

**THIS ORDER
SCANNED.**

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

**WAS
PLEASE**

HAPSMITH, et al.,

Petitioners,

v

CITY OF AUBURN,

Respondent.

REPORT ERRORS.

)
) Consolidated
) Case No. 95-3-0075c
)

) FINDING OF NON-COMPLIANCE
) AND NOTICE OF
) SECOND COMPLIANCE HEARING
)
)

I. PROCEDURAL BACKGROUND

The above captioned case consolidated two petitions for review filed by The Hapsmith Company (Hapsmith) and by the Burlington Northern Santa Fe Railroad (BNSF or BN). The two petitions alleged that the City of Auburn's (Auburn or the City) comprehensive plan (the Plan) violated the Growth Management Act (GMA or the Act).

On May 10, 1996, the Board issued a Final Decision and Order (the FDO). The Order portion of the FDO provided:

5) The City's Comprehensive Plan is in compliance with the requirements of the GMA, with the following exceptions:

A) The transportation element's trends analysis forecasting method is remanded with instructions for the City to bring its traffic forecasting analysis into compliance with the Board's Final Decision on that matter in this case.

B) The transportation element is remanded with instructions for the City to prepare an assessment of the City's transportation plan on adjacent jurisdictions and incorporate that assessment into the Plan.

C) That portion of the description of Light Industrial designations that requires all significant activities to occur inside (Plan, at 14-14) is remanded. The City shall either delete or modify this language,

2 create an exception that permits the siting of essential public facilities, or
3 otherwise bring this provision into compliance with the Act.

4 D) Policy CF-62 (Plan, at 5-15) is remanded since it does not constitute
5 a process for siting essential public facilities. Until and unless the
6 Growth Management Planning Council or its successor adopts a
7 process for siting essential public facilities and the City then adopts
that process, the City must adopt its own process for siting essential
public facilities.

8 On June 6, 1996, in response to motions from several parties, the Board issued its
9 ..Order on Petitions for Reconsideration and Motion to Supplement" (the
Reconsideration Order). The Reconsideration Order modified a holding from the FDO
by deleting language shown below with a strikethrough:

0 Accordingly, ~~the Board holds that to attempt to cause BNSF's present~~
1 ~~railroad use or the potential future intermodal facility use to locate to some~~
2 ~~other site not now presently owned by BNSF, or to force the Railroad to~~
3 ~~enclose its facilities within buildings, would, at the very least, result in~~
4 ~~significant avoidable expense. Accordingly, the Board further holds that~~
5 ~~the portion of the Plan discussed in Legal Issue No.5 below (i.e., at 14-14)~~
6 ~~that requires significant activities on lands designated as Light Industrial to~~
7 ~~take place inside buildings, is not consistent with Policy T-16 in the~~
8 ~~KCCPPs. Reconsideration Order, at 37.~~

9 On October 18, 1996, the Board received ..BN's Motion Requesting Substantive
Compliance Hearing."

0 On this same date, the Board received the ..City of Auburn's Statement of Compliance"
1 (Auburn's Statement). Attached to Auburn's Statement were a copy of Ordinance No.
2 4912, a document dated September 24, 1996 entitled ..City of Auburn Planning and
3 Community Development Committee's Proposed Comprehensive Plan Amendments," a
4 document dated October 7 , 1996 entitled ..City of Auburn Adopted Comprehensive
5 Plan

6 Amendments," and a certification signed by the Auburn City Clerk that Ordinance 4912
7 was published on October 13, 1996.

8 On October 29, 1996, the Board issued its '.Notice of Compliance Hearing.'

9 On November 22, 1996, the Board received ..Petitioner BN's Response to City's
Statement of Compliance" (BN's Response) with attachments 1 through 7.

0 On December 13, 1996, the Board received '.Respondent City of Auburn's
1 Memorandum in Response to Burlington Northern's Opposition to Auburn's Statement
2 of Compliance" with an attached '.Reply Verified Statement of Michael L. Holsteen."

2 On December 18, 1996, the Board held a compliance hearing at its office, at 2329 One
3 Union Square, Seattle. Present for the Board were members Chris Smith Towne and
4 Joseph W. Tovar, presiding officer. Board member Edward G. McGuire participated
5 telephonically. Tayloe Washburn represented the City; Eric R. Laschever represented
6 BNSF. Court reporting services were provided by Cynthia J. LaRose of Robert H.
7 Lewis & Associates, Tacoma. No witnesses testified.

