



*support a rezone to effectuate an adopted comprehensive plan. The Board concluded that Petitioners did not carry their burden of demonstrating that the Ordinance was inconsistent with the cited land use and historic preservation policies in Everett's Comprehensive Plan. The Board also concluded that the environmental review for the action met the SEPA guidelines at issue.*

*It appeared to the Board that all of the parties missed opportunities to achieve a better outcome. However, the Board concluded that the Petitioners failed to carry their burden of proving noncompliance with the GMA or SEPA, and the Petition was dismissed. [Keywords: Consistency, Dissenting Opinions, Essential Public Facilities, Historic Preservation, Implementing Actions, Notice, Public Participation, SEPA]*

## **I. PROCEDURAL BACKGROUND**<sup>1</sup>

On November 3, 2008, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review from the North Everett Neighbor Alliance and Neighbors for Neighborhoods (together, **Petitioners** or **NENA**). The petition challenged the City of Everett's (**Respondent** or **City**) adoption of Ordinance No. 3090-08 amending the City's Comprehensive Plan and certain development regulations and adopting the Master Plan to allow the expansion of Providence Regional Medical Center Everett<sup>2</sup> (**Providence** or **PEMC**). Providence moved to intervene.

At the prehearing conference, the parties indicated that the Ordinance was also being contested in Snohomish County Superior Court (**the LUPA action**). On December 10, 2008, the Board issued its Prehearing Order and Order on Intervention. The City timely provided its Index of the Record and Core Documents. Subsequently three supplemental indices were filed.<sup>3</sup>

### *MOTIONS*

The City and Providence filed motions to dismiss various claims on jurisdictional grounds. In response, Petitioners withdrew one of their legal issues but contested the other matters at issue. On January 26, 2009, having thoroughly reviewed the parties' extensive briefing, the Board issued its Order on Motions, denying the motions to dismiss.

### *BRIEFING AND HEARING ON THE MERITS*

Briefing on the merits and additional motions to supplement the record were submitted as follows:

- February 10, 2009 - Petitioners' Opening Brief (**NENA PHB**)

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<sup>1</sup> A complete chronology of the procedures in this matter is attached as Appendix A.

<sup>2</sup> Providence Everett Medical Center (PEMC) has changed its name to Providence Regional Medical Center Everett (Providence). The names may be used interchangeably in these proceedings.

<sup>3</sup> Petitioners filed a motion to supplement the record, which was satisfied when the City submitted its updated Index on January 5, 2009.

- February 20, 2009 - City of Everett's Motion to Supplement the Record, with 5 exhibits.
- February 23, 2009 - Intervenor's Motion to Supplement the Record and Declaration of Michael Gaffney.
- February 23, 2009 - City of Everett's Prehearing Brief (**City PHB**)
- February 23, 2009 – Intervenor's Prehearing Brief (**Providence PHB**)
- February 23, 2009 - Petitioners' Rebuttal to City of Everett's Motion to Supplement the Record.
- February 26, 2009 - City of Everett's Reply to Petitioner's Response to Motion to Supplement the Record.
- March 2, 2009 - Petitioners' Reply Brief and Response to PEMC's Motion to Supplement the Record (**NENA Reply**)

The Hearing on the Merits was convened at 10:00 a.m., March 9, 2009, in the Chief Sealth Training Center, 20<sup>th</sup> Floor, 800 Fifth Avenue, Seattle, and adjourned at 1:20 p.m. Board members Edward McGuire, David Earling, and Margaret Pageler, Presiding Officer, were present. Gary Seagrave was the spokesperson for Petitioner North Everett Neighborhood Alliance, and Jeffrey McClimans was spokesperson for Neighbors for Neighborhoods. The City of Everett was represented by Eric Laschever, and Intervenor Providence by Chuck Maduell with John Keegan. A number of citizens and staff of the parties attended. Court reporting services were provided by Katie Eskew of Byers and Anderson, Inc.

The Hearing on the Merits afforded the Board an opportunity to ask questions clarifying important facts in the case and providing better understanding of the legal arguments of the parties. At the outset of the hearing, after hearing argument, the Presiding Officer granted the motion of Providence to supplement the record with attendance sheets from various pre-application neighborhood meetings. The Presiding Officer denied the City's motion to supplement the record with items from the parallel LUPA action.

