

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

KING COUNTY,)	
	)	Case No. 03-3-0011
Petitioner,	)	[King County I]
)	
and	)	ORDER FINDING CONTINUING
	)	NONCOMPLIANCE AND
CITY OF RENTON,	)	CONTINUING INVALIDITY
	)	AND NOTICE OF SECOND
Intervenor,	)	COMPLIANCE HEARING
)	
v.)	
)	
SNOHOMISH COUNTY,)	
)	
Respondent,)	
)	
and)	
)	
SNO-KING ENVIRONMENTAL)	
ALLIANCE,)	
)	
Intervenor.)	
)	
<hr style="border: 0.5px solid black;"/>		
KING COUNTY,	)	Case No. 03-3-0025
	)	[King County II]
Petitioner,)	
	)	ORDER OF DISMISSAL
and)	
)	
CITY OF RENTON,)	
)	
Intervenor,)	
)	
v.)	
)	
SNOHOMISH COUNTY)	
)	
Respondent.)	
)	
<hr style="border: 0.5px solid black;"/>		

KING COUNTY,)	
	)	Case No. 04-3-0012
	)	[King County III]
Petitioner,)	
v.	)	ORDER OF DISMISSAL
)	
SNOHOMISH COUNTY)	
)	
Respondent.)	
_____)	

I. SYNOPSIS

On October 13, 2003, the Central Puget Sound Growth Management Hearings Board issued a Final Decision and Order (the **FDO**) in the *King County I* case. In that decision, the Board agreed with petitioners King County and the City of Renton that Snohomish County’s Ordinance No. 03-006 regulating Essential Public Facilities did not comply with the goals and requirements of the Growth Management Act. The Board directed Snohomish County to achieve compliance with the Act by February of 2004.

On October 22, 2003, Snohomish County adopted Emergency Ordinance No. 03-145 establishing a moratorium for permits for wastewater treatment facilities. In response to Ordinance 03-145, King County and Renton filed a new petition for review alleging that Snohomish County’s moratorium also violated the essential public facilities provisions of the GMA. The new case was titled *King County II*.

On February 11, 2004, Snohomish County adopted two ordinances: Ordinance No. 04-020 (which repealed the moratorium created by Ordinance No. 03-145) and Ordinance No. 04-019 (which adopted new essential public facilities regulations in order to achieve compliance with the Board’s direction in the FDO.) King County and Renton filed another petition for review, creating a new case titled *King County III*.

This Board’s May 26, 2004 Order addresses all three cases: with respect to *King County I*, the Board finds that Snohomish County’s noncompliance was not cured by Ordinance No. 04-019. Snohomish County has been ordered to take further action to achieve compliance with the essential public facilities goals and requirements of the Growth Management Act by September 22, 2004. As to the *King County II* case, the Board agrees with Snohomish County that the moratorium is no longer in effect and therefore challenges to Ordinance No. 03-145 are moot. Nevertheless the Board agrees with King County that it is appropriate for the Board to clarify that, as a matter of law, moratoria may not preclude essential public facilities.

Finally, the Board dismisses the *King County III* case because it has already been determined in the compliance phase of the *King County I* case that Ordinance No. 04-019 is noncompliant with the GMA.

II. PREFATORY NOTE

As indicated in the caption, this Order addresses three different, but related cases before the Board. Section III lists a detailed procedural history of the compliance phase of the *King County I* case, and directs readers to more complete histories of all three cases in Appendix A. Section IV lists Findings of Fact for all three cases. Sections V through VII address the legal issues in the *King County I* case, while Section VIII sets forth the Board's conclusions regarding the *King County II* and *King County III* cases. Section IX lists the Board's Order directing Snohomish County to take further action relative to the *King County I* case and dismissing with prejudice the *King County II* and *King County III* cases.

III. PROCEDURAL HISTORY

A. Compliance Hearing Phase of *King County I*

On February 18, 2004, the Board received "Snohomish County's Statement of Actions Taken to Comply" (the **SATC**).

On February 23, 2004, the Board received "King County's Response to Snohomish County's Statement of Actions Taken to Comply with the Board's October 13, 2003 Final Decision and Order" (the **King Response**) and "Brief of City of Renton in Response to Snohomish County's Statement of Actions Taken to Comply" (the **Renton Response**); "Motion of *Amicus Curiae* Puget Sound Water Quality Defense Fund to Submit Response to Snohomish County's Statement of Actions Taken to Comply" (the **PSWQDF Motion**) together with a proposed "Compliance Brief of *Amicus Curiae* Puget Sound Water Quality Defense Fund" (the **PSWQDF Brief**).

On February 26, 2004, the Board issued "Order on Motion by SKEA to Intervene and Order on Motion by PSWQDF to File Response Brief" in which the Board granted the SKEA Motion to Intervene and invited the parties to present argument at the compliance hearing on the PSWQDF Motion. On this same date, the Board received "Snohomish County's Objection to Motion of *Amicus Curiae* Puget Sound Water Quality Defense Fund to Submit Response to Snohomish County's Statement of Actions Taken to Comply."

On February 27, 2004, the Board received "Snohomish County's Reply Brief for Compliance Hearing," (the **Snohomish County Reply**) "Memo of SKEA regarding Snohomish County's SATC" (the **SKEA Memo**), and "Snohomish County's Motion for Reconsideration of Order on Motion by SKEA to Intervene."

On March 1, 2004, beginning at 10:00 a.m., the Board conducted the Compliance Hearing in this matter in the Training Center adjacent to the Board's office at 900 Fourth Avenue, Seattle. Present for the Board were Edward G. McGuire and Joseph W. Tovar, presiding officer. The parties were represented as follows: for King County were J.

03-3-0011 Order Finding Continuing Noncompliance and Invalidity

03-3-0025 Order of Dismissal

04-3-0012 Order of Dismissal

Page 3

Tayloe Washburn and Verna P. Bromley; for the City of Renton was Lawrence J. Warren; for Snohomish County were Millie M. Judge and John R. Moffatt; for SKEA was David Bricklin; and for PSWQDF was Richard Gendler. As a preliminary matter, counsel for Snohomish County submitted “Snohomish County’s Corrected Reply Brief for Compliance Hearing” (the **Snohomish County Corrected Reply**). The parties presented brief oral argument with respect to two matters: (1) the PSWQDF motion for leave to submit a pre-compliance hearing brief and (2) the Snohomish County motion for the Board to reconsider the briefing limitations listed in the February 23, 2004 order regarding SKEA’s intervention. The presiding officer orally granted both motions with the proviso that opposing counsel had until 4:00 p.m. on March 5, 2004 to file an optional post-compliance hearing brief addressed to either the PSWQDF brief or the SKEA brief. With no further preliminary matters, the Board then heard oral argument from Snohomish County, SKEA, King County, and Renton. Court reporting services were provided by Brenda Steinman of Mills and Lessard, Seattle. A copy of the Transcript of the compliance hearing was ordered (the **CH Transcript**).

As of the close of business on March 5, 2004, the Board had received no post-compliance hearing pleadings authorized by the presiding officer at the compliance hearing.

On April 20, 2004, the Board received “Snohomish County’s Update to Statement of Actions Taken to Comply” (the **Snohomish Update**).

B. Procedural Histories of *King County I*, *King County II*, and *King County III*

A complete procedural history of all three cases appears in Appendix A.

IV. FINDINGS OF FACT

1. The FDO provided in part:

Having reviewed and considered the above-referenced documents, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

- 1) Snohomish County’s adoption of Ordinance No. 03-006 **does not comply** with the requirements of RCW 36.70A.200) and **was not guided by** RCW 36.70A.020(7) and (12); the County’s action was **clearly erroneous**. Furthermore, because the continued validity of Ordinance No. 03-006 would substantially interfere with the fulfillment of RCW 36.70A.020 (7) and (12), the Board enters a **determination of invalidity** for Ordinance No. 03-006.
- 2) The Board establishes **4:00 p.m. on Wednesday, January 14, 2004** as the deadline for Snohomish County to take appropriate legislative action to bring the EPF provisions of its development regulations into

03-3-0011 Order Finding Continuing Noncompliance and Invalidity

03-3-0025 Order of Dismissal

04-3-0012 Order of Dismissal

Page 4

compliance with the goals and requirements of the Growth Management Act as interpreted in this order.