8 At the beginning of the compliance hearing, BNSF offered a number of exhibits
9 identified with "Tabs." The City objected to Tab 9, a ruling by the Federal Surface
10 Transportation Board, and requested an opportunity to submit a post-hearing brief to
11 respond to Tab 9. The presiding officer orally admitted the offered exhibits and provided
12 the City with an opportunity to submit a post-compliance hearing brief and for BN to
13 submit a reply.

14 On December 23, 1996, the Board received from Mr. Washburn a letter indicating that
15 the City did not object to any of the exhibits offered at the compliance hearing by BNSF
16 and that there would be no City post-compliance hearing brief forthcoming.

17 II. STATEMENT OF FACTS

- 18 1. On October 7, 1996, the Auburn City Council adopted Ordinance 4912, adopting,
19 among other things, amended Plan Policy *CF-62* to comply with the Board's Final
20 Decision and Order in this case. Auburn's Statement, Attachment 1.
- 21 2. Policy *CF-62* constitutes the City's process for siting essential public facilities
22 (EPFs). Policy *CF-62* includes a process for siting essential public facilities that
23 meet "largely local needs." Auburn's Statement, Attachment 1, *CF-62(6)*.
- 24 3. Policy *CF-62* also includes a process for siting certain essential public facilities that
25 serve "a regional, countywide, statewide or national need." *CF-62(1)*. This portion
26 of Policy *CF-62* includes a process for siting only those facilities that are included
27 within an adopted state or regional plan, establishes criteria for the contents of the
28 plan, and requires that the plan undergo a NEPA/SEPA review. *CF-62 (1)(a)*.

29 III. RULING ON OFFERED EXHIBITS

30 At the compliance hearing, BN offered the following "tabbed" exhibits:

31 Tab 4 is a complete copy of Exhibit 4 attached to BN's Response; Tab 6 is a complete
32 copy of "Washington's Transportation Plan 1997-2016" published by the Washington
33 State Department of Transportation in April, 1996; Tab 7 is a complete copy of the
34 "1995 Metropolitan Transportation Plan" adopted by the Puget Sound Regional Council
35 General Assembly on May 25, 1995; Tab 8 is an excerpted transcript from the
36 September 17, 1996 public hearing conducted by the City of Auburn Planning
37 Commission; Tab 9 is the Decision of the Surface Transportation Board regarding STB

2 Finance Docketed Items No.32974 and 33095 decided on September 25, 1996; and Tab
3 10 which is a "Declaration of Dennis W. Wilson in Opposition to Plaintiff's Motion to
4 Amend" dated December 6, 1996, in *City of Auburn v. King County, et al.*, Case No.
5 C96-156S-Z. All of the "tabbed" exhibits offered at the compliance hearing are
6 admitted.

6 IV . DISCUSSION

7 Remand Items 5A, 5B, AND 5C

8 The City's action to achieve compliance with remand items 5A, 5B, and 5C is presumed.
9 valid upon adoption. RCW 36. 70A.320(1). No argument or evidence has been
10 presented challenging the compliance of those items with either the GMA or the specific
11 directions of the Board's FDO. After a review of the description of actions taken to
12 comply with those directions in Auburn's Statement, the Board holds that the City has
13 complied with the GMA and the FDO with respect to remand items SA, SB, and
14 SC.

15 Remand Item 5D

16 The City's action to achieve compliance with Remand Item 5D enjoys the same
17 presumption of validity; however, BN has specifically challenged this presumption. To
18 overcome this presumption, a petitioner must show by a preponderance of the evidence
19 that a challenged enactment does not comply with the GMA. RCW 36.70A.320(1).
20 Item 5D of the remand order provides:

21 D) Policy CF-62 (Plan, at 5-15) is remanded since it does not constitute a
22 process for siting essential public facilities. Until and unless the Growth
23 Management Planning Council or its successor adopts a process for siting
24 essential public facilities and the City then adopts that process, the City must
25 adopt its own process for siting essential public facilities.

26 Amended Policy *CF-62* now provides:

27 1. The City will review proposals through the process outlined in parts (3)
28 through (7) below, if the essential public facility largely serves a regional,
29 countywide, statewide or national need and is included within an adopted
30 state or regional plan which meets the following criteria:

31 a. The state or regional plan was developed through an appropriate
32 public process (including at least one local public hearing) and has
33 undergone a NEP A and/or SEP A review;

34 b. Appropriate alternative sites both in and outside Auburn must be
35 considered and evaluated;

2 c. Impacts of the proposed essential public facility must be identified and
3 an appropriate mitigation plan developed with a financing strategy
4 using non-local sources;

5 d. The state or regional agency which adopted the plan will act as co-
6 proponent for the proposal as it proceeds through the local permit
7 process.