At the close of the hearing, the Board invited the parties to provide supplemental briefing by March 19, 2009, on the relevance of the Final Decision and Order in *Halmo v. Pierce County*, CPSGMHB Case No. 07-3-0004c (Sept. 28, 2007).

Supplemental briefing was submitted as follows:

- March 17, 2009 – City of Everett's Submittal of Legislative History Regarding RCW 36.60A.140.
- March 18, 2009 – Petitioner's Objection to the City of Everett's Continued Briefing
- March 19, 2009 – Petitioners' Comment Brief Ordered at Hearing on the Merits (**NENA *Halmo* Brief**)
- March 19, 2009 – City of Everett's Briefing Regarding *Halmo v. Pierce County* (**City *Halmo* Brief**)
- March 19, 2009 – Intervenor's Supplemental Brief on *Halmo v. Pierce County* (**Providence *Halmo* Brief**)

- April 20, 2009 – City of Everett’s Statement of Supplemental Legal Authority
- April 22, 2009 – Petitioners’ Objection to the City of Everett’s Statement of Supplemental Legal Authority

The Board received the transcript of the hearing on March 18, 2009 (**HOM**).

## **II. STANDARD AND SCOPE OF REVIEW**

Upon receipt of a petition challenging a local jurisdiction’s GMA actions, the legislature directed that the Boards, “after full consideration of the petition, shall determine whether there is compliance with the requirements of [the GMA].” RCW 36.70A.320(3); *see also*, RCW 36.70A.280, .300(1).

The Board is empowered to determine whether county decisions comply with GMA requirements, to remand noncompliant ordinances to counties, and even to invalidate part or all of a comprehensive plan or development regulation until it is brought into compliance.

*Lewis County v. Western Washington Growth Management Hearings Board (Lewis County)*, 157 Wn.2d 488 at 498, fn. 7, 139 P.3d 1096 (2006).

The GMA creates a high threshold for challengers. A jurisdiction’s GMA enactment is presumed valid upon adoption. RCW 36.70A.320(1). “The burden is on the petitioner to demonstrate that [the challenged action] is not in compliance with the requirements of [the GMA].” RCW 36.70A.320(2).

In *Swinomish Indian Tribal Community, et al. v Western Washington Growth Management Hearings Board*, 161 Wn.2d 415, 423-24, 166 P.3d 1198 (2007), the Supreme Court summarized the Board’s standard of review:

The Board is charged with determining compliance with the GMA and, when necessary, invalidating noncomplying comprehensive plans and development regulations. The Board “shall find compliance unless it determines that the action by the state agency, county or city is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” RCW 36.70A.320(3). An action is “clearly erroneous” if the Board is “left with the firm and definite conviction that a mistake has been committed.” “Comprehensive plans and development regulations [under the GMA] are presumed valid upon adoption.” RCW 36.70A.320(1). Although RCW 36.70A.3201 requires the Board to give deference to a [jurisdiction], the [jurisdiction’s] actions must be consistent with the goals and requirements of the GMA.

161 Wn.2d at 423-24 (internal case citations omitted).

As to the degree of deference to be granted under the clearly erroneous standard, the *Swinomish* Court stated:

The amount [of deference] is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the [jurisdiction's] actions a "critical review" and is a "more intense standard of review" than the arbitrary and capricious standard.

*Id.* at 435, fn. 8 (internal citations omitted).

The scope of the Board's review is limited to determining whether a jurisdiction has achieved compliance with the GMA only with respect to those issues presented in a timely petition for review. RCW 36.70A.290(1).

### **III. BOARD JURISDICTION AND PRELIMINARY MATTERS**

#### **A. BOARD JURISDICTION**

The Board finds that the Petition for Review was timely filed, pursuant to RCW 36.70A.290(2).

The Board finds that Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2). Both petitioning organizations provided written and oral comments throughout the City's public process for consideration of the Ordinance; they have participation standing under the GMA. The Petition for Review also alleged that the Petitioners had standing to challenge the City's SEPA compliance. Petition for Review, Paragraph 6.3. At the Hearing on the Merits, the City explained that it was not prepared to argue that the SEPA standing requirement had not been met and referenced "how [Petitioners] pled in their petition what their injury was." HOM, at 94. The Board therefore finds that the Petitioners have standing to bring their SEPA challenge.