- 3) By **Monday, January 28, 2004, at 4:00 p.m.**, Snohomish County shall submit to the Board, with a copy to the other parties, an original and four copies of its Statement of Actions Taken to Comply (the **SATC**). Attached to the SATC shall be a copy of any legislative action taken in response to this Order.
- 4) By **Monday, February 2, 2004, at 4:00 p.m.**, Petitioner King County and Intervenor City of Renton and City of Edmonds shall submit to the Board, with a copy to Snohomish County, an original and four copies of any Response to the SATC.
- 5) By **Monday, February 9, 2004, at 4:00 p.m.**, Snohomish County shall submit to the Board, with a copy to the other parties, an original and four copies of any Reply to the Responses to the SATC.
- 6) The Board schedules a **Compliance Hearing** in this matter for **10:00 a.m. on Thursday, February 12, 2004**. The Compliance Hearing will be held in the conference room adjacent to the Board's office at Suite 2470, Bank of California Building, 900 Fourth Avenue, in Seattle.

FDO, at 19-20.

2. Snohomish County adopted Ordinance No. 03-145 on October 22, 2003. Certified copy of Ordinance No. 03-145.
3. The title caption of Ordinance No. 03-145 reads: ADOPTING A MORATORIUM ON ACCEPTANCE OF APPLICATIONS FOR PERMITS FOR CERTAIN WASTEWATER TREATMENT FACILITIES AND WASTEWATER CONVEYANCE SYSTEMS, AND AN INTERIM ZONING ORDINANCE AND OFFICIAL CONTROL RELATING TO SUCH FACILITIES; DECLARING AN EMERGENCY; AMENDING CHAPTER 30.22 SCC; AND SETTING A HEARING DATE. *Id.*
4. Section E of Ordinance No. 03-145 provides: "In response to the Board's order [the FDO] it is necessary and desirable to study and consider a range of alternatives, consistent with the County's countywide planning policies, GMA comprehensive plan, and development regulations, to be developed by the Department of Planning and Development Services (PDS), reviewed by the Snohomish County Planning Commission, and considered by the County Council. *Id.*
5. Snohomish County adopted Ordinance No. 04-019 on February 11, 2004 "to respond to the FDO." SATC, Ex. A. *See also*, SATC, at 3, lines 6-8.

03-3-0011 Order Finding Continuing Noncompliance and Invalidity

03-3-0025 Order of Dismissal

04-3-0012 Order of Dismissal

Page 5

6. The title caption of Ordinance No. 04-019 reads: EMERGENCY ORDINANCE NO. 04-019 RELATING TO GROWTH MANAGEMENT; ADOPTING DEVELOPMENT REGULATIONS PROVIDING FOR IDENTIFICATION, DESIGNATION, SITING AND REGULATION OF ESSENTIAL PUBLIC FACILITIES; DECLARING AN EMERGENCY; AMENDING SECTIONS 30.22.020 AND 30.70.110 SCC; REPEALING CHAPTER 30.42D SCC; ADOPTING A NEW CHAPTER 30.42D SCC; AND SETTING A PUBLIC HEARING DATE. SATC, Ex. A.
7. Snohomish County adopted Ordinance No. 04-020 on February 11, 2004 “to respond to the FDO.” SATC, Ex. B. *See also*, SATC, at 3, lines 6-8.
8. The title caption of Ordinance No. 04-020 reads: EMERGENCY ORDINANCE NO. 04-020 REPEALING SECTIONS 1, 2, 3, 5, 6, AND 7 OF EMERGENCY ORDINANCE NO. 03-145 RELATING TO THE ADOPTION OF A MORATORIUM ON ACCEPTANCE OF APPLICATIONS FOR PERMITS FOR CERTAIN WASTEWATER TREATMENT FACILITIES AND WASTEWATER CONVEYANCE SYSTEMS, AND AN INTERIM ZONING ORDINANCE AND AN OFFICIAL CONTROL RELATING TO SUCH FACILITIES; AMENDING SECTION 30.22.130 SCC; DECLARING AN EMERGENCY AND SETTING A HEARING DATE. SATC, Ex. B.
9. On March 31, 2004, the Snohomish County Council conducted a public hearing on Emergency Ordinances Nos. 04-019 and 04-020, after which it adopted minor scrivener’s errors and kept these Ordinances in effect. Snohomish Update, at 1-2.

V. APPLICABLE LAW AND PLEADINGS OF THE PARTIES

A. Noncompliance, Invalidity and Sanctions

Once the Board finds a jurisdiction is not in compliance with the GMA and remands the matter back to the jurisdiction, the Board must specify the compliance period in its FDO. RCW 36.70A.300. The Act prescribes a limited period to achieve compliance; it provides in relevant part:

[In the FDO], [t]he board shall specify a reasonable time *not in excess of one hundred eighty days*, or such longer period as determined by the board in cases of unusual scope or complexity, within which the . . . city shall comply with the requirements of this chapter.

RCW 36.70A.300(3)(b) (emphasis supplied).

In the FDO, January 14, 2004 was established as the compliance date by which time Snohomish County was required to take legislative action to achieve compliance with the goals and requirements of the Act. By subsequent Board orders, the deadline for the

County to act was extended in order to allow the Superior Court to determine whether or not to issue a stay of the Board's proceedings. Second Order Granting Extension, at 2.

RCW 36.70A.330 provides, in relevant part:

- (1) After the time set for complying with the requirements of this chapter under RCW 36.70A.300(3)(b) has expired, or at an earlier time upon the motion of a . . . county or city subject to a determination of invalidity under RCW 36.70A.300 [now RCW 36.70A.302], the board shall set a hearing *for the purpose of determining whether the . . . city is in compliance with the requirements of this chapter.*
- (2) *The board shall conduct a hearing and issue a finding of compliance or noncompliance* with the requirements of this chapter and with any compliance schedule established by the board in its final order. . . .
- (3) If the board after a compliance hearing finds that the . . . county or city is not in compliance, *the board shall transmit its finding to the Governor.* The board *may* recommend to the Governor that the *sanctions* authorized by this chapter be imposed. *The board shall take into consideration the . . . county's or city's efforts* to meet its compliance schedule in making the decision to recommend sanctions to the Governor.
- . . .
- (5) The board shall schedule additional hearings as appropriate pursuant to subsections (1) and (2) of this section.

(Emphasis added.)

B. Burden of Proof in a Compliance Proceeding with Invalidity

The Board remanded the matter with direction to Snohomish County to take appropriate legislative action. Snohomish in its SATC points to Ordinance No. 04-019 as its action taken to comply with the FDO. Finding of Fact 5. Because the Board found that Snohomish County's prior action was not only noncompliant, but also invalid, Snohomish bears the burden of proof:

A county or city subject to a determination of invalidity made under RCW 36.70A.300 or 36.70A.302 has the burden of demonstrating that the ordinance or resolution it has enacted in response to the determination of invalidity will no longer substantially interfere with the fulfillment of the goals of this chapter under the standard of RCW 36.70A.302(1).

RCW 36.70A.320(4). (Emphasis added).

C. Permits and Essential Public Facilities Goals and Requirements of the Act

RCW 36.70A.020 provides in relevant part:

(7) Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.
...

(12) Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

RCW 36.70A.200 provides in relevant part:

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

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

In reviewing the above cited statutory provisions, and after considering the facts and arguments of the parties, the Board adopted the following holding in the Final Decision and Order:

... [N]o local government plan or regulation, including permit processes and conditions, may preclude the siting, expansion or operation of an essential public facility. Local plans and regulations may not render EPFs impossible or impracticable to site, expand, or operate, either by the outright exclusion of such uses, or by imposition of process requirements or substantive conditions that render the EPF impracticable. While there is no absolute time limit for how long an EPF permit review may take, an EPF permit process lacking provisions that assure reaching an ultimate decision may be found to be so unfair, untimely, and unpredictable as to substantively violate RCW 36.70A.020(7).

FDO, at 16.

C. Positions of the Parties and Board Analysis

Prefatory Note

In its SATC and Reply, Snohomish County attempts to carry its burden of proving that, as a result of adopting Ordinance No. 04-019, its EPF regulations are no longer noncompliant with RCW 36.70A.200 and no longer substantially interfere with the fulfillment of Goals 7 and 12. SKEA supports Snohomish County's position. King County, Renton, and PSWQDF argue to the contrary, making arguments that fall into three broad categories: (1) the Ordinance definitions of "local" and "state or regional" would enable the County to deny CUPs for certain "state or regional" EPFs; (2) the criteria used for the CUP are overly broad and vague and include criteria the Board has previously ruled impermissible; and (3) the "Type 2" process would create unpredictable delay for decisions on EPF permits. The parties' arguments and the Board's analysis are organized to answer these three essential questions.

