CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

OPEN FRAME LLC, Petitioner, v. CITY OF TUKWILA, Respondent.	**CPSGMHB Case No. 06-3-0028** ***(Open Frame v. Tukwila)*** **ORDER OF DISMISSAL**

I. BACKGROUND

On August 17, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) with five exhibits from Open Frame LLC (**Petitioner** or **Open Frame**). The matter was assigned Case No. 06-3-0028, and is hereafter referred to as *Open Frame v. Tukwila*. Board member David O. Earling is the Presiding Officer (**PO**) for this matter. Petitioner challenges the City of Tukwila's (**Respondent** or the **City**) adoption of Resolution 1579, adopting the 2006-2011 Transportation Improvement Plan (**TIP**). The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**).

On August 21, 2006, the Board issued a "Notice of Hearing" (**NOH**) in the above-captioned case.

On September 15, 2006, the Board received the First Amended PFR (**Amended PFR**) with two exhibits. In the Amended PFR, the Petitioner included Resolution 1606, adopting the 2007-2012 TIP, and the City's Determination of Non-Significance (**DNS**) as it relates to various comprehensive and planning documents of the City.[1, 2]

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[1] The Board notes that Resolution 1579 was passed by the City Council on June 20, 2005 and Resolution 1606 was passed on June 19, 2006. Petitioner's PFR was filed on August 17, 2006 and the Amended PFR on September 15, 2006. RCW 36.70A.290(2) requires that a petition must be filed within sixty days of publication. If a jurisdiction does not publish its action, there is no closure of the appeal period and no protection provided by RCW 36.70A.290(2). *McVittie v. Snohomish County*, CPSGMHB Case 00-3-0006c, Order on Motions at 4 (4/25/00). The Board, *sua sponte*, requested an Affidavit of Publication from the City and determined that neither resolution was published.

[2] The Board notes that the purpose of WAC 242-02-060, allowing for amendments to a PFR, is not to later add ordinances that the Petitioner failed to include in the original PFR. *Samson v. Bainbridge Island*¸ CPSGMHB Case

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On September 21, 2006, the Board conducted the Prehearing Conference (**PHC**). At the PHC, the Board received Tukwila's "Respondent's Document Index" (**Index**).

On September 25, 2006, per the Board's request, the Petitioner submitted a "Statement of Citations of Authority Original & First Amended Petitions for Review" (**Statement of Citations**) with cited provisions of the Revised Code of Washington (RCW), Washington Administrative Code (WAC), and Tukwila Municipal Code (TMC) attached.

On September 28, 2006, the Board issued its "Prehearing Order" (**PHO**) that set the final schedule and legal issues to be decided.

On October 5, 2006, the Board received "Petitioner's Index to the Record (**Petitioner's Index**) [3]

Also on October 5, 2006, the Board received "Petitioner's Motion for Discovery (**Motion for Discovery**)

On October 13, 2006, the Board received the City's Motion to Dismiss (**Motion to Dismiss**) with 11 exhibits.

Also on October 13, 2006, the Board received the City's First Amended Index to the Record (**Amended Index**).

On October 16, 2006, the Board received the City's Opposition to Petitioner's Motion for Discovery (**City's Opposition to Discovery**).

04-3-0013, Order on Motions (July 6, 2004). The purpose of an Amended PFR is generally to add or clarify issues which stem from the actions challenged in the original PFR. With the Amended PFR, Petitioner effectively substituted Resolution 1606 for Resolution 1579 and sought additional review of the City's environmental review, public participation, and comprehensive planning processes. Generally, the Board does not permit this. However, in this matter, since the City did not publish the challenged Resolutions and the statutory time limitation has not closed, the Petitioner could have filed a separate PFR to challenge Resolution 1606 and all of the issues raised within the Amended PFR. If this would have occurred, the Board would have, on the basis of judicial economy, consolidated the two matters into a single case and the same result would have occurred. In addition, for the education of the parties, if Resolution 1579 had been published within a reasonable time after passage, Petitioner's PFR, filed almost a year later, would have been untimely and dismissed, leaving nothing for the Petitioner to amend. Filing an Amended PFR to an untimely PFR does not save the second filing. Neither does attempting to file additional challenges beyond the 60-day time limitation set forth in the GMA by seeking an amendment to a PFR filed within the statutory time parameters result in a timely filing. The time limits, commencing with the date of publication, is the date from which the "clock starts ticking," not the date a PFR is filed.

[3] Petitioner submitted an index (Petitioner's Index) listing numerous items which were not included on the City's Index. On October 13, 2006, the City filed its Amended Index incorporating all of the Petitioner's documents by reference. The Board did not conduct a line-by-line, record-by-record evaluation of the Amended Index. The Board assumes that the City's statement that it incorporated the Petitioner's documents into the Amended Index should be interpreted to mean that it incorporated all of the documents shown on Petitioner's Index which were not shown on the Index. In addition, for the benefit of the parties, when practicing before this Board the Petitioner is not required to submit an index to the record. That, as noted in WAC 242-02-520, is the duty of the respondent. The Petitioner is expected to review the Index submitted by the Respondent City/County and, if the Petitioner finds that the needed exhibits are not included, the Petitioner should ask the jurisdiction to amend the Index prior to bringing a Motion to Supplement the Record to the Board.

