CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

JOCELYNNE FALLGATTER, Petitioner, and SNOHOMISH COUNTY FIRE DISTRICT #5, Participant, v. CITY OF SULTAN, Respondent.	))))))))))))))	**CPSGMHB Case No. 06-3-0034** ***(Fallgatter VIII)*** **ORDER FINDING CONTINUING NONCOMPLIANCE AND INVALIDITY [Re: TIP] and SETTING THIRD COMPLIANCE SCHEDULE**

I. BACKGROUND

Final Decision and Order

On February 13, 2007, the Board issued its Final Decision and Order (FDO) in this matter. The FDO stated:

1. The City of Sultan's adoption of Resolution No. 06-10, the 2006-2012 TIP, was **clearly erroneous** and **does not comply** with the requirements of RCW 36.70A.120, and **is not guided** by GMA goals RCW 36.70A.020(1), (3), and (12).

2. Therefore the Board **remands** Resolution No. 06-10 to the City of Sultan with direction to the City to take legislative action to comply with the requirements of the GMA as set forth in this Order.

3. The Board further finds and concludes that the enactment of Resolution No. 06-10 substantially interferes with the goals and requirements of the GMA. The Board therefore enters an **order of invalidity.**

The FDO stressed that a Transportation Improvement Plan (TIP) based on a non-compliant Comprehensive Plan Transportation Element violates the GMA mandate for consistency. The Board explained that the Transportation Element forms the basis for the Six Year TIP and the two must be consistent.

> (c) *The transportation element described in this subsection (6), and the six-year plans required by RCW 35.77.010 for cities*, RCW 36.81.121 for counties, RCW 35.58.2795 for public transportation systems, and RCW 47.05.030 for the state, *must be consistent.*

RCW 36.70A.070(6), emphasis supplied. The Board stated:

> The City of Sultan doesn't deny that its 2006 TIP is inconsistent with its Plan and is based on a deficient and non-compliant Transportation Element; rather, the City argues that it is a victim of multiple demands and should be allowed time to complete its work. The City asserts that it is making a good faith effort to comply, having adopted an updated CFP since the filing of the PFR in this matter and having retained a consultant to develop the Transportation Element of the Plan. The City's best argument is that it will reach compliance before the deadline for adoption of the 2007 TIP [July 2007].
>
> The Board finds the City's argument unconvincing. The City's deadline for a compliant updated Comprehensive Plan was December 1, 2004. That Plan was required to include an updated Capital Facilities Plan and the mandatory Transportation Element. Petitioner's first PFR to this Board in January 2005, raised those very issues (among others). Yet in the February 5, 2007 HOM on the present case, the City stated that its City Council meeting *this week* will consider a contract with a transportation consultant to develop a Transportation Element meeting GMA requirements. In the Board's view, the time has long past for the City of Sultan to have completed its work on these required core components of GMA planning.
>
> The long-missed deadline for updating its Plan to include a compliant 20-year Transportation Element (December 1, 2004) has been put on a back burner by the City in order to pursue short-term funding by adopting, for the second year in a row, *a free-standing TIP that has no Transportation Element for support.* Under the GMA, the citizens of Sultan are entitled to coordinated and comprehensive planning for growth in their community, including transportation planning that goes beyond ad hoc project approvals. The Transportation Element is one of the most detailed mandatory elements in the statute. Local transportation analysis forms the basis for applying concurrency as a growth management strategy as well as for assessing impact fees to fund transportation improvements. *Lacking a compliant Transportation Element in its Plan on which to base its TIP*, Sultan is without a basic building block for managing its growth.

FDO, at 11.

First Compliance Hearing

The FDO established May 15, 2007, as the deadline for the City of Sultan to take appropriate legislative action to bring its 2006-2012 TIP into compliance with the GMA. The City timely submitted the City's Status Report RE: Compliance and City's Compliance Index and Fallgatter submitted Petitioner's Response to City's Status Report and Response to City's Compliance Index. The First Compliance Hearing was convened in the Board's offices on June 4, 2007.