1. *Does Ordinance No. 04-019 fail to comply with RCW 36.70A.200 and substantially interfere with fulfillment of Goals 7 and 12 because its definitions draw an inappropriate distinction between "local" EPFs and "state or regional" EPFs?*

a. Positions of the Parties

Snohomish County and SKEA

Snohomish County asserts that adoption of Ordinance No. 04-019 responds to the FDO by repealing Ordinance No. 03-006 and enacting a new chapter 30.42D relating to EPFs. SATC, at 3-4. The first key component of the new EPF regulations is "a dual track system for handling EPF applications, as required by the FDO, at pp. 14-16." SATC, at 4. One track sets forth the process and criteria for "local EPFs"¹ and a second track sets

¹The "local EPF" track is set forth at SCC 30.42D.080 which provides:

The hearing examiner may approve or approve with conditions, a conditional use permit for a local EPF only when the proposal meets all of the following criteria:

- (1) The proposal is consistent with the comprehensive plan;
- (2) The project sponsor has demonstrated a need for the project, as supported by an analysis of the projected service population, an inventory of existing and planned comparable facilities, and the projected demand for the type of facility proposed;
- (3) If applicable, the project would serve a significant share of the county's population, and the proposed site will reasonably serve the project's overall service population;
- (4) The sponsor has reasonably investigated alternative sites, as evidenced by a detailed explanation of site selection methodology;
- (5) The project is consistent with the sponsor's own long-range plans for facilities and operations;
- (6) The project will not result in a disproportionate burden on a particular geographic area;
- (7) The sponsor has provided a meaningful opportunity for public participation in the siting decision and development of mitigation measures that is appropriate in light of the project's scope, applicable requirements of the county code, and state or federal law;
- (8) The proposal complies with applicable requirements of Chapter 30.42C SCC and all other applicable provisions of the county code;

forth the process and criteria for “regional, state or federal EPFs.”² *Id.* Snohomish County explains the rationale for this distinction and its effect:

Where the EPF application does not fit the definition of a regional, state or federal EPF, it is treated as a “local EPF,” and the County retains the authority to consider many relevant factors in using a CUP for an EPF proposal, including whether a proper siting decision has been made. This is appropriate as provided by the Board’s decision in the FDO at p. 15. There the Board stated: “When a local jurisdiction is contemplating its own EPF, public or private, it is free to establish a non-preclusive siting process with any criteria it deems relevant.”

SATC, at 5-6, quoting FDO, at 15.

A second key component of Ordinance No. 04-019 is how it defines “local” as opposed to “regional, state or federal” facilities. The definition of “regional EPF” provides:

A “regional, state or federal EPF” means an essential public facility identified and designated by the director as a facility that is required to be

(9) The project site meets the facility's minimum physical site requirements, including projected expansion needs. Site requirements shall be determined by the minimum size of the facility, setbacks, access, support facilities, topography, geology, and on-site mitigation needs;

(10) The proposal, as conditioned, adequately mitigates adverse impacts to life, limb, property, the environment, public health and safety, transportation systems, economic development and other identified impacts;

(11) The proposal incorporates specific features to ensure it responds appropriately to the existing or intended character, appearance, quality of development, and physical characteristics of the site and surrounding property; and

(12) The project sponsor has proposed mitigation measures that provide substantial assistance to displaced or impacted businesses in relocating within the county.

² The track for “regional, state or federal” EPFs is set forth at SCC 30.42D.090 which provides:

The hearing examiner must approve or approve with conditions, a conditional use permit for a regional, state or federal EPF in accordance with the following criteria:

(1) The sponsor has provided a meaningful opportunity for public participation in the siting decision and development of mitigation measures that is appropriate in light of the project's scope, applicable requirements of the county code, and state or federal law;

(2) The proposal complies with applicable requirements of Chapter 30.42C SCC and all other applicable provisions of the county code;

(3) The project site meets the facility's minimum physical site requirements, including projected expansion needs. Site requirements shall be determined by the minimum size of the facility, setbacks, access, support facilities, topography, geology, and on-site mitigation needs;

(4) The proposal, as conditioned, adequately mitigates adverse impacts to life, limb, property, the environment, public health and safety, transportation systems, economic development and other identified impacts;

(5) The proposal incorporates specific features to ensure it responds appropriately to the existing or intended character, appearance, quality of development, and physical characteristics of the site and surrounding property; and

(6) The project sponsor has proposed mitigation measures that provide substantial assistance to displaced or impacted businesses in relocating within Snohomish County.

03-3-0011 Order Finding Continuing Noncompliance and Invalidity

03-3-0025 Order of Dismissal

04-3-0012 Order of Dismissal

Page 10

built within six years by a regional authority as defined by this section or by a state or federal agency where state or federal law preempts the exercise of local regulatory authority over facility siting.

30.42D.010(2)(b) SCC

The definition of “regional authority” provides:

A “regional authority” under this chapter means Snohomish County acting alone or jointly in combination with a public agency through an interlocal agreement approved by the legislative body of each participating agency pursuant to chapter 39.34 RCW and Snohomish County is a voting member of any legal or administrative entity created thereunder.

30.42D.010(2)(c) SCC

In explaining its rationale for limiting “regional authority” to entities with which it has an interlocal agreement and in which it has a voting right, Snohomish states:

This is in keeping with the Court’s decision in *Des Moines*, . . . where the court recognized the GMA’s purpose of instituting a “bottom-up” system of growth management, and is intended to ensure that citizens, communities and the private sector cooperate and coordinate with one another in comprehensive land use planning. *Id.* at 8. As the Court of Appeals recognized, “Although GMA does not authorize land use planning by ‘balkanized fiefdoms’ neither does it allow regional planners to steamroll local comprehensive plans in favor of regional goals. *Des Moines, supra*, at 9.”

SATC, at 6-7, citing portions of *City of Des Moines v. Puget Sound Regional Council*, 97 Wn.App.920, 988 P.2d 933 (1999).

Intervenor SKEA argues that Ordinance No. 04-019 complies with the GMA, as construed in prior case law:

In the EPF context, the distinction [between local EPFs and regional/state/federal EPFs] relates to the host jurisdiction’s ability to reject a proposed site for an EPF. With regard to regional (and state) EPF’s, the host jurisdiction has no authority to reject the site for the EPF selected by the regional (or state) government. The host jurisdiction can impose reasonable mitigation but cannot directly or indirectly thwart the regional or state decision. *Des Moines v. PSRC*, 97 Wn.App.920 (1999).

SKEA Memo, at 3.

SKEA argues that “nothing in the Act suggests that EPF siting decisions made by an individual local government can be forced upon another co-equal local government (so long as the targeted host local government is making reasonable accommodation for EPFs somewhere in the host jurisdiction).” SKEA Memo, at 5. SKEA insists that for King County to compel any host jurisdiction to accept a King County-proposed EPF as a regional facility, “then it is incumbent on King County to take its proposal to the PSRC [Puget Sound Regional Council] and obtain regional approval of the proposal . . . PSRC enjoys the institutional authority to make a truly regional decision in this context.” SKEA Memo, at 8.

King County, Renton, and PSWQDF

King County argues that through the definitions adopted in Ordinance No. 04-019 Snohomish County attempts to impermissibly reserve authority to limit or preclude locally disfavored EPFs. King County Response, at 8. King County argues that these definitions are “antithetical” to the clear and simple mandate in the FDO, that “when the siting decision is made by a state or regional agency, the role of the host jurisdiction is much more limited.” King County Response, at 9, quoting FDO, at 15. King County complains:

By requiring Snohomish County’s voluntary consent through an interlocal agreement, the new EPF Ordinance gives the County unfettered veto power over siting of regional EPFs within its borders and makes many regional EPFs, such as Brightwater, subject to many of the same criteria earlier found by the Board in the FDO to “revisit” or “second guess” a siting decision that has been made by a regional or state agency. If it does not like a proposed EPF, it simply would refuse to enter into an interlocal agreement for its construction. Presumably, if the project sponsor pressed ahead, Snohomish County would then classify the project as a local EPF that is subject to denial through the CUP Process. There is no authority in the GMA, the FDO, or other Board decisions to support this absurd result.