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On October 17, 2006, the Board received Petitioner's Index of Exhibits Supporting the Motion for Discovery (**Index for Discovery**).

On October 23, 2006, the Board received Petitioner's Response to the City's Motion to Dismiss (**Petitioner's Response)** with 24 exhibits.

On October 30, 2006, the Board received the City's Rebuttal to Motion to Dismiss (**City's Rebuttal**) with 2 exhibits.

On November 3, 2006, the Board received Petitioner's Motion to Strike Jim Morrow's Declaration (**Motion to Strike**).

The Board did not hold a hearing on the dispositive motions.

II. THE CHALLENGED ACTION

Petitioner Open Frame owns commercial property located within the Tukwila Urban Center. The City of Tukwila ultimately intends to locate a Transit Center in the Urban Center and its Comprehensive Plan includes a policy supporting the location of a "pedestrian-friendly transit center on Andover Park West, between Baker Boulevard and Stander Boulevard." Core Document, Tukwila Comprehensive Plan, Transportation Policy 13.4.8 (Emphasis added). Petitioner alleges that the City has made a final decision as to the location of the Transit Center, locating the Transit Center on a portion of the Petitioner's property, which is north of Baker Boulevard. This decision, according to Petitioner, is inconsistent with the Comprehensive Plan language and with the preferred alternative identified in the 2005 Transit Plan.

Petitioner initially challenged Resolution 1579, adopting the 2006-2011 TIP (*see* PFR). Petitioner then filed the Amended PFR to include a challenge to Resolution 1606, adopting the 2007-2012 TIP. Both versions of the TIP contain a line item which reads: "Tukwila Urban Center – Transit Center, Central Business District – Design and construct a transit center." PFR, Exhibit A, Line Item 14; Amended PFR, Exhibit H, Line Item 13. No specific location for the Transit Center is indicated in either TIP. In all of the Petitioner's subsequent filings, arguments made and assertions raised stem from Resolution 1606.

Petitioner contends that the site for the Transit Center has been determined and that the City is conducting preliminary design so as to proceed with construction of the facility on Petitioner's property. Petitioner cites to a staff e-mail memo indicating that the Mayor does not support the consultant's preferred alternative location. Petitioner's Response, Exhibit C. In addition, Petitioner references e-mail correspondence between City Staff that denotes "opposition from the owners of the site where we want to install a 'transit center'" subsequent to a Council meeting at which Petitioner's attorney voiced opposition to the proposed transit center referenced in the 2006-2012 TIP. Petitioner's Response, Exhibit P. Petitioner challenges the TIPs and the alleged decision to locate the Transit Center on Open Frame's parcel.

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II. DISCUSSION AND ANALYSIS

The Petitioner has submitted the following motions:

1. Motion for Discovery
2. Motion to Strike

The City has submitted the following motion:

1. Motion to Dismiss

The Board will address the City's motion first; then, if needed, the Board will address the motions of the Petitioner.

Motion to Dismiss – Ripeness: Legal Issues 4, 5, and 6[4]

The City argues, with Legal Issues 4, 5, and 6, that the matter is not ripe for review because the City Council has taken no final action or determination as to the location of the proposed transit center in the Tukwila Urban Center (**TUC**). Motion to Dismiss at 3 and 11. The City asserts that the challenged action, the adoption of a TIP, "merely identified proposed funding sources for various proposed transportation improvement projects … and did not constitute a final action by the City…" Motion to Dismiss at 9. The City further argues that adoption of the TIP is exempt from SEPA review and therefore any of the Petitioner's SEPA-based challenges are not ripe for review by the Board. *Id.* at 16.

In response, Petitioner argues that the Board has the authority to review the City's actions leading up to the adoption of Resolution 1606 because these actions are based upon an adopted Comprehensive Plan and Transit Plan. Petitioner's Response at 12. Petitioner believes, pursuant to RCW 36.70A.070, that these preliminary actions must be internally consistent with the City's adopted comprehensive planning, including Transportation Policy 13.4.8 which limits the location of a transit center to an area lying south of Baker Boulevard. *Id.* at 14-15. Petitioner asserts that all of the City's actions amount to either a *defacto decision* for the location of the transit center or a *defacto amendment* of the City's Comprehensive Plan. Petitioner's Response at 4, 13, and 21. The Petitioner does not respond to the City's arguments pertaining to SEPA.[5]

In reply, the City reiterates its assertion that "the decision to site the Transit Center has not yet been made by the Tukwila City Council [the only persons with the authority to make that decision]" and that the matter of the Transit Center location is simply not ripe for review by the Board. City's Rebuttal at 4.