8 2. If the essential public facility largely serves a regional, countywide, statewide
9 or national need and is not part of an adopted state or regional plan, the
10 proponent will be required to request that the appropriate state or regional plan
11 be amended to include the proposal meeting the criteria contained in part (1)
12 above. The proposal will also be reviewed following the process outlined in parts
13 (3) through (7).

14 3. Essential public facilities of a regional, countywide, statewide or national
15 nature will be reviewed by the City through the special area plan process. The
16 boundaries of the Special Area Plan will be set at a scale directly related to the
17 size and magnitude of the proposal. For facilities of regional, state, and national
18 need, Auburn staff shall participate in the review process of part 1 (above), and
19 use the data, analysis and environmental documents prepared in that process to
20 aid in the City's special area plan review, if Auburn determines that those
21 documents are adequate. If the facility requires other development permits, those
22 approvals also shall be considered within the review process.

23 4. The special area plan process to be used for essential public facilities of a
24 regional, countywide, statewide or national nature shall follow the City's
25 Comprehensive Plan amendment process which includes multiple opportunities
26 for public involvement.

27 5. An analysis of the facility's impact on City finances shall be undertaken. If the
28 study shows that locating a facility in a community would result in a
29 disproportionate financial burden on the City of Auburn, an agreement with the
30 project's proponents must be executed to mitigate the adverse financial impact or
31 the approval shall be denied.

32 6. If the essential public facility meets largely local needs (for example, inpatient
33 facilities, including substance abuse facilities, mental health facilities and group
34 homes), the facility shall be considered based upon section (7) below.

35 7. The following criteria shall be used to evaluate all applications to site essential
36 public facilities:

37 a. Whether there is a public need for the facility.
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2 b. The impact of the facility on the surrounding uses and environment,
3 the City and the region.

4 c. Whether the design of the facility or the operation of the facility can be
5 conditioned, or the impacts mitigated, in a similar manner as with a
6 traditional private development, to make the facility compatible with the
7 affected area and the environment.

8 d. Whether a package of incentives can be developed that would make
9 siting the facility within the community more acceptable.

1 e. Whether the factors that make the facility difficult to site can be
2 modified to increase the range of available sites or to minimize impacts
3 on
4 affected areas and the environment.

5 f. Whether the proposed essential public facility is consistent with the
6 Auburn Comprehensive Plan.

7 g. Essential public facilities shall comply with any applicable state siting
8 and permitting requirements (e.g., hazardous waste facilities).

9 Auburn's Statement, Attachment 1 (City of Auburn Adopted Comprehensive
10 Plan Amendments, October 7, 1996).

11 BN argues that the amended Plan remains out of compliance with the GMA because
12 amended Policy CF-62 precludes the siting of EPFs in Auburn that are not identified in a
13 state or regional plan (prefatory text of paragraph (1)), and because certain provisions
14 would effectively preclude siting of EPFs (the financial provisions of paragraph (5) and
15 subparagraphs (1)(c) and (7)(d)) and the requirement of regional/state co-sponsorship in
16 subparagraph (1)(d). The City responds that amended Policy CF-62 reflects the
17 discretion vested in local decision makers. BN does not challenge paragraphs
18 (2),(3),(4),(6) and (7),(a),(b),(c),(e),(f), and (g) of CF-62.

19 RCW 36.70A.200 provides:

20 (1) The comprehensive plan of each county and city that is planning under this
21 chapter shall include a process for identifying . and siting essential public
22 facilities. Essential public facilities include those facilities' that are typically
23 difficult to site, such as airports, state education facilities and state or regional
24 transportation facilities, state and local correctional facilities, solid waste
25 handling facilities, and inpatient facilities including substance abuse facilities,
26 mental health facilities, and group homes.

27 (2) The office of financial management shall maintain a list of those essential
28 state
29 public facilities that are required or likely to be built within the next six years.

2 The office of financial management may at any time add facilities to the list.
3 No local comprehensive plan or development regulation may preclude the
4 siting of essential public facilities. (Emphasis added.)

5 The Board previously examined the language of RCW 36.70A.200 and the matter of
6 preclusion in *Children's Alliance and Low Income Housing Institute v. City of Bellevue*,
7 (*Children's 1*), CPSG1111HB Case No.95-3-0011, Final Decision and Order (July 25,
8 1995):

9 The legislature included RCW 36.70A.200 in the GMA for a reason: "essential
10 public facilities" such as group homes are typically difficult to site. They are
11 precisely the types of land uses which provoke "NI:MBY" (Not in My Backyard)
12 responses. The City argues that because the Ordinance does not prohibit group
13 homes from being sited anywhere in Bellevue, it has not precluded the siting of
14 an essential public facility. However, such a narrow interpretation of section
15 .200 would not accomplish the legislature's goal.