At the hearing, the City stated that it had not yet completed the work to bring its six-year TIP into compliance and requested the Board to set a new compliance deadline of August 15, 2007. Petitioner joined the request for an extended compliance schedule but was skeptical about whether the necessary work could be completed under the City's timeline. Accordingly, on June 18, 2007, the Board issued an Order Finding Continuing Noncompliance and Invalidity and Amending Compliance Schedule. The Order set September 15, 2007, as the date for the second Compliance Hearing.

Second Compliance Hearing

On August 31, 2007, the Board received the City's Statement of Actions Taken to Comply **(2nd SATC)** and the City's Second Compliance Index with attachment. The City stated that at its August 9, 2007, City Council meeting, it enacted Resolution 07-14: Adopting a Six-Year Transportation Improvement Program for the Years 2008-2013. The City states:

> The TIP adopted by Resolution 07-14 is based upon traffic studies and assessment done during 2007. A supplemental EIS also is in process. The traffic studies disclose a need to change traffic levels of service in the City from those adopted in the 2004 Comprehensive Plan. An update to the Transportation Element of the Comprehensive Plan is also in the works to be completed before the end of the year. *The TIP adopted in Resolution 07-14 is not consistent with the 2004 adopted Comprehensive Plan*, but is consistent with the Traffic Study and Assessment, is the basis for the SEIS, and is consistent with the Comprehensive Plan update to be adopted before the end of the year.

2nd SATC, at 3 (emphasis supplied).

On September 10, 2007, the Board received Petitioner's Reply to City of Sultan's SATC. Petitioner raised numerous objections, among them:

- The public participation process was deficient.
- The TIP is based on revised Level of Service (LOS) standards that have not yet been adopted.
- Some projects on the TIP are outside the city limits.
- The TIP is not consistent with the outdated, but not yet replaced, Transportation Element.

Petitioner's Reply, at 7-8.

On September 10, 2007, the Board received a Letter Requesting Participation in Compliance Proceedings from Snohomish County Fire District #5 Board of Commissioners. The proposed participants indicated that the TIP includes projects that may encroach on land the Fire District has purchased for a future Fire District headquarters facility.

On September 10, 2007, the Board issued its Order Changing Date for Compliance Hearing, setting the hearing at 2:00 p.m. on September 27.

On September 25, 2007, the Board received a copy of a letter from Fire District #5 to the City of Sultan's Councilpersons and Mayor. The letter documents the involvement of Fire District #5 in the public process leading up to the adoption of Resolution 07-14, their concerns about potential encroachment of proposed road T-35 and proposed trail NM-1 on their property, and various other criticisms and suggestions concerning the City's process.

The Second Compliance Hearing was convened on September 27, 2007, from 2:00 p.m. to 3:30 p.m., in the Chief Sealth Training Room, 20th Floor, 800 Fifth Avenue, Seattle. Board members Margaret Pageler, Presiding Officer, Ed McGuire, and Dave Earling were present, with Board staff attorney Julie Taylor. The City of Sultan was represented by Thom Graafstra, with City Administrator Deborah Knight, Community Development Director Rick Cesar, and consultants Reid Shockey and Brittney Baldwin. Petitioner Jocelynne Fallgatter appeared *pro se*. Commissioner Fox, Commissioner Ingalls, and Chief Halvorson attended on behalf of proposed Participants Fire District #5. Also present were Courtney Flora, Rusty Driestan, and Matt Anderson.

II. DISCUSSION

Snohomish County Fire District # 5

RCW 36.70A.330(2) provides, in pertinent part:

> Any person with standing to challenge the legislation enacted in response to the Board's final order may participate in the [compliance] hearing along with the petitioner and the … city.

The Board finds that Snohomish County Fire District #5 has standing to challenge Resolution 07-14, pursuant to RCW 36.70A.280(2)(b), and that the request to participate was timely. Therefore participation in the compliance proceedings is **granted**.

At the Compliance Hearing, Commissioner Fox explained the Fire District's concern about possible encroachment of City transportation projects on Fire District land. The City indicated its intent to resolve the issue with the Fire District.