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[4] *See* Appendix A for full text of the Legal Issues

[5] Although Petitioner asserted APA and GMA Participation Standing in the original PFR, no statement was made as to SEPA Standing. The Board has previously noted that SEPA standing and GMA Standing are two distinct things and that a Petitioner must assert each type within their PFR. Since the Petitioner did not provide a basis for SEPA standing and gave no weight to the City's request for dismissal of their SEPA claims, the Board will do the same.

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Board's Analysis:

Petitioner states that its "principal issues deal with internal consistency, public participation, and the procedural requirements for adopting updates and amending comprehensive plans." Petitioner's Response at 4. However, prior to the Board's review of any of these issues, there must be a challengeable action by the City. What Petitioner objects to is the location of the Transit Center on its property. Therefore, the Board asks: Has the City made a *final decision* as to the location of Transit Center within the TUC?

The ripeness doctrine ensures that what the Board is evaluating is the final decision of a jurisdiction. The Washington Supreme Court explained the purpose of the "ripeness doctrine" in *Asarco Inc. v. Dept. of Ecology* in which the Court stated:

> "The ripeness doctrine *exists to prevent* the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial *interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties*."

Asarco Inc v. Dept. of Ecology, 145 Wn.2d 750, 759 (En Banc 2001) (citing *Abbott Labs v. Gardner*, 387 U.S. 136, 148-49 (1967)) (Emphasis added).

Although the GMA does not define what a final action is or set out standards for determining whether an action is final and thus reviewable, the GMA does define what types of actions the Board has authority to review. RCW 36.70A.280(2) provides that a Petitioner must allege that an *adopted* comprehensive plan, development regulation, or permanent amendment thereto, is not in compliance with the goals and requirements of the GMA. Therefore, the "*adoption*" of the stated planning documents and development regulations is the final action reviewed by the Board to determine compliance with the GMA.[6]

The Petitioner asserts that the City's Comprehensive Plan, the Transportation Element, and the Transit Plan represent final actions by the City and all claims and issues arising from these documents are ripe for review by the Board. Petitioner's Response at 16. The Petitioner is correct in one regard – all elements of the City's Comprehensive Plan and the related Transit Plan are final actions for the purpose of GMA. However, it is not these documents that are being challenged here; rather Petitioner's challenge concerns the City's current actions regarding the Transit Center location.

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[6] Support for this analysis is aided by reference to the Land Use Petition Act (LUPA), RCW 36.70C. LUPA defines a "land use decision" as a *final determination* by a local jurisdiction's body or officer with the highest level of authority to make the determination. RCW 36.70C.020(1). See *Grandmaster Sheng-Yen Lu v. King County*, 110 Wash. App. 92, 100 (Div I, 2002) (holding "[C]ourts should [under the statutory framework of LUPA] generally defer review of decisions involving the use of land until such decisions are final - that is when the highest body or officer has finally acted.").

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Although the Board agrees that passage of Resolution 1606, adopting the 2007-2012 TIP, is a final action of the City, the Board does not read the TIP as adopting a specific location for the Transit Center. Petitioner asserts that the TIP authorizes the construction of a transit center on Open Frame's property and is in conflict with Comprehensive Plan Transportation Element Policy 13.4.8. Line 13 of the TIP denotes that one of the unfunded projects the City would like to undertake is the construction of a transit center within the TUC – an area of approximately 1.35 square miles that is bordered on the north by Interstate 405, on the south by South 180th Street, on the west by Interstate 5, and on the east by the West Valley Highway. City's Motion to Dismiss, Exhibit F (TIP); Core Document – Tukwila Comprehensive Plan, TUC, Pages 111, 113.

The Board's review of the TIP denotes that, with the exception of a few proposed projects, most of the items listed within the TIP provide a location (shown as "*from*" and "*to*") for the proposed project. *E.g.* TIP Line 17: S. 144th Street Bridge Sidewalks *from* 51st Avenue S. *to* 53rd Avenue S.; TIP Line 24: S. 168th Street *from* Southcenter Parkway *to* Andover Park W. Line 13 provides no such locationale information except that the Transit Center would be located within the Central Business District of the TUC. The very nature of this omission supports the City's assertion of the preliminary nature of the action. Namely, if the City had made a final decision as to where it was going to site the transit center, it would have provided that location within the TIP. For the Petitioner to assert that a line item in the TIP which identifies no location equates to a *defacto* amendment of the City's Comprehensive Plan is without merit.

It appears to the Board that the Petitioner's claims lie not only in the TIP itself but in the City's preceding actions. The Petitioner asserts that a variety of actions taken by the City prior to the adoption of Resolution 1606 combine into a final action for which the Board has jurisdiction.[7] These actions include, but are not limited to: informational stakeholders' meetings which discussed the design and location of the transit center; an FTA Regional Competition Application, concept design plans; an FTA Regional Project Presentation; Transportation Committee meetings including those which discuss seeking grants to funding right-of-way acquisitions and construction funds; and a Transit Center Project Update Presentation. Petitioner's Response at 8-16. According to the Petitioner, "any action by the City to undertake action, whether it be in the form of plans, amendments to its TIP, or any project level staff or consultant action for the engineering design, funding, right-of-way acquisition, and construction of a Transit Center [is subject to the Board's jurisdiction and] 'consistency' review under RCW 36.70A.280." *Id.* at 16-17.