The Board finds that it has jurisdiction over the subject matter of the petition pursuant to RCW 36.70A.280(1). The City and Providence brought motions to dismiss portions of the petition on the grounds that the Ordinance provisions rezoning the property and adopting the master plan were a "site-specific rezone" not subject to GMA jurisdiction. The Board's Order on Motions (Jan. 26, 2009) rejected the motions to dismiss and found GMA jurisdiction.

The Board's analysis in the Order on Motions was limited to the language of Ordinance 3090-08 itself. Subsequently, the parties have submitted hundreds of pages of the City's record in support of their respective positions on the merits. These records affirm the Board's conclusions regarding its jurisdiction. The Board notes that from the outset of the application for rezoning, Providence described its request as a "non-project action." See, e.g., Ex. 1, Application, at 0026; Ex. 2, SEPA Checklist, at 0046, 0070. At the Hearing on the Merits, Providence stated that its SEPA analysis was a "nonproject environmental review" [HOM at 48, 55], and that the level of specificity in its plan was appropriate to a

“nonproject action” [HOM, at 58, 59].<sup>4</sup> Thus the Board’s conclusion in its Order on Motions – finding subject matter jurisdiction to review Ordinance 3090-08 – is amply supported by the record and by admissions of the parties.

## **B. PRELIMINARY MATTERS**

### *Providence Motion to Supplement the Record.*

Providence moved to supplement the record with sign-in sheets from neighborhood meetings held prior to and following submission of its application for re-designation of the College property. Providence explains that these records were kept by Providence, not by the City, but notes that City planning staff Dave Koenig and Allan Giffen attended virtually all of the meetings. Providence asserts that these sign-in sheets may be of assistance to the Board in deciding issues of public participation, including the question of compliance with the Everett code requirement for pre-application neighborhood consultations.<sup>5</sup> Petitioners objected that the documents were misleading, because attendance by community members provides no indication of the subject matter discussed at the meetings.<sup>6</sup>

At the Hearing on the Merits, after hearing argument, the Presiding Officer **granted** Intervenor’s Motion to Supplement. HOM, at 11. The record is supplemented with the following documents:

- HOM Ex. 1** – PEMC Neighborhood Meeting Attendance Sheet – 23 Jan 07
- HOM Ex. 2** – PEMC Neighborhood Meeting Attendance Sheet – 15 Mar 07
- HOM Ex. 3** – PEMC Neighborhood Meeting Attendance Sheet – 25 Apr 07
- HOM Ex. 4** – PEMC Neighborhood Meeting Attendance Sheet – 12 Jun 07
- HOM Ex. 5** – PEMC Neighborhood Meeting Attendance Sheet – 23 Oct 07
- HOM Ex. 6** – PEMC Neighborhood Meeting Attendance Sheet – 26 Feb 08
- HOM Ex. 7** – PEMC Neighborhood Meeting Attendance Sheet – 12 May 08
- HOM Ex. 8** – Everett Community College/Providence Everett Medical Center Community Meeting – 29 May 08
- HOM Ex. 9** – PEMC Neighborhood Meeting Attendance Sheet – 1 Jul 08
- HOM Ex. 10** – PEMC Neighborhood Meeting Attendance Sheet – 17 Nov 08

### *City’s Motion to Supplement the Record*

The City moved to supplement the record with three exhibits:

Proposed Ex. B - Excerpts of Petitioner’s Opening Brief in Superior Court

Proposed Ex. C - Pages 1 and 5 of the Land Use Petition (Filed in Snohomish County Superior Court on 11/17/08)

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<sup>4</sup> The City at the hearing described the action as a “hybrid” of policy-level and project-level actions - “something that’s neither fish nor fowl.” [HOM, at 91-93].

<sup>5</sup> Intervenor’s Motion to Supplement the Record and Declaration of Michael Gaffney.

<sup>6</sup> Petitioners’ Reply Brief and Response to PEMC’s Motion to Supplement the Record.

## Proposed Ex. D - Stipulated Order Pursuant to RCW 36.70A.080(5) Waiving the Initial Hearing and Establishing a Case Schedule

The City asserts that these pleadings from the parallel LUPA case in Superior Court are necessary or of substantial assistance to the Board in determining its jurisdiction concerning the City's compliance with various City Code provisions.<sup>7</sup> The City states that Petitioner Neighbors for Neighborhoods "has invoked the jurisdiction of the Superior Court over compliance with the City code, stipulated to jurisdiction in that Court, and made arguments identical to those before the Board." *Id.* at 3. Petitioner NENA objects that it is not a party to the Court proceeding and points out that its arguments were developed and presented to the Planning Commission and City Council in Power Points and letters prior to adoption of the Ordinance,<sup>8</sup> so it is not surprising that the same arguments and language appears in both proceedings.