16 Importantly, the legislature selected the verb "preclude" rather than "prohibit." A
17 comparison between the meanings of "prohibit" and "preclude" is useful at this
18 point:

19 prohibit: 1. To forbid by authority. 2. To prevent: debar. *Webster's II*
20 *New Riverside University Dictionary* (2d. ed., 1988); at 940.

21 preclude: To make impossible or impracticable by prior action:
22 PREVENT. *Webster's, supra*, at 926.

23 *Children's I*, at 19.

24 Thus, the Act requires the comprehensive plans of counties and cities to include a
25 process for siting EPFs, and prohibits provisions in local plans or development
26 regulations that would render "impossible or impracticable" the siting of EPFs.

27 Additionally, where the EPF is of a county-wide or state-wide "nature," CTED's
28 guidelines recommend that the siting process should conform to the applicable county-
29 wide planning policies (CPPs). WAC 365-195-340(2). In addition, "[This] process
30 should provide for a cooperative interjurisdictional approach to siting of [EPFs] of a
31 county-wide, regional, or state-wide nature, consistent with [CPPs]." WAC 365-195-
32 340(2)(b)(ii).

33 The Act itself requires such inter jurisdictional planning. RCW 36.70A.210 provides in
34 part:

35 (3) A county-wide planning policy shall at a minimum, address the following: . . .

2 (C) Policies for siting public capital facilities of a county-wide or state-
3 wide nature;

4 (d) Policies for county-wide transportation facilities and strategies;
5 (Emphasis added.)

6 Thus, the Act requires the comprehensive plans of counties and cities to include a
7 process for siting EPFs, and prohibits local plans and development regulations that
8 would render "impossible or impracticable" the siting of EPFs. The Act also requires
interjurisdictional planning for public facilities that are of a county or statewide nature,
through development of CPPs.

9 CF-62(1)

1 Policy CF-62(1) consists of a prefatory policy statement, and four criteria, stated as
0 subparagraphs (a) through (d). CF-62(1) clearly contemplates an interjurisdictional
1 approach in siting EPFs that have more than local significance; however, it does more
1 than simply contemplate this interjurisdictional approach. It sets forth an extensive siting
2 process for essential public facilities. The question then becomes: Does the process set
1 forth in CF-62 render "impossible or impracticable" the siting of EPFs in Auburn?
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4 *CF-62* begins with the statement that EPFs must be "included within an adopted state or
1 regional¹ plan." However, it does not define what is meant by "included." The Board
5 presumes that "included" in this context refers to policies, as opposed to sites, within a
1 regional¹ or state plan. The nature of regional transportation plans, such as the
6 Metropolitan Transportation Plan and the Washington Transportation Plan in the record
1 before the Board, is that they are policy plans which describe existing conditions, future
7 needs and possible criteria for subsequent site-specific decisions; however, regional
1 policy plans of this nature do not typically identify specific sites. The Board concludes
8 that it is not reasonable to impose such a burden on EPFs. If CF-62(1) had explicitly
9 stated that specific sites for EFPs were required to be included in state or regional plans,
2 then the Board would have found such reference noncompliant with RCW
0 36.70A.200(1).
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2 The Board concludes that subparagraphs (a) and (b) are reasonable provisions for a
2 siting policy.
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4 The Board reads the word "using" in subparagraph (l)(c) of *CF-62* to mean "including
2 but not limited to" non-local sources. Given this meaning, this provision is reasonable.
5 To the extent that certain improvements will be made that will have a benefit beyond
2 that
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8 1: While the "regional agency" that has been discussed in much of the briefing is the Puget Sound
2 Regional Council, the Board notes that the GMA also describes individual counties as "regional
9 governments." RCW 36.70A.210.

2 which accrues to a specific project proponent, the City must contemplate an appropriate
3 proportionate share of local financial participation.

4 The Board holds that Policy CF-62(1) and subparagraphs (a), (b) and (c), as
5 interpreted above, are in compliance with the requirements of the GMA.

6 In contrast, the Board concludes that to require that a state or regional agency act as co-
7 proponent for a local permit application is an unprecedented and unreasonable burden to
8 place on EPFs. The Board agrees with BNSF that neither the Puget Sound Regional
9 Council (PSRC) or the Washington State Department of Transportation (WSDOT)
plans in the record identify specific project sites; thus, it would be illogical and unlikely
that those agencies would serve as co-applicants for local project permits.