What the Petitioner challenges with the stated actions is <u>not a final action</u> of the City but the City's *preliminary decision-making pro*cess – the evaluation of the alternatives; the shifts in perspective; the backward, the forward, and the sideways moves. Nothing in the Record demonstrates that any of these actions constitutes a final action by the City in "locating" the Transit Center. <u>The preliminary steps in the administrative decision-making process do not equate to a final order or decision</u>. *Lewis County v. Pub. Employment Relations Comm'n*, <u>31 Wn. App. 853</u>, 862, (1982). The Board has previously stated:

[7] In fact, documents on which Petitioner largely relies for asserting that City officials have made up their minds about the Transit Center location specifically states that alternative locations will be evaluated, Transit agencies will be consulted, traffic and pedestrian data will be evaluated , etc. *See* Exhibit C (Bradshaw E-mail).

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> The Board recognizes that local government must undertake many steps, internal communications, and activities prior to the development of a proposed amendment to a GMA plan or regulation, at least some of which actions are not GMA actions. And, the Board has never articulated a standard from when such local government steps, communications, and activities arise to the status of a "proposed GMA amendment" that would be subject to the provisions of the GMA [and the Board's review].

Upper Green Valley Preservation Society v. King County, CPSGMHB Case No. 98-3-0008c, Final Decision & Order (July 29, 1998), at 10-12.

The TIP, adopted via Resolution 1606, does not commit the City to a particular location for the Transit Center and so the Transit Center location is not yet "a final action." The matter is not ripe for Board review. The Board's jurisdiction, as limited by RCW 36.70A.280(1), does not include such preliminary matters. The dispute in this matter is not about a "final" decision regarding the location of the Transit Center. It is about a series of preliminary actions and/or decisions made in the process of, but prior to, reaching a final decision on the location for a proposed transit center. Therefore, given the arguments and exhibits submitted by the parties, the Board finds that there is nothing for the Board to review. The controversy presented by the Petitioner is hypothetical and speculative, and may be rendered moot depending on actions yet to be taken by the Tukwila City Council. **Legal Issues 4, 5, and 6 are DISMISSED.**

Motion to Dismiss –Subject Matter Jurisdiction: Legal Issues 7, 8, and 9[8]

The City moved to dismiss Legal Issues 7, 8, and 9 on the basis of subject matter jurisdiction. City's Motion to Dismiss at 3. Legal Issue 7 alleges a violation of RCW 82.02 – Impact Fees, Legal Issue 8 alleges a violation of RCW 36.70B – Local Project Review, and Legal Issue 9 alleges violation of the City's own code – TMC 9.48 Transportation Concurrency Standards and Impact Fees and TMC 18.80 – Amendments to Comprehensive Plans and Development Regulations.

The Board is charged with adjudicating compliance with the GMA. *Alexanderson v. Western Washington Growth Mgmt. Hearings Board,* 144 P.3d 1219 (2006) (citing *King County v. Central Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 552 (2000). It is well established through Board case law and the Washington Courts that this jurisdiction is limited to the review of the legislative actions of local government that *adopt or amend* Comprehensive Plans and development regulations, adopted pursuant to Chapter 36.70A RCW. *See*: *Happy Valley Assoc. v. King County*, CPSGMHB Case No. 93-3-0008, Order Granting Respondent King County's Motion to Dismiss and Denying Happy Valley's Motion to Amend Its Petition for Review (Oct. 25, 1993), at 13-14; *South Bellevue Partners Limited Partnership and South Bellevue Development Inc. v. City of Bellevue and Issaquah School District No. 411*, CPSGMHB Case No 95-3-0055, Order of Dismissal, November 30, 1995, at 6; *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868 (1997); and *Wenatchee Sportsmen*

[8] *See* Appendix A for full text of the Legal Issues

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Ass'n v. Chelan County, 141 Wn. 2d 169, 179 (2000). Likewise, it is equally clear that the Board's jurisdiction does not extend to review of specific land use project decisions. *See*: *Hanson, et al., v. King County*, CPSGMHB Case No. 98-3-0015, Order Granting Dispositive Motions (Sep. 28, 1998); *Petersville Road Area Residents v. Kitsap County*, CPSGMHB Case No 00-3-0013, Order on Motions, (Oct. 23, 2000); *Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868 (1997); and *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn. 2d 169, 179 (2000).