Id., footnotes omitted.

b. Board Analysis

The Board agrees with King County and Renton that Ordinance No. 04-019 fails to comply with RCW 36.70A.200(5) first and foremost because the Ordinance’s definition of “Regional Authority” [Sec. 30.42D.010(2)(b)] artificially and impermissibly subjects certain regional EPFs (*i.e.*, those sponsored by entities with which Snohomish County has no inter-local agreement) to preclusive criteria and process. Snohomish County’s reliance on Chapter 39.34 RCW, the Interlocal Cooperation Act, to define “regional authorities” is misplaced. While Snohomish and SKEA point to many good works done under the auspices of that Act, participation by any entity in an Interlocal Agreement is voluntary. This is clearly stated in the purpose section that provides:

It is the purpose of this chapter to *permit* local governmental units to make the most efficient use of their powers by *enabling them* to cooperate with other localities on a basis of mutual advantage and thereby to provide services and facilities in a manner pursuant to forms of governmental organization that will accord best with geographic, economic, population and other factors influencing the needs and development of local communities.

RCW 39.34.010 (emphasis supplied).

Snohomish County has a duty not to adopt regulations that preclude EPFs. RCW 36.70A.200(5). The Board has previously held that “local governments lack authority to deny a development permit for EPFs that are sponsored by state or regional entities.” FDO, at 16. Snohomish County acknowledges it has a duty to approve a “regional, state or federal EPF.” SATC, at 9. However, to allow a local government to define “regional entities” as Ordinance No. 04-019 does, (*i.e.*, acceding to the regional authority of only those entities that the local government voluntarily recognizes through an interlocal agreement) would vitiate the GMA’s imperative to accommodate these needed facilities.

Signing an interlocal agreement under Chapter 39.34 RCW is a voluntary local government exercise. Accommodating a regional EPF under Chapter 36.70A RCW is not. The Board agrees with King County and Renton that Snohomish County has failed to carry its burden of proof by demonstrating that its regulations, with respect to regional EPFs, comply with the GMA and the FDO.

2. *Does Ordinance No. 04-019 fail to comply with RCW 36.70A.200 and substantially interfere with fulfillment of Goals 7 and 12 because it includes CUP criteria that are overly broad and vague and include criteria the Board has previously ruled impermissible?*

a. Positions of the Parties

Snohomish County and SKEA

Snohomish County contends that Ordinance No. 04-019 is significantly different from the invalidated Ordinance No. 03-006 because the CUP criteria for EPFs are not those of Chapter 30.42C (the CUP) but rather those of Chapter 30.42D. SATC, at 8. With regard to local EPFs, the County states:

Section .080 provides decision criteria to be considered by the hearing examiner when deciding whether to approve a **local** EPF (“the hearing examiner **may** approve or disapprove” The criteria against which a local EPF is considered include both the appropriateness of the site and whether the proposal provides appropriate mitigation for impacts

03-3-0011 Order Finding Continuing Noncompliance and Invalidity

03-3-0025 Order of Dismissal

04-3-0012 Order of Dismissal

Page 13

associated with construction and operation of the EPF. The Hearing Examiner has discretion to impose conditions and make certain decisions, with appeal to the County Council. This process comports with the Board's decision in the FDO at p. 15.

SATC, at 8-9, Emphasis in original.

With respect to "regional, state and federal EPFs" the County points to Chapter 30.42D.090. While this section authorizes the Examiner to set conditions, Snohomish argues that this meets the FDO's direction because: "The hearing examiner **must approve or approve with conditions**, a conditional use permit for a regional, state or federal EPF in accordance with the following conditions" SATC, at 9 (Emphasis in original).

In replying to Petitioners' arguments, Snohomish County points out that the FDO did not declare any of the County's prior criteria to be invalid under GMA:

EPFs that are sited by a regional or state agency are distinct from those that are 'sited by' a local jurisdiction or a private organization or individual. When a local jurisdiction is contemplating its own EPF, public or private, *it is free to establish a non-preclusive siting process with any criteria it deems relevant. . . .*" Accordingly, Snohomish County was free to adopt the criteria it chose under SCC 30.42D.080 for local EPFs, as long as those criteria do not "preclude" the siting of the facility.

Snohomish Corrected Reply, at 6, quoting FDO, at 15, emphasis by County.

SKEA contends that the criteria for local EPFs are not unduly vague. SKEA points out that:

. . . reasonable minds can differ as to which location is 'best'" . . . "horse-trading" may occur which spares the best site [from selection] . . . The permitting system [in Ordinance No. 04-019] provides a check to ensure that important siting decisions are based on legitimate technical information, not political horse-trading.

SKEA Memo, at 10-11.

King County, Renton, and PSWQDF

King County refutes the Snohomish County's characterization of the local EPF criteria as merely to be "considered" by the Hearing Examiner, who "**may** approve or disapprove." King County Response, at 10, quoting portions of SATC, at 8, lines 18-19. Emphasis in SATC. Rather, King County argues:

[U]nder [SCC] 30.42D.080 what is deemed a local EPF can be approved with conditions “only when the proposal meets all of the following criteria.” Thus, the spin reflected in the SATC’s characterization belies the fact that the Examiner is obligated to deny any EPF that is defined under the Revised Ordinance as a “local EPF” . . . In summary, the County’s SATC papers over and significantly mischaracterizes the so-called “key differences” in the Revised Ordinance CUP Criteria.

King County Response, at 10-11. Emphasis in original.

Renton asserts that the EPF Conditional Use Permit process that the Ordinance sets forth in SCC 30.42D.080 cannot be reconciled with the prohibition against preclusion found in RCW 36.70A.200(5). Renton suggests that a “common sense reading of the decision criteria under SCC 30.42D.080 would indicate that the Hearing Examiner has the authority to approve the CUP for a local EPF only if all the criteria are met.” Renton Response, at 5, emphasis in original. The City points out that the Hearing Examiner’s express authority to deny the CUP is found in SCC 30.72.060(3) which provides: “The Hearing Examiner may . . . deny . . .” and argues that these two code sections, when read together, plainly authorize, if not require, the denial of a permit for an EPF, something that RCW 36.780A.200(5) expressly forbids. Renton Response, at 6.

Renton claims that several of the CUP criteria are so vague and overbroad that they leave considerable room for denial of an EPF. The City points to subsection (3) in which the phrase “significant share of the county’s population” appears but is not defined. Renton Response, at 10. The City also argues that this subsection requires the County to second guess the experts regarding site selection because the Examiner must consider whether “the proposed site will reasonably serve the projects overall service population.” *Id.* The City argues that SCC 30.42D.080 (4) raises similar ambiguities and invites intrusion of the Hearing Examiner’s unbridled opinions concerning what constitutes a “reasonable investigation of alternative sites,” what constitutes a “disproportionate burden” and what are adequate methodologies for making those determinations? Renton Response, at 11. In addition to vagueness of the criteria, the City complains that, under SCC 30.42D.100 (1), the Examiner has the authority to increase requirements in the County’s adopted standards, criteria or policies. *Id.*

Renton also argues that the Board should find noncompliant several other EPF CUP criteria that the Board previously identified as noncompliant in the FDO. The City contends that Subsection 3 of SCC 30.42D.080, which requires that the project “serve a significant share of the county’s population and the proposed site will reasonably serve the project’s overall service population” is simply a way of saying “other jurisdictions have not taken an equitable share of such facilities.” Renton Response, at 12. The City argues that such a criterion was expressly rejected by the Board in a 1996 case.³ Further,

³ Renton cites the Board’s first EPF case *Hapsmith v. City of Auburn*, CPSGMHB Case No. 95-3-0075c, FDO, May 10, 1996: “The City cannot utilize this policy to reject the siting of an essential public facility

Renton points to SCC 30.42D.080(6) which requires that the EPF “. . . not result in a disproportionate burden on a particular geographic area” and complains that this language is almost “word-for-word” from the criteria in the rejected ordinance. *Id.* King County agrees with Renton that the “Decisional Criteria for Local Essential Public Facilities” establishes many of the same criteria that the Board has already struck down. King County Response, at 9.

b. Board Analysis

As SKEA pointed out, it was unclear from the briefing whether King County and Renton allege that the EPF criteria are vague and over-reaching when applied to a local EPF as opposed to a regional EPF. SKEA Memo, at 10. As the Board noted *supra*, Ordinance No. 04-109 violates RCW 36.70A.200 by enabling Snohomish County to classify certain regional EPFs as local EPFs by dint of the lack of an inter-local agreement. Because the focus of much of the Petitioners’ pleadings was the regional EPF, the Board construes their objections to the criteria to attack the Ordinance’s treatment of regional, rather than the local, EPFs.