At the Hearing on the Merits, after hearing argument, the Presiding Officer **denied** the City's Motion to Supplement.<sup>9</sup>

### Post-Hearing Briefing

WAC 242-02-810 provides: "Unless requested by or authorized by a board, no post hearing evidence, documents, briefs or motions will be accepted." At the close of the Hearing on the Merits, the Board requested simultaneous briefing on the relationship between this case and the Board's decision in *Halmo v. Pierce County*, CPSGMHB Case No. 07-3-0004c, Final Decision and Order (Sept. 28, 2007). Briefs were timely submitted by each of the three parties.

In addition, the City filed City of Everett's Submittal of Legislative History Regarding RCW 36.60A.140. NENA then filed Petitioner's Objection to the City of Everett's Continued Briefing.

Pursuant to WAC 242-02-810, the Board will not accept the City's additional unrequested briefing. The Submittal of Legislative History Regarding RCW 36.60A.140 is **disregarded**.

## **IV. THE CHALLENGED ACTION**

Providence is a nonprofit entity that has been providing health care from its north Everett site since 1924. Ex. 190, at 2403. It has become a regionally-significant facility that provides medical services throughout northwest Washington. Ordinance 3090-08, Findings 2-4. The Providence North Everett campus consists of 14 acres in a residential neighborhood.

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<sup>7</sup> City of Everett's Motion to Supplement the Record.

<sup>8</sup> Petitioners' Reply Brief and Response to PEMC's Motion to Supplement the Record.

<sup>9</sup> Pageler: "It's not clear to the Board that this ... that admitting these documents will be of any assistance in making our decision..." HOM, at 14.

In November 2006, Providence reached an agreement with Everett Community College (**ECC or College**) whereby the hospital would acquire nine acres of adjacent property owned by the College and used for athletics. In order to incorporate the College property into the existing 14-acre hospital campus, the hospital applied to the City for (1) a comprehensive plan amendment, (2) rezoning from residential (R-2) to Institutional Overlay Zone (R-2-I), and (3) a Development Master Plan for the College property.<sup>10</sup> The proposed amendments were initiated in June of 2007 as part of the City's annual review cycle of its GMA plans and development regulations. RCW 36.70A.130(2).<sup>11</sup>

The land acquisition was part of an agreement between the College and Providence to exchange tracts of land so that each institution could grow in its contiguous neighborhood. Ex. 1, at 0021. The College and Providence made their agreement contingent on obtaining City re-designation and rezoning of their respective properties. *Id.* Applications of both institutions were filed and processed in tandem.

The initial Providence application broadly requested designation of the College property for future hospital-related uses – described by Providence as “land banking” – and proposed a building envelope and setbacks. *Id.* at 0026, 0040. In October 2007, the Providence application was amended to include a central utility plant as a first phase of development on the property. Ex. 3, at 0077. A SEPA scoping meeting was convened by the Planning Commission in November, 2007. Ex. 47, at 3045. The following April, the Commission held its hearing on the DSEIS. Ex. 46, at 0341.

After issuance of the FSEIS, the Planning Commission held public hearings on June 2 and July 7, 2008.<sup>12</sup> The City Council held its additional public hearing at its Council meeting on August 20, 2008.<sup>13</sup>

Following deliberation, the City Council adopted Ordinance No. 3090-08, which comprises three actions:

- amends the City's Comprehensive Plan land use policies and the Plan's land use map,
- rezones the College property from R-2 (Single Family) to R-2-I (Institutional Overlay with Master Plan), and
- prospectively adopts an amended Master Plan for the combined Providence acreage.<sup>14</sup>

Two community organizations – Neighbors for Neighborhoods and North Everett Neighborhood Alliance - filed a Petition for Review with this Board, challenging

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<sup>10</sup> See Ordinance No. 3090-08, WHEREAS, ninth paragraph.

<sup>11</sup> See Ordinance No. 3090-08, WHEREAS clauses describing the procedural history of the ordinance; Ex. 50, at 0373.