- *Legal Issue 7 – RCW 82.02 – Transportation Impacts*

The Petitioner agreed with the City that the Board possesses no jurisdiction to hear issues related to RCW 82.02 and **withdrew** the issue. Petitioner's Response at 4. **Legal Issue 7 is withdrawn and dismissed.**

- *Legal Issue 8 - RCW 36.70B*

The City relies on the Board's Order in *Petersville Road Residents v. Kitsap County*, CPSGMHB 00-3-0013, to support its dismissal request that the Board has no jurisdiction over claims asserting a violation of RCW 36.70B. City's Motion to Dismiss at 19-20. The City further argues that the resolution adopting the TIP is "not a site-specific project" governed by RCW 36.70B and the Petitioner is seeking for the Board to review the City's actions based on the requirements of that statute. *Id.* at 20.

In response, it appears what the Petitioner is asserting is that the City's "project level" actions, which culminated in the adoption of the 2007-2012 TIP, identify, when taken together, a "site-specific and project-specific action by the City" for which the Board has the authority to review for consistency with Policy 13.4.8 and the Transit Plan. Petitioner's Response at 17-19. Petitioner argues that RCW 36.70A.470 requires review of project level actions to be conducted under the provisions of 36.70B and that .470 therefore grants the Board the "requisite jurisdiction and authority." Petitioner's Response at 24.

In addition, the Petitioner challenges the actions of the City in regard to transportation impact fees collected from Westfield (Southcenter) Mall. The Petitioner asserts that the City's actions represent a development agreement for the purposes of RCW 36.70B.170 for which the City was required to follow public hearing procedures as set forth in RCW 36.70B. Amended PFR at 4. In their Response, Petitioner states that they are willing to withdraw this element of Legal Issue 8 if the City will stipulate that money collected from the Westfield Mall under a project level impact mitigation agreement executed under RCW 36.70B be limited solely to right-of-way acquisition and improvements south of Baker Boulevard or on Mall property. Petitioner's Response at 26.

In rebuttal, the City states that it "is willing to stipulate that the money collected from Westfield is limited to transit improvements for the benefit of Westfield's property." City's Rebuttal at 2. Therefore, the City reiterates its motion that the Petitioner's issues regarding RCW 36.70B be dismissed.

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Analysis

The Board agrees with the City. RCW 36.70B was part of the Land Use Regulatory Reform Act signed into law in 1995 (ESHB 1724). This statute requires all counties and cities to combine permit review and environmental review, and to consolidate administrative appeals of permit and SEPA decisions, thereby providing a more streamlined permit and environmental review process by reducing duplication and paperwork for project actions.[9]

As noted above, the Board's jurisdiction is strictly limited to those statutes set forth in RCW 36.70A.280, of which RCW 36.70B is not one. The Board clearly does not have jurisdiction to review any issues which assert a violation of RCW 36.70B. **Legal Issue 8 is DISMISSED.**

- *Legal Issue 9: Tukwila Municipal Code 9.48 and 18.80*

Relying on the Board's holding in *Twin Falls*, the City asserts that the Board does not have jurisdiction to determine whether a City is in compliance with its own municipal code. City's Motion at 21.

In response, the Petitioner asserts that the actions of the City amount to a "*defacto*" update or amendment to the City's Comprehensive Plan, thereby requiring compliance with the City's own amendment procedures contained within TMC 18.80. Petitioner's Response at 21-22. The Petitioner further alleges that the impact fees collected by the City from Westfield Mall, subject to TMC 9.48, are reviewable by the Board in order to determine whether the City's actions were intended to circumvent Policy 13.4.8 and the Transit Plan. *Id.* at 26-27.

Analysis

The Board has previously held that it may, depending on the facts, have jurisdiction to review a jurisdiction's compliance with its own code. *Fallgatter v. City of Sultan*, CPSGMHB Case No. 06-3-0017, Order on Motions at 4-5 (June 29, 2006). However, this authority to review is couched not specifically in the jurisdiction's own code but in the GMA provisions it was adopted to comply with – here RCW 36.70A.130(2). TMC 18.80 addresses the City's procedural process for amending the Comprehensive Plan and development regulations including application for amendment, docketing, notice and comment, and criteria for City Council consideration. In order to violate their own amendment procedures, and conjunctively .130(2), the City would have had to amend the Comprehensive Plan or development regulations. The actions that the Petitioner identifies that the City has *recently* taken do not amount to a legislative action to adopt or amend, *defacto* or otherwise, either its comprehensive plan or development regulations. And, the City indicated it has not taken such an action. Without an amendment, there can be no violation.

Although Petitioner does not reference TMC 9.48 in their response, they make several references to impact fees that the City collected from Westfield Mall. TMC 9.48 was developed from the

[9] Comprehensive plan and development regulations, or amendments to plans and regulations, are non-project actions and therefore not subject to project review requirements of RCW 36.70B.

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City's authority pursuant to its police powers, RCW 36.70A, RCW 82.02, RCW 58.17, and RCW 43.21C. *TMC 9.48.010.* However, it is not the GMA that authorizes the collection of impact fees. It is RCW 82.020.020(2) which provides that cities and counties planning under the GMA are authorized to impose such fees. *RCW 82.02.020(2).* Therefore, for the Board to review any of the City's actions in regard to TMC 9.48 would amount to the Board's review of actions under RCW 82.02, for which it has no jurisdiction.