The Board agrees with Snohomish County that the twelve criteria for local EPFs (listed at SCC 30.42D.080) and the prospect of denial when these criteria are not satisfied, are appropriate when applied to local EPF applications. Likewise, the Board finds that the additional criteria required for a conditional use permit (SCC 30.42C.100) are within the discretion that RCW 36.70A.200 allows for local EPF applications. The Board does not read any of these criteria, on their face, to be so vague or over-reaching as to render the siting of local EPFs impracticable. The Board finds that these criteria, as applied to local EPFs, comply with the GMA as interpreted by the Board in the FDO.

With respect to “regional” EPFs however, the Board finds that a number of the criteria set forth at SCC 30.42D.090 and in the conditional use permit provisions of SCC 30.42C.100 are problematic. Notwithstanding the affirmative preamble “The Hearing examiner must approve or approve with conditions . . .” the Board finds that criteria (1) and (2) of .090 impermissibly intrude upon the prerogatives and duties of the sponsors of a regional EPF. For example, criterion 1 presumes to judge whether or not the sponsor has “provided a meaningful opportunity for public participation in the siting decisions.” Snohomish County is free to establish its own notice and public review procedures (within limits) for regional, state or federal EPF applications once they are made; however, it may not second guess the rationale, justifications, methods or procedures by which such a sponsor develops the proposal that it submits for the County’s permit review.

Criterion 2 of 30.42D.090 requires that the regional EPF “complies with applicable requirements of Chapter 30.42C SCC.” Turning to that section, the Board sees at 30.42C.100(1) the problematic language emphasized in the following:

on the grounds that other jurisdictions have not taken an equitable share of such facilities.” *Hapsmith*, FDO, at 41.

03-3-0011 Order Finding Continuing Noncompliance and Invalidity

03-3-0025 Order of Dismissal

04-3-0012 Order of Dismissal

Page 16

. . . the hearing examiner may approve, approve with conditions, or **deny** a conditional use permit only **when all of the following criteria are met:**

- (a) The proposal is **consistent with the comprehensive plan;**
- (b) The proposal complies with applicable requirements of this title;
- (c) The proposal will **not be materially detrimental to uses or property in the immediate vicinity;** . . .

Emphasis added.

The Board acknowledges Snohomish’s position that this section of the Code was not amended by the Ordinance at bar. Nevertheless, Ordinance No. 04-019 creates “as applied” GMA noncompliance - by its explicit terms, it requires regional, state or federal EPFs to get a CUP and therefore subjects them to the criteria at 30.42C.100(1). The Board finds that the bold portions cited above violate RCW 36.70A.200. As discussed, in the FDO and *supra*, a local government may not **deny** a regional, state or federal EPF, nor may it include conditions that make it impracticable for the sponsor to build the project with the means at hand. King County correctly argues that many regional EPFs, due their scale and very nature, will inevitably be detrimental to some degree to surrounding uses; the Board finds therefore that the absolute regulatory requirement of 30.42C.100(1)(c) that a regional EPF not be materially detrimental to its surroundings does not comply with RCW 36.70A.200(5). The Board also agrees with King County that criterion (a) requiring “compatibility with the comprehensive plan” is problematic. If there is a lack of compatibility between a local plan and a regional EPF, the former must yield to the latter.

The Board finds that the other criteria listed at SCC 30.42C.090 and .100 are sufficiently clear that they are not impermissibly vague and over-reaching when applied to regional, state or federal EPFs. However, the Board finds that the defects identified *supra* must be deleted or otherwise corrected in order for the Board to find the County’s CUP process for regional EPFs compliant with the GMA as interpreted by the FDO and this Order.

3. *Does Ordinance No. 04-019 fail to be guided by and substantially interfere with the fulfillment of RCW 36.70A.020 (7) and (12) because the “Type 2” process would create unpredictable delay for decisions on EPF permits?*

a. Positions of the Parties

Snohomish County and SKEA

In response to FDO discussion about timeliness and predictability in the permit process, the SATC points to Section 6 of the Ordinance. As adopted, SCC 30.70.110⁴ deleted the

⁴ SCC 30.70.110 provides:

exception for EPFs from the 120-day time period for issuing a final decision on permit applications. SATC, at 9.

King County, Renton, and PSWQDF

Renton focuses this argument on subsection (8) of SCC 30.42D.080 that incorporates all “applicable” provisions of SCC 30.42C that is titled “Conditional Use Permits.”⁵ The

-
- (1) Notice of final decision on a project permit application shall issue within 120 days from when the permit application is determined to be complete, unless otherwise provided by this section or state law.
 - (2) In determining the number of days that have elapsed after an application is complete, the following periods shall be excluded:
 - (a) Any period during which the county asks the applicant to correct plans, perform required studies, or provide additional required information. The period shall be calculated from the date the county mails notification to the applicant of the need for additional information until the date the county determines whether the additional information satisfies the request for information, or 14 days after the applicant supplies the information to the county, whichever is earlier. If the information submitted by the applicant under this subsection is insufficient, the county shall mail notice to the applicant of the deficiencies and the provisions of this subsection shall apply as if a new request for information had been made;
 - (b) Any period during which an environmental impact statement is being prepared;
 - (c) A period, not to exceed 30 calendar days, during which a code interpretation is processing in conjunction with an underlying permit application pursuant to chapter 30.83 SCC
 - (d) The period specified for administrative appeals of project permits;
 - (e) Any period during which processing of an application is suspended pursuant to SCC 30.70.045(1)(b); and
 - (f) Any period of time mutually agreed upon by the applicant and the county.
 - (3) The time periods established by this section shall not apply to a project permit application:
 - (a) That requires an amendment to the comprehensive plan or a development regulation in order to obtain approval;
 - (b) That requires approval of a new fully contained community as provided in RCW 36.70A.350, a master planned resort as provided in RCW 36.70A.360;
 - (c) That is substantially revised by the applicant, in which case a new 120-day time period shall start from the date at which the revised project application is determined to be complete;
 - (d) That requires approval of a development agreement by the county council;
 - (e) When the applicant consents to an extension; or
 - (f) During any period necessary for reconsideration of a hearing examiner's decision.
 - (4) Subject to all other requirements of this section, notice of final decision on an application for a boundary line adjustment shall be issued within 45 days after the application is determined complete.
 - (5) The county shall notify the applicant in writing if a notice of final decision on the project has not been made within the time limits specified in this section. The notice shall include a statement of reasons why the time limits have not been met and an estimated date of issuance of a notice of final decision.
 - (6) Failure of the county to make a final decision within the timelines specified by this chapter shall not create liability for damages.

⁵ SCC 30.42C regarding Conditional Use Permits provides in relevant part:

30.42.C.010 Purpose and applicability. The purpose of this chapter is to set forth the procedure and decision criteria for conditional use permit applications. A conditional use permit is the mechanism by which the county may gather input through an open record hearing and place special conditions on the use or development of land. The provisions of this chapter apply to all conditional use permit applications except where chapter 30.44 SCC applies.

City concedes that SCC 30.70.110 removes the exemption of EPF permits from the 120-day deadline, but complains that “there are twelve periods of time that toll the running of the 120-day deadline. Several of these tolling periods create unpredictability and delay in violation of RCW 36.70A.020[7].” Renton Response, at 7. The City then enumerates the “tolling” periods involved in the various subsections of SCC 30.70.11 and the time frames involved in the administrative appeals process for “Type 2” processes found in SCC 30.72. *Id.* Renton provides a table summarizing the steps involved, and argues:

Some of the time periods in step #1 and the time periods in steps 6-11 are not included in the 120-day cap. Because these time periods are not part of the 120-day computation, the unending loop has not gone away. Moreover, even if the county did not toll the 120 days for administrative appeals, Ordinance 04-019 has a catch-all provision that allows the county

30.42C.020 Conditional use permit procedure. The hearing examiner may grant conditional use permits under the circumstances set forth in this chapter. The approval process is a Type 2 process described in chapter 30.72 SCC. Applications shall be made according to the submittal requirements checklist provided by the department pursuant to SCC 30.70.030.