Consistency Between Transportation Element and TIP

The City's Status Report states that the newly-adopted TIP is based on analysis done in preparation for adoption of an updated Transportation Element which is to be adopted by the end of the year. The City acknowledges that the new TIP is not consistent with the Transportation Element of the 2004 Comprehensive Plan which is currently in effect. At the Compliance Hearing, the City explained that the new TIP is based on traffic studies and a needs assessment conducted for revision of the Transportation Element, including cost information based on the most recent Capital Facilities Plan (CFP) and consistency with the State's LOS for Highway 2. By including a project outside the city limits and projects inconsistent with the State's Route Development Plan, the City says, it is providing its local input to the state and regional projects and agencies.

At the Compliance Hearing, Petitioner restated her objection to adoption of a TIP that is not coordinated with an updated Transportation Element, is based on an LOS that has not been adopted, and includes projects outside the City limits and not coordinated with state and county transportation improvement plans.

The Board finds and concludes that the TIP has not yet been brought into compliance with the GMA. RCW 36.70A.070(6) sets out the mandatory components of the Transportation Element of a comprehensive plan, including the six-year TIP, and requires that the two be consistent. The TIP for 2008-2013 adopted by Resolution 07-14 has the same fatal flaw as the TIP for 2007-2012 adopted by Resolution 06-10: "[It is] a free-standing TIP that has no Transportation Element for support." FDO, at 11. As the Board stated in the FDO more than seven months ago:

> The Board is cognizant that the City of Sultan has retained a consultant to assist it in developing a Transportation Element for its Plan. However, the statutory deadline for this work has long passed, and a TIP based on the non-compliant Plan element is clearly erroneous.

FDO, at 15. Accordingly, the Board will enter an **order of continuing noncompliance and invalidity** and will notify the Governor's office of this determination. The Board will extend the compliance schedule to the end of the year in reliance on the City's representation that its Transportation Element will be updated by that time. This schedule also coordinates with the compliance schedule for *Fallgatter V* (CPSGMHB Case No. 06-3-0003), which also involves a non-compliant TIP. If compliance is not achieved by the extended deadline, the Board will request that the Governor impose sanctions.

III. ORDER

Based upon review of the 2nd SATC, the briefs and exhibits submitted by the parties, the GMA, prior Board Orders and case law, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

1. The City of Sultan has not yet brought its TIP into compliance with the GMA and the Board's Order. The Board therefore enters an **order of continuing noncompliance and determination of continuing invalidity**.

2. The Board extends the schedule for the City's compliance as follows:

   - The Board establishes **December 31, 2007,** as the deadline for the City of Sultan to take appropriate legislative action.
   - By no later than **January 14, 2008**, the City of Sultan shall file with the Board an original and four copies of the legislative enactment described above, along with a statement of how the enactment complies with this Order (**Statement of Actions Taken to Comply - SATC**). By this same date, the City shall also file a "**Compliance Index**," listing the procedures (meetings, hearings, etc.) occurring during the compliance period and materials (documents, reports, analysis, testimony, etc.) considered during the compliance period in taking the compliance action.
   - By no later than **January 28, 2008**,[1] the Petitioner may file with the Board an original and four copies of Response to the City's SATC.
   - By no later than **February 4, 2008**, the City may file with the Board a Reply to Petitioner's Response.
   - Each of the pleadings listed above shall be simultaneously served on the other party to this proceeding.
   - Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **February 7, 2008, at 11:00 a.m.** at the Board's offices. If the parties so stipulate, the Board will consider conducting the Compliance Hearing telephonically. If the City of Sultan takes the required legislative action prior to the December 31, 2007, deadline set forth in this Order, the City may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 3rd day of October, 2007.
CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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David O. Earling
Board Member

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Edward G. McGuire, AICP
Board Member

[1] January 20, 2008, is also the deadline for a person to file a request to participate as a "participant" in the compliance proceeding. *See* RCW 36.70A.330(2). The Compliance Hearing is limited to determining whether the City's remand actions comply with the Legal Issues addressed and remanded in the FDO.

Margaret A. Pageler
Board Member