For the reasons noted above, the Board finds that it does not have subject matter jurisdiction in regard to Legal Issue 9. The Board concludes that the City has not amended its Comprehensive Plan or development regulations so as to trigger any procedural requirements contained within TMC 18.80. The Board further concludes that impact fees collected by a City, although intended to ensure adequate facilities to serve the growth envisioned by the GMA, are not subject to the Board's review because such fees are based on RCW 82.02, a statute for which the Board has no review authority. **Legal Issue 9 is DISMISSED.**

Motion to Dismiss – Legal Issues 1, 2, and 3[10]

In response to the City's Motion, Petitioner asserted that the City did not challenge the Board's authority to review Legal Issues 1, 2, and 3 despite the fact that the City appears to present arguments which affect these issues. Petitioner's Response at 3. Petitioner further argues, since the City did not specifically challenge these issues, that any challenges presented by the City, either within its original motion or subsequent to the motion, should be disregarded by the Board. *Id.* at 3-4

In their rebuttal, the City moved to dismiss Legal Issues 1, 2, and 3 or, in the alternative, for the Board to clarify whether these legal issues remain viable for hearing. City's Rebuttal at 1.

- *Legal Issue 1 – Public Participation*

The GMA's public participation requirements were clearly delineated by the Court of Appeals in 2002:

> The GMA requires public participation, but it does not require that a city necessarily *act upon* the desires expressed by the public during that participation and comment. The "public participation" that is one of the hallmarks of the GMA, does not equate to "citizens decide." The Act requires the elected legislative bodies of cities and counties, not individual citizens, to ultimately "decide" on the direction and content of policy documents such as comprehensive plans. The Act assigns this policy making authority to elected officials, who are accountable to their citizens at the ballot box.

City of Burien v. CPSGMHB, 113 Wash. App. 375, 388 (Div. II 2002).

In the present case, Petitioner concedes there has been significant public process concerning the siting of the Transit Center. In the PFR, the Amended PFR, the City's Motion to Dismiss, the Petitioner's response, and the Record itself, are numerous references to stakeholders' meetings,

[10] *See* Appendix A for full text of the Legal Issues

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council meetings, planning commission meetings, and examples of correspondence between the City and the Petitioner. *E.g.* Petitioner's Response - Exhibit F, Minutes of June 19, 2006 City Council Meeting; Exhibit H, Correspondence from Petitioner's attorney to City; Exhibit U, Powerpoint Presentation to Planning Commission Work Session & Public Hearing,; City's Motion Exhibit D, Comments from Stakeholder's Workshop #1, Record of Index Nos. 2467 to 2507 (Stakeholders Workshop #1); Index Nos. 2513 to 2540 (Conceptual Design Workshop #2); Index Nos. 2993 to 3015 (Williamson correspondence and City's response); Index Nos. 3521 to 3522 (TUC Workshop #4); Index Nos. 3525 to 3519 (TUC Workshop #1); Index Nos. 5006 to 5008 (Public Workshop on Transit); Index Nos. 5009 to 5012 (Public Workshop #2 on TUC). For the Petitioner, who participated at multiple levels, to allege that the City had not incorporated the Petitioner and other members of the public into the planning process for the Transit Center is untenable.

Analysis

It appears to the Board that the basis of the Petitioner's public participation complaints stem not from the lack of City public process but the concern that the siting of the Transit Center will be influenced – perhaps even determined - by undisclosed, off-the-record, political deal-making. *See* PFR and Amended PFR. The Board reviews the final actions of the legislative body. The motives and intentions of local elected officials must be judged at the ballot box. The Board presumes that the final actions taken are in good faith and with intent to comply with the GMA.

The City states, and the Board has found, that the adoption of the 2007-2012 TIP did not amount to a final, reviewable decision as to the Transit Center location, so presumably there will be additional public process during which the Petitioner and other concerned members of the public may engage. Petitioner's issue is not ripe for the Board's review with respect to any assertion as to the City's failure to comply with the public participation requirements of the GMA for the Transit Center location. **Legal Issue 1 is DISMISSED**.

- *Legal Issue 2 – Consistency*

Legal Issue 2 questions whether the City's actions were consistent with not only the goals and policies of the GMA, but with the policies and the City's Comprehensive Plan and related planning documents (*i.e.* Transit Plan). RCW 36.70A.070 provides that a comprehensive plan "shall be internally consistent" and .080(2) requires that sub-area plans, such as the TUC, be consistent with the comprehensive plan. *RCW 36.70A.070, RCW 36.70A.080(2).*

The Petitioner asserts that the inconsistency between the City's actions and its Comprehensive Plan stems from a single comprehensive plan policy and the 2005 Transit Plan. Petitioner's Response at 12. The cited policy seeks to support forming a partnership with METRO, Westfield Mall, and surrounding businesses to locate a pedestrian-friendly transit center on Andover Park West, between Baker and Strander Boulevards. Core Documents, Comprehensive Plan, Transportation Element, Policy 13.4.8.