30.42C.100 Decision criteria – conditional use permit.

- (1) The hearing examiner may approve, approve with conditions, or deny a conditional use permit only when all the following criteria are met:
 - (a) The proposal is consistent with the comprehensive plan;
 - (b) The proposal complies with applicable requirements of this title;
 - (c) The proposal will not be materially detrimental to uses or property in the immediate vicinity; and
 - (d) The proposal is compatible with and incorporates specific features, conditions, or revisions that ensure it responds appropriately to the existing or intended character, appearance, quality of development, and physical characteristics of the site and surrounding property.
- (2) As a condition of approval, the hearing examiner may:
 - (a) Increase requirements in the standards, criteria, or policies established by this title;
 - (b) Stipulate the exact location as a means of minimizing hazards to life, limb, property damage, erosion, landslides, or traffic;
 - (c) Require structural features or equipment essential to serve the same purpose set forth in 30.42C.100(2)(b);
 - (d) Impose conditions similar to those set forth in items 30.42C.100(2)(b) and 30.42C.100(2)(c) as may be deemed necessary to establish parity with uses permitted in the same zone in their freedom from nuisance generating features in matters of noise, odors, air pollution, wastes, vibration, traffic, physical hazards, and similar matters. The hearing examiner may not in connection with action on a conditional use permit, reduce the requirements specified by this title as pertaining to any use nor otherwise reduce the requirements of this title in matters for which a variance is the remedy provided;
 - (e) Assure that the degree of compatibility with the purpose of this title shall be maintained with respect to the particular use on the particular site and in consideration of other existing and potential uses, within the general area in which the use is proposed to be located;
 - (f) Recognize and compensate for variations and degree of technological processes and equipment as related to the factors of noise, smoke, dust, fumes, vibration, odors, and hazard or public need;
 - (g) Require the posting of construction and maintenance bonds or other security sufficient to secure to the county the estimated cost of construction and/or installation and maintenance of required improvements; and
 - (h) Impose any requirement that will protect the public health, safety, and welfare.

03-3-0011 Order Finding Continuing Noncompliance and Invalidity

03-3-0025 Order of Dismissal

04-3-0012 Order of Dismissal

to exceed the 120-day cap. SCC 30.70.110 (5). There are no standards imposed on such an extension.

Renton Response, at 9.

b. Board Analysis

As noted, *supra*, with respect to its definitions and certain permit criteria, Snohomish County has failed to carry its burden of proving that, by the adoption of Ordinance No.04-019, it has achieved compliance with the GMA as interpreted in the FDO. The Board therefore need not and does not reach the question of whether the Type 2 process would create unpredictable delay for decisions on EPF permits.

VI. CONCLUSIONS OF LAW

Based on the analysis in Section V *supra*, the Board concludes that Snohomish County has failed to carry its burden of proof pursuant to RCW 36.70A.320(4) and therefore continues not to comply with the goals and requirements of the GMA, specifically RCW 36.70A.020 (7) and (12) and RCW 36.70A.200, respectively. Therefore, **the Board will enter a Finding of Continuing Noncompliance and Continuing Invalidity**. The Board will give Snohomish County until **September 22, 2004** to achieve compliance with the GMA by taking appropriate legislative action consistent with the GMA as interpreted in this Order and the FDO.

These findings shall be transmitted to the Governor pursuant to RCW 36.70A.330(3). Because the Board presumes that Snohomish County will move promptly to correct the deficiencies identified in Ordinance No. 04-019, no recommendation will be made at this time that the Governor consider the imposition of sanctions. If no County action is taken by the deadline date, the Board will revisit the question of sanctions at the Second Compliance Hearing.

VII. NOTICE OF SECOND COMPLIANCE HEARING

The Board has concluded that Snohomish County Ordinance No. 04-019 does not comply with the goals and requirements of the GMA. Consequently, the Board will remand this ordinance to the County with direction to take appropriate legislative action to achieve compliance with the GMA as interpreted in this Order and the FDO.

Notice is hereby given of a **Second Compliance Hearing** in this matter for **10:00 a.m.** on **Thursday, October 21, 2004**. The Second Compliance Hearing will be held in the conference room adjacent to the Board's office at Suite 2470, Bank of California Center, 900 Fourth Avenue, in Seattle. The Board will issue a schedule for Snohomish County to submit a Second Statement of Actions Taken to Comply (the **Second SATC**) and for the parties to the case to submit pre-compliance hearing pleadings.

03-3-0011 Order Finding Continuing Noncompliance and Invalidity

03-3-0025 Order of Dismissal

04-3-0012 Order of Dismissal

Page 20

VIII. ORDER -DISPOSITION OF CASES NOS. 03-3-0025 AND 04-3-0012

A. CPSGMHB CASE NO. 03-3-0025 – King County II

The Board agrees with Snohomish County that the Board has dismissed cases based on mootness. *See Gawenka v. Bremerton*, CPSGMHB Case No. 00-3-0011; *Morris, et al. v. City of Lake Forest Park*, CPSGMHB Case No. 97-3-0029c; *Martin P. Hayes v. Kitsap County*, CPSGMHB Case No. 95-3-0081c. Therefore, the Board finds that Snohomish County Ordinance No. 03-145, which was repealed by Snohomish County Ordinance No. 04-020, is **moot** and therefore the legal issues framed in CPSGMHB Case No. 03-3-0025 are also **moot**. The Board will therefore **dismiss with prejudice** CPSGMHB Case No. 03-3-0025.

However, the Board has also acknowledged the mootness doctrine’s flexibility for “matters of continuing and substantial public interest.” *McVittie v. Snohomish County*, CPSGMHB Case No. 99-03-0016c, citing *Orwick v. Seattle*, 103 Wn.2d 249 (1984). As noted *supra*, Ordinance No. 03-145 has been repealed and is therefore moot. Nevertheless, the Board notes that the legal question regarding moratoria posed in this case has been exhaustively briefed and concludes that to answer the question posed will serve “matters of continuing and substantial public interest.” The Board will do so.

The Board agrees with King County and Renton that the GMA prohibition against the preclusive effect of local government regulations on EPFs applies not only to “permanent regulations” adopted pursuant to RCW 36.70A.040 but also to “interim” regulations adopted pursuant to RCW 36.70A.390. Moreover, the Board rejects Snohomish County’s position that interim regulations adopted under RCW 36.70A.390 are entitled to the presumption of validity in situations where the specific subject matter of the interim regulation (*e.g.*, development regulations governing Essential Public Facilities) is *identical* to that of a development regulation previously found by the Board to be noncompliant and invalid.

Snohomish cites RCW 36.70A.320 for the proposition that “comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.” Snohomish reasons, therefore, that an interim regulation such as a moratorium is valid upon adoption, notwithstanding the fact that it would constitute an absolute, albeit time-limited, preclusion of an EPF. The problem with this reasoning is that it fails to recognize the more specific direction of RCW 36.70A.302(7)(a) that provides:

*If a determination of invalidity has been made and the county or city has enacted an ordinance or resolution amending the invalidated part or parts of the plan or regulation or establishing interim controls on development affected by the order of invalidity, **after a compliance hearing**, the board shall modify or rescind the determination of invalidity if it determines under the standard in subsection (1) of this section that the plan or*

03-3-0011 Order Finding Continuing Noncompliance and Invalidity

03-3-0025 Order of Dismissal

04-3-0012 Order of Dismissal

Page 21

regulation, as amended or made subject to such interim controls, will no longer substantially interfere with the fulfillment of the goals of this chapter.

Emphasis added.

A cardinal rule of statutory construction is that a more specific statutory provision controls over a general provision. Therefore, RCW 36.70A.320 concerning the presumption of validity controls in all circumstances **except** where, pursuant to the specific provisions of RCW 36.70A.302(7)(a), the Board has entered a determination of invalidity and the noncompliant city/county has adopted either “amendments” or “interim controls” dealing with the subject of the invalidated ordinance. In the latter instance, the subsequent local government action is **not** valid until after a compliance hearing and the Board subsequently determines that the “plan or regulation, as amended or made subject to such interim controls, will no longer substantially interfere with the fulfillment of the goals of this chapter.”