1 The Board holds that subparagraph (1)(d) of amended Policy CF-62 effectively
0 renders impossible or impracticable the siting of certain EPFs in Auburn, and
1 therefore the City's Plan fails to include a process for siting EPFs as required by
1 RCW 36.70A.200(1).

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1 CF-62 (2). (3). (4). (6) and (1).(a).(b).(c).(e),(f), and (g)

3
1 BN did not object to these provisions of CF-62. The Board holds that CF-
4 62(2),(3),(4), (6) and (7)(a),(b),(c),(e),(t), and (g) comply with the requirements of
1 the Act.

6
1 CF -62 (5)

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1 Paragraph (5) deals with mitigation of the impacts of an EPF on the City . The Board
8 does not find it inappropriate that Auburn's amended plan contains policies that seek to
1 protect the City from the adverse effects of a proposed EPF. The Board agrees with BN
9 that the City cannot use Policy CF-62(5) to block an EPF by demanding unreasonable
2 mitigation.

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1 The Board holds that CF-62(S) complies with the requirements of the Act.

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2 CF-62(1)(d)

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2 Subparagraph (7)(d) also deals with the general concept of facility impacts, but unlike
4 CF-62(5), it does not address measures to 'mitigate" financial impacts. Instead, it
5 speaks of .'incentives" that can make the siting of a facility (and implicitly its impacts)
2 more acceptable to the community. BN argues that the City could ..require a proponent
6 to provide so many incentives that it would be impractical to locate the facility in
2 Auburn." BN's Response, at 5. At the hearing on the merits, the City volunteered to
7 stipulate to replace the word ..incentives" with .'mitigating measures" in subparagraph
2 (7)(d). Upon remand, the Board will order the City to make it so.

2 The Board holds that CF-62(7)(d) does not comply with the requirements of the
3 Act. Pursuant to the City's suggestion, the Board will direct that Auburn replace
4 the word "incentives" in CF-62(7)(d) with the words "mitigating measures." In
the alternative, the City may simply delete CF-62(7)(d).

5 V. FINDING OF NON-COMPLIANCE

6 The Board, having reviewed its Final Decision and Order and the file in this case, having
7 reviewed the above referenced documents, and having considered the arguments of the
8 parties, concludes that the City's actions relative to remand items 5A, 5B, and 5C are in
compliance with the GMA and the Board's FDO.

9 However, the Board finds that the City's action with respect to remand item 5D fails to
10 comply with the GMA, specifically subparagraphs (1)(d) and (7)(d) and therefore
11 finds
12 the City in noncompliance with the requirements of the GMA.
13 Rather than enter a finding of invalidity as to Policy CF-62, or recommending the
14 imposition of gubernatorial sanctions, the Board instead will schedule a second
15 compliance hearing in this matter pursuant to RCW 36.70A.330(2). The Board
16 concludes that before considering invalidation or a recommendation of sanctions, it is
17 appropriate to first provide the City with the option of remedying the noncompliant
18 provisions. For example, replacing the word ".incentive" with the words ".mitigating
19 measures" in subparagraph(7)(d) would provide a remedy to this finding of
20 noncompliance. In the alternative, the City could simply delete CF-62(7)(d). The only
21 remedy available with regard to subparagraph (1)(d) is its deletion.

22 VI. NOTICE OF SECOND COMPLIANCE HEARING

23 Pursuant to RCW 36.70A.330(2), the Board shall conduct an additional compliance
24 hearing in the Board's offices at 10:00 a.m. on Wednesday, May 28, 1997 on the
25 matter of the City's compliance with Remand Item 5D of the FDO. The Board orders
26 the City to file an original and three copies of a Compliance Status Report, and serve a
27 copy on BNSF, no later than 4:00 p.m. on May 7, 1997, regarding the status of the
28 City's subsequent action to achieve compliance with Remand Item 5D. BNSF shall
29 submit to the Board three copies and an original of any response brief, and serve a copy
30 on the City, by 4:00 p.m. on May 21, 1997. The City shall submit an original and three
31 copies to the Board of any optional Reply brief, and serve a copy on BNSF, no later than
32 4:00 p.m. on May 27, 1997.

33 After reviewing the City's Compliance Status Report and the above referenced briefing
34 and oral presentations at the Second Compliance Hearing, the Board will consider what,
35 if any, action to then take relative to the City's compliance with the requirements of the
36 GMA.

2 So ORDERED this 13th day of February, 1997.

3 CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS
4 BOARD

5 Edward G. McGuire, AICP
6 Board Member

7 Joseph W. Tovar, AICP
8 Board Member

9 Chris Smith Towne
Board Member

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