200(2) and (5), and WAC 365-196-550(3)?
4. Did the City act improperly and unlawfully in enacting Ordinance No. 28491, which amends City codes by providing that the defined “detention facility” use, an **“essential public facility”** under the GMA, should be allowed in the M-1 (Light Industrial) zoning district with a conditional use permit, but prohibited in all other industrial zoning districts, without applying a process or criteria to properly identify and site essential public facilities in violation of RCW 36.70A.200(1) and(2) and WAC 365-196-550(3)?