The Board’s reading on this point is a sound interpretation of the law. If moratoria adopted under RCW 36.70A.390 were immune from the operation of RCW 36.70A.302(7)(a), the consequence of a finding of noncompliance and invalidity could be so easily evaded as to render such findings meaningless. A noncompliant local government, upon receiving a finding of noncompliance/invalidity could simply re-adopt as an “interim” ordinance that which had just been found noncompliant and invalid, and enjoy the presumption of validity for the new action for up to the six-months that a new case would entail. This absurd outcome could be repeated *ad infinitum*, eviscerating the legislature’s intent in adopting RCW 36.70A.302(7)(a).

B. CPSGMHB CASE NO. 04-3-0012 – King County III

The local government enactment at issue in CPSGMHB Case No. 04-3-0012 is Snohomish County Ordinance No. 03-145. Because the Board has already addressed the GMA compliance of Ordinance No. 03-145 *supra*, and remanded it to Snohomish County for corrective action, the legal questions contained in CPSGMHB Case No. 04-3-0012 are **moot**. The Board therefore **dismisses this case with prejudice**. The prehearing conference scheduled for June 1, 2004 is **cancelled** and the schedule is **stricken**.

IX. ORDER – DISPOSITION OF CASE NO. 03-3-0011

Having reviewed and considered the above-referenced documents, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

- 1) Snohomish County’s adoption of Ordinance No. 04-019 **does not comply** with the requirements of RCW 36.70A.200 and **was not guided by** RCW 36.70A.020 (7) and (12); the County’s action was **clearly erroneous**. Furthermore, because the continued validity of Ordinance No. 04-019 would substantially interfere with the

03-3-0011 Order Finding Continuing Noncompliance and Invalidity

03-3-0025 Order of Dismissal

04-3-0012 Order of Dismissal

Page 22

fulfillment of RCW 36.70A.020 (7) and (12), the Board enters a **determination of invalidity** for Ordinance No. 04-019.

- 2) The Board establishes **4:00 p.m. on Wednesday, September 22, 2004** as the deadline for Snohomish County to take legislative action to bring the EPF development regulations into compliance with the goals and requirements of the Growth Management Act as interpreted in this order and the FDO.
- 3) By **Monday, October 4, 2004, at 4:00 p.m.**, Snohomish County shall submit to the Board, with a copy to the other parties, an original and four copies of its Second Statement of Actions Taken to Comply (the **Second SATC**) and an Index of the Record on Remand. Attached to the Second SATC shall be a copy of any legislative action taken in response to this Order.
- 4) By **Monday, October 11, 2004, at 4:00 p.m.**, Petitioner King County and Intervenor City of Renton and SKEA shall submit to the Board, with a copy to Snohomish County, an original and four copies of any Response to the Second SATC. The parties may attach to Response Briefs any exhibits from the Index of the Record on Remand.
- 5) By **Monday, October 18, 2004, at 4:00 p.m.**, Snohomish County shall submit to the Board, with a copy to the other parties, an original and four copies of any Reply to the Responses to the Second SATC. In its Reply, Snohomish County may attach exhibits from the Index of the Record of Remand.
- 6) The Board schedules a **Second Compliance Hearing** in this matter for **10:00 a.m. on Thursday, October 21, 2004**. The Second Compliance Hearing will be held in the conference room adjacent to the Board's office at Suite 2470, Bank of California Building, 900 Fourth Avenue, in Seattle.
- 7) A copy of this Order shall be transmitted to the Governor.

So ORDERED this 26th day of May 2004.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

Joseph W. Tovar, FAICP
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300. Any party wishing to file a motion for reconsideration of this final order must do so within ten days of service of this order. WAC 242-02-830(1). Any party wishing to appeal this final order to superior court must do so within thirty days of service of this order. WAC 242-02-898.

BOARD MEMBER McGUIRE'S CONCURRING OPINION

I agree with my colleague in all respects as to the findings and conclusions in this compliance proceeding. I write separately to comment on the question of whether the Type 2 permit process in Ordinance No. 04-019 achieves the “timeliness, fairness and predictability” required by RCW 36.70A.020(7). Had the Board reached this question, I would have found that it does not. While improvements have been made relative to the process found noncompliant in the FDO, the timeframes remain confusing and ambiguous. For example, Renton makes a good point that there are no clear standards to guide the exercise of discretion in extensions pursuant to SCC 30.70.110 (5). I encourage Snohomish County, in its further work on this matter, to establish clear standards for extensions and to seek ways to clarify and simplify the time periods involved.

Appendix A

CPSGMHB Case No. 03-3-0011 – King County I

On October 13, 2004, the Central Puget Sound Growth Management Hearings Board (the **Board**) issued its “Final Decision and Order” (the **FDO**) in CPSGMHB Case No. 03-3-0011.⁶

On October 23, 2004, the Board received “Snohomish County’s Motion for Reconsideration/Clarification” (the **Snohomish County Motion for Reconsideration**).

On October 29, 2003, the Board received “City of Renton’s Response to Snohomish County’s Motion for Reconsideration and Motion for Order of Invalidation concerning Moratorium by Snohomish County on Wastewater Treatment Facilities.

On October 30, 2003, the Board received “King County’s Response to Snohomish County’s Motion for Reconsideration and Clarification. Attached to the King County Response were three exhibits: Exhibit A is an unsigned copy of Snohomish County Emergency Ordinance No. 03-145 which is captioned “ADOPTING A MORATORIUM ON ACCEPTANCE OF APPLICATIONS FOR PERMITS FOR CERTAIN WASTEWATER TREATMENT FACILITIES AND WASTEWATER CONVEYANCE SYSTEMS, AND AN INTERIM ZONING ORDINANCE AND OFFICIAL CONTROL RELATING TO SUCH FACILITIES; DECLARING AN EMERGENCY; AMENDING CHAPTER 30.22 SCC; AND SETTING A HEARING DATE.” Exhibit B is a copy of the “Countywide Planning Policies for Snohomish County” last amended on April 11, 2000. Exhibit C is a conformed copy of an “Interlocal Agreement to Implement Common Siting Processes for Essential Public Facilities” signed by Snohomish County Executive Robert Drewel on December 12, 2001.

On November 4, 2003, the Board received “Snohomish County’s Reply in Opposition to King County and Renton’s Responses on County’s Motion for Reconsideration/Clarification.”

On November 10, 2003, the Board issued its “Order Re-opening Hearing on the Merits, Order Supplementing the Record, and Order Setting Date for Hearing” (**11/10/03 Order**). The 11/10/03 Order requested a certified copy of Emergency Ordinance No. 03-145 as a supplement to the record, and established December 1, 2003 as the date for the re-opened hearing on the merits to consider the motions of the parties.

On November 18, 2003, the Board received “Snohomish County’s Certified Copy of Ordinance No. 03-145” (**Certified Ord. No. 03-145**).

On December 1, 2003, the Board received from Snohomish County a “Notice of Appearance of Millie M. Judge.”

Also on December 1, 2003, the Board reopened the hearing in the matter of *King County v. Snohomish County [City of Renton and City of Edmonds – Intervenor]*, CPSGMHB Case No. 03-3-0011. Present for the Board were Joseph W. Tovar, Presiding Officer and Board Member Edward G. McGuire. Snohomish County was represented by Millie M. Judge. King County was represented by J. Tayloe Washburn and Verna P. Bromley. Lawrence J. Warren appeared for Intervenor City of Redmond. Court reporting was provided by Brenda Steinman of Mills & Lessard, Seattle. The Board ordered preparation of a Transcript of the Re-Opened Hearing (the **ROH Transcript**).

Also on December 1, 2003, the Board received “Snohomish County’s Response to the Board’s Request for Additional Information at Oral Argument” (**Snohomish County’s Additional Information**).

On December 15, 2003, the Board issued “Order on Reconsideration” which denied the Snohomish County Motion for Reconsideration.

On January 23, 2004, the Board issued “Order Granting Extension for Filing Statement of Actions Taken to Comply” (the **First Order Granting Extension**).

On January 26, 2004, the Board received from the City of Edmonds “Motion for Permission to Withdraw.”

On February 2, 2004, the Board issued “Second Order Granting Extension for Filing Statement of Actions Taken to Comply” (the **Second Order Granting Extension**) in which the Board established the schedule for submittal of various pleadings regarding the compliance phase of CPSGMHB Case No. 03-3-0011.