The City argues that Policy 13.4.8 is just that – a policy statement – for which there must be general conformity but no strict adherence. City's Rebuttal at 12 (citing *Citizens for Mt. Vernon v. City of Mt. Vernon*, 133 Wn.2d 861 (1997). The City further asserts that its Comprehensive

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Plan is not used to make specific land use decisions but rather as a guide when making land use decisions.[11]

The Board finds that the essence of Petitioner's claims in Legal Issue 2 is that the TIP is inconsistent with various comprehensive plan provisions and documents. However, Petitioner's premise is erroneous in that it assumes the TIP "located" the Transit Center. As discussed, *supra*, the location of the Transit Center has not yet occurred. Therefore, **Legal Issue 2 is DISMISSED.**

- *Legal Issue 3 – Adoption/Amendments to Comp Plans & Related documents*

Like Legal Issue 9, the Petitioner asserts that the City has failed to comply with the requirements for amending a Comprehensive Plan and related planning documents. Petitioner argues that the City's actions circumvented the GMA requirements and amount to a *defacto* amendment to these documents. PFR at 8-9; Amended PFR at 7-8.

The City, not directly in rebuttal but in the original Motion, argues that these issues are not ripe for review. *See generally* City's Motion to Dismiss at 8-10. The basis for this claim is grounded in the City's assertion that it has made no final decision as to the location of the Transit Center and any actions it has taken to date do not amend the Comprehensive Plan or related planning documents. *Id.*

As noted in Legal Issue No. 9, the City has not amended its Comprehensive Plan, development regulations, or related planning so as to trigger any procedural requirements contained within the GMA. Therefore, as with Legal Issue 9, **Legal Issue 3 is DISMISSED**.

Motion for Discovery

The Petitioner filed a Motion for Discovery seeking the deposition of Tukwila City Staff and the Tukwila Mayor. Petitioner asserted that without the information from these depositions, they would be unfairly prejudiced in their ability to submit adequate and sufficient evidence to overcome the presumption of validity. Petitioner's Motion for Discovery at 1-2.

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[11] The Board would like to clarify the City's statement – that the comprehensive plan is merely a collection of policy statements to which only general conformity, as opposed to strict adherence, is required. The City misreads the court's holding in the *Mt. Vernon* case. In *Mt. Vernon*, the Supreme Court found that a comprehensive plan is a guide and not a document designed for making specific land use decisions and that any conflicts are resolved in favor of the more specific regulations, usually development regulations. *Id.* at 874. RCW 36.70A.040(4) states that development regulations must be consistent with and implement the comprehensive plan. For the City to assert that it is only required to generally conform to its comprehensive plan, would create chaos in attempts to implement and apply the numerous, varied, and sometimes competing policies and regulations that govern the use of land.

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Board Analysis and Conclusion

Although the GMA and the Board's own rules permit discovery,[12] the Board generally limits review to the Record before the Council when making its decision. The GMA is explicit in this requirement. RCW 36.70A.290(4) provides: The Board shall base its decision *on the record developed* by the city, county, or the state and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision. (Emphasis added).

Based on .290(4), and the fact that the Board has dismissed all of the Legal Issues presented in this matter based on ripeness or lack of jurisdiction, the Petitioner's Motion for Discovery is **DENIED.**

III. ORDER

Based upon review of the GMA, Board's Rules of Practice and Procedure, briefing and exhibits submitted by the parties, case law and prior decisions of this Board, and having deliberated on the matter, the Board enters the following ORDER:

1. The City's Motion to Dismiss is **GRANTED as to:**

    - Legal Issue 1 is **DISMISSED.**
    - Legal Issue 2 is **DISMISSED.**
    - Legal Issue 3 is **DISMISSED.**
    - Legal Issue 4 is **DISMISSED.**
    - Legal Issue 5 is **DISMISSED.**
    - Legal Issue 6 is **DISMISSED.**
    - Legal Issue 7 is **DISMISSED.**
    - Legal Issue 8 is **DISMISSED.**
    - Legal Issue 9 is **DISMISSED.**

2. Petitioner's Motion for Discovery is **DENIED.**

3. CPSGMHB Case No. 06-3-0038 *Open Frame LLC v. City of Tukwila* is **CLOSED.**

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[12] WAC 242-02-410 Discovery — Limitation.

(1) Discovery shall not be permitted except upon an order of a board or its presiding officer.

(2) Insofar as applicable and not in conflict with this chapter, when discovery has been authorized by a board or presiding officer, the statutes and court rules regarding pretrial procedures in civil cases in superior courts of the state of Washington shall be used. Such statutes and rules shall include but shall not be limited to those rules pertaining to discovery of evidence by parties to civil actions.

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This Order of Dismissal should not be construed as a Board determination as to whether Tukwila substantively complies with the relevant goals and requirements of the GMA.