<sup>12</sup> Transcripts at Ex. 286 and 287.

<sup>13</sup> Transcript at Ex. 282.

<sup>14</sup> Section 3 of the Ordinance prospectively adopts a combined Master Plan for the whole area (existing 14-acre campus and new 9-acre College property).

compliance with various provisions of the GMA and SEPA. Concurrently, Neighbors for Neighborhoods filed a challenge in Snohomish County Superior Court<sup>15</sup> under the Land Use Petition Act, RCW 36.70C, which provides the exclusive avenue of review for land-use project permit decisions.

## **V. LEGAL ISSUES AND DISCUSSION**

### **A. PUBLIC REVIEW PROCESS - Legal Issue No. 1**

Petitioners challenge the City's public process for adopting Ordinance 3090-08, asserting that the process did not provide the public participation required under the GMA and, specifically, did not follow the City's own code provisions.

The Prehearing Order states Legal Issue No. 1 as follows:

*Issue 1. Public Participation.* The City of Everett's adoption of Ordinance 3090-08 was not guided by RCW 36.70.020(11) and did not comply with RCW 36.70A.035 and RCW 36.70A.140 requiring early and continuous public participation throughout the planning and code amendment process; the City's action further failed to comply with policies and regulations in the Comprehensive Plan and Everett Municipal Code ("EMC") addressing the public review process for such map amendments and institutional master plans under, *inter alia*, EMC Title 15 and Chapter 19.33B.

#### **Applicable Law**

The GMA requires cities planning under the Act to provide notice and opportunity for participation in the process of planning and development regulation consideration. The notice and public participation requirements of the GMA are found in RCW 36.70A.140 and .035:

**36.70A.140 Comprehensive plans — Ensure public participation.** Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments.... Errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed.

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<sup>15</sup> *Neighbors for Neighborhoods v. City of Everett, et al.*, Snohomish County Superior Court No. 08-2-07289-2 (Honorable Bruce Weiss).

**36.70A.035 Public participation — Notice provisions.** (1) The public participation requirements of this chapter shall include notice procedures that are reasonably calculated to provide notice to property owners and other affected and interested individuals, tribes, government agencies, businesses, school districts, and organizations of proposed amendments to comprehensive plans and development regulations.

RCW 36.70A.035 provides examples of reasonable notice provisions and articulates special rules concerning late amendments by the elected decision makers. In summary, after the close of public testimony and comment, a county or city council may not make further amendments to GMA legislation unless the amendments are within the scope of the alternatives that have been available for public discussion (.035(2)).

RCW 36.70A.020(11) is the GMA Goal dealing with public process:

(11) Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

*Positions of the Parties*

Petitioners contend that the City's process was deficient. They allege three specific failures and two general concerns:

1. Providence did not conduct the pre-application meetings required by City code. NENA PHB, at 27-31.
2. The City's notice boards did not meet standards. *Id.* at 9, 23-24.
3. The Planning Commission never held the pre-hearing workshop(s) required by the City code. *Id.* at 25-27.
4. The Providence proposal was modified without giving the public adequate opportunity for review and analysis. *Id.* at 24.
5. Providence failed to work with the neighbors as required by the Comprehensive Plan and City Code. *Id.* at 33; HOM at 83.

The City responds with evidence in the record that the neighborhood groups were thoroughly informed and actively participated in the public process from spring 2007 until enactment of the Ordinance in August, 2008. City PHB, at 6. The City cites the changes made to the Providence proposal after the first Planning Commission hearing (June 7, 2008) as ample evidence of its responsiveness to community concerns. *Id.* at 13. The City further argues that GMA compliance does not encompass its application of its own municipal code (*id.* at 8-11), but, in any event, it asserts that one or more of the Planning Commission meetings should count as a "workshop." *Id.* at 11-12.

The response from Providence emphasizes the participation of the neighborhood groups at each step of the process and the changes made to its first master plan proposal in response

to the neighborhood outcry. Providence PHB, at 27-39. Providence suggests that the Petitioners were given extraordinary opportunities to state their concerns.

### Board Discussion

#### Statement of Facts<sup>16</sup>

Because expansions of major institutions can have severe impacts on surrounding neighborhoods, the City of Everett has enacted special code provisions for its consideration and enactment of zoning for hospitals, community colleges