On February 9, 2004, the Board received the “Sno-King Environmental Alliance’s Motion to Intervene” (the **SKEA Motion**) together with the “Declaration of David A. Bricklin” attached to which was a copy of an email dated February 15, 2003 from Peggy Cahill to Ed Moats and Jeff Sax, with the subject line “From David Bricklin: Proposed Amendments to EPF Ordinance.” The transmittal letter with these pleadings, dated February 9, 2004 and signed by Jennifer A. Dold, proposed a shortened briefing schedule for the parties to respond to the SKEA Motion to Intervene.

On February 10, 2004, the Board received a letter from Patrick J. Mullaney, co-counsel for Petitioner King County, objecting to the schedule proposed by Ms. Dold, and requesting that the Board adhere to the 10-day response time set forth at WAC 242-02-270.

On February 11, 2004, the Board issued “Order Setting Deadlines Concerning Sno-King Environmental Alliance’s Motion to Intervene.”

03-3-0011 Order Finding Continuing Noncompliance and Invalidity

03-3-0025 Order of Dismissal

04-3-0012 Order of Dismissal

Page 26

On February 17, 2004, the Board received “City of Renton’s Response to Sno-King Environmental Alliance’s Motion to Intervene.”

On February 18, 2004, the Board received “King County’s Opposition to Sno-King Environmental Alliance’s Motion to Intervene.” Also on this date, the Board received “Snohomish County’s Response to SKEA’s Motion to Intervene” and “Snohomish County’s Statement of Actions Taken to Comply” (the **SATC**).

On February 20, 2004, the Board received “SKEA’s Reply in Support of Motion for Intervention” (the **SKEA Reply**) together with the “Declaration of Corinne Hensley” and the “Declaration of Jennifer A. Dold.”

On February 23, 2004, the Board received three pleadings: “King County’s Response to Snohomish County’s Statement of Actions Taken to Comply with the Board’s October 13, 2003 Final Decision and Order” (the **King Response**); “Brief of City of Renton in Response to Snohomish County’s Statement of Actions Taken to Comply” (the **Renton Response**); and “Motion of *Amicus Curiae* Puget Sound Water Quality Defense Fund to Submit Response to Snohomish County’s Statement of Actions Taken to Comply” (the **PSWQDF Motion**) together with a proposed “Compliance Brief of *Amicus Curiae* Puget Sound Water Quality Defense Fund” (the **PSWQDF Brief**).

On February 26, 2004, the Board issued “Order on Motion by SKEA to Intervene and Order on Motion by PSWQDF to File Response Brief” in which the Board granted the SKEA Motion to Intervene and invited the parties to present argument at the compliance hearing on the PSWQDF Motion. On this same date, the Board received “Snohomish County’s Objection to Motion of *Amicus Curiae* Puget Sound Water Quality Defense Fund to Submit Response to Snohomish County’s Statement of Actions Taken to Comply.”

On February 27, 2004, the Board received “Snohomish County’s Reply Brief for Compliance Hearing,” (the **Snohomish County Reply**) “Memo of SKEA regarding Snohomish County’s SATC” (the **SKEA Memo**), and “Snohomish County’s Motion for Reconsideration of Order on Motion by SKEA to Intervene.”

On March 1, 2004, beginning at 10:00 a.m., the Board conducted the Compliance Hearing in this matter in the Training Room adjacent to the Board’s office at 900 Fourth Avenue, Seattle. Present for the Board were Edward G. McGuire and Joseph W. Tovar, presiding officer. The parties were represented as follows: for King County were J. Tayloe Washburn and Verna P. Bromley; for the City of Renton was Lawrence J. Warren; for Snohomish County were Millie M. Judge and John R. Moffatt; for SKEA was David Bricklin; and for PSWQDF was Richard Gendler. As a preliminary matter, counsel for Snohomish County submitted “Snohomish County’s Corrected Reply Brief for Compliance Hearing” (the **Snohomish County Corrected Reply**). The parties presented brief oral argument with respect to two matters: (1) the PSWQDF motion for

leave to submit a pre-compliance hearing brief and (2) the Snohomish County motion for the Board to reconsider the briefing limitations listed in the February 23, 2004 order regarding SKEA's intervention. The presiding officer orally granted both motions with the proviso that opposing counsel had until 4:00 p.m. on March 5, 2004 to file an optional post-compliance hearing brief addressed to either the PSWQDF brief or the SKEA brief. With no further preliminary matters, the Board then heard oral argument from Snohomish County, SKEA, King County, and Renton. Court reporting services were provided by Brenda Steinman of Mills and Lessard, Seattle. A copy of the Transcript of the compliance hearing was ordered (the **CH Transcript**).

On April 20, 2004, the Board received "Snohomish County's Update to Statement of Actions Taken to Comply" (the **Snohomish Update**).

CPSGMHB Case No. 03-3-0025 – King County II

On December 18, 2003, the Board received a "Petition for Review and Request for Declaratory Ruling and Order of Invalidity on Snohomish County Ordinance 03-145" from King County. The new PFR challenged the adoption by Snohomish County Ordinance No. 03-145. The matter was assigned Case No. 03-3-0025, and captioned as *King County (II) vs. Snohomish County*. Board member Joseph W. Tovar was assigned as the Presiding Officer.

On December 29, 2003, the Board received a "Notice of Appearance" from Millie Judge, legal counsel representing Snohomish County.

On January 13, 2004, the Board received "Motion to Intervene by the City of Renton" (the **Renton Motion to Intervene**).

On January 20, 2004, the Board received "Snohomish County's Index to the Record."

On January 22, 2004, the Board received "Notice of Association of Counsel" which noted that John R. Moffatt has become associated with Mille Judge as attorneys for Snohomish County.

The Board conducted the prehearing conference in this matter beginning at 10:00 a.m. on January 23, 2003 in the Board's offices at 900 Fourth Avenue, Suite 2470, Seattle, WA. Present for the Board was Joseph W. Tovar, presiding officer. Representing King County were Tayloe Washburn and Verna Bromley. Present for proposed Intervenor City of Renton was Larry Warren. Representing Snohomish County were Millie Judge and John Moffatt. During the review of the issues and case schedule the parties discussed the relationship of this case to CPSGMHB Case No. 03-3-0011, the status of that case before Thurston Superior Court and the potential to coordinate the schedule for the present matter with that prior case. Absent an objection from either County, the Presiding Officer orally granted the Renton Motion to Intervene.

03-3-0011 Order Finding Continuing Noncompliance and Invalidity

03-3-0025 Order of Dismissal

04-3-0012 Order of Dismissal

Page 28

On February 3, 2004, the Board issued “Prehearing Order and Order Granting Intervention” in *King County II*.

On February 6, 2004, the Board issued “Order of Correction” which revised the case deadline for the optional rebuttal to response to motions.

On March 3, 2004, the Board received “Snohomish County’s Motion for Order of Dismissal” (the **Snohomish Motion to Dismiss**) together with the “Declaration of John Moffat” and a copy of Ordinance No. 04-020.

On March 8, 2004, the Board received a “Stipulation Re: Extension of Time” (the **Stipulation**) signed by the parties to the *King County II* case.

On March 29, 2004, the Board issued “Order Granting Extension of Time” (the **Order Granting Extension**) in the *King County II* case. That order provided, in part: “In the event that King County indicates that it does not wish to file a response to the Snohomish County Motion to Dismiss, the Board will subsequently issue and order dismissing Case No. 03-0025.” Order Granting Extension, at 2.

On April 20, 2004, the Board received “Snohomish County’s Update to Statement of Actions Taken to Comply.”

CPSGMHB Case No. 04-3-0012

On April 16, 2004, the Board received from King County “Petition for Review and Request for Declaratory Ruling and Order of Invalidity on Snohomish County Ordinance 04-019.” The matter was assigned CPSGMHB Case No. 04-3-0012 and captioned as *King County [III] v. Snohomish County*. Board member Joseph W. Tovar was assigned as the presiding officer.

On April 23, 2004, the Board received “Notice of Appearance” from Snohomish County attorneys Millie Judge and John R. Moffat.

On May 3, 2004, the Board issued “Notice of Hearing” in the *King County III* matter.

On May 17, 2004, the Board received “Snohomish County’s Index to the Record.”