So ORDERED this 17th day of November, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
David O. Earling
Board Member

_____
Edward G. McGuire
Board Member

_____
Margaret A. Pageler
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

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APPENDIX A

Open Frame LLC v. City of Tukwila
CPSGMHB Case No. 06-3-0028

Notice – Hearings – Public Participation:

(Intended to reflect Petitioner's Issues: 4.1, 4.2, 4.5, 4.5, 4.6, 4.8, 4.10, 4.13, 4.14, 4.16, and 4.17)

Legal Issue No. 1: In adopting Resolutions 1579 and 1606 and the actions which followed the adoption of those Resolutions, did the City of Tukwila, as a municipal entity or through its Mayor, substantially interfere with the public participation requirements of the GMA, including, RCW 36.70A.020(11), by failing to comply with RCW 36.70A.35, .130, .140 and WAC 365-195-600 which require procedures that provide for adequate notice, public hearings, and early and continuous public participation?

Consistency:
(Intended to reflect Petitioner's Issues: 4.1, 4.6, 4.12, and 4.16)

Legal Issue No. 2: Are the City's actions, which include the adoption of Resolutions 1579 and 1606 and actions following the adoption of those Resolutions,:

> *(A) consistent with the goals and policies of the GMA*
> *(B)consistent with the substantive policies and procedures of the City's Comprehensive Plan*
> *(C) consistent with prior-adopted planning documents – Tukwila Center Plan and TIP, in regard to size, features, and specific location of the transit center*
> *(D) capital budget decisions made consistent (in conformity) with the Comp Plan and the Transportation Element, specifically the 6-year TIP?*

Adoption and/or Amendments to Comp Plan & Related Planning Documents
(Intended to reflect Petitioner's Issues: 4.1, 4.3, 4.4, 4.5, 4.6, 4.15, 4.16, 4.18, and 4.21)

Legal Issue No. 3: In adopting Resolutions 1579 and 1606 and taking the actions which followed the adoption of those Resolutions, did the City of Tukwila:

> *(A) fail to comply with the tiered formation and adoption requirements of the GMA for Comprehensive Plans, Sub-Area Plans, Transportation Elements, and TIPs*

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(B) engage in an unlawful and clearly erroneous amendment to its Comp Plan, Transportation Element, TIP, or Tukwila Urban Center Sub-Area Plan
(C) circumvent the GMA by adopting defacto amendments to its Comp Plan, Transportation Element, TIP, and Tukwila Urban Center Sub-Area Plan
(D) engage in actions which do not conform with the GMA's amendment procedures (formation and adoption) and the City's Comp Plan land use goals?

Site Specific Project and/or Development Agreement
(Intended to reflect Petitioner's Issues: 4.9, 4.19, and 4.19)

Legal Issue No. 4: *Does the City's "Farside" proposal:*

(A) represent a site-specific project action which requires compliance with the GMA and TMC 18.80
(B) amount to a defacto development agreement with a private developer
(C) amount to an unlawful and clearly erroneous action by the City of Tukwila?

Interference with prior development authorization
(Intended to reflect Petitioner's Issues: 4.7, 4.7, and 4.14)

Legal Issue No. 5: *Did the City of Tukwila, in adopting Resolutions 1579 and 1606 and the actions which followed the adoption of those Resolutions,:*

(A) misuse its comprehensive planning authority to interfere with prior Design Review approval of a building site and parking plan
(B) through its Mayor, interfere with the GMA, WAC 365-195, and SEPA by directing Public Works to bypass study results?

SEPA
(Intended to reflect Petitioner's Issues: 4.11, 4.12, 4.14, and 4.19)

Legal Issue No. 6: *In adopting Resolution 1579 and 1606 and taking the actions which followed the adoption of those Resolutions, did the City of Tukwila violate RCW 43.21C, SEPA, by:*

(A) irretrievably committing resources and engaging in decision-making without SEPA environmental review
(B) through its Mayor, interfering in the public hearing and participation requirements of SEPA
(C) misusing its comprehensive planning process to conduct site-specific development without regard to environmental review procedures or impacts?

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RCW 82.02 – Transportation Impacts
(Intended to reflect Petitioner's Issue: 4.21)

Legal Issue No. 7: In adopting Resolutions 1579 and 1606 and taking the actions which followed, did the City of Tukwila violate RCW 82.02.020?

RCW 36.70B – Local Project Review
(Intended to reflect Petitioner's Issues: 4.7, 4.9, and 4.19)

Legal Issue No. 8: In adopting Resolutions 1579 and 1606 and taking the actions which followed, did the City of Tukwila violate RCW 36.70B?

Tukwila Municipal Code
(Intended to reflect Petitioner's Issues: 4.6, 4.8, and 4.15)

Legal Issue No. 9: In adopting Resolutions 1579 and 1606 and taking the actions which followed, did the City of Tukwila's actions conform with:

> *(A) the notice, hearing, and procedures of TMC 18.80, including 18.80.050, 18.80.060*
> *(B) the amendment procedures of TMC 18.80*
> *(C) TMC 9.48 – Transportation Concurrency Standards and Impact Fees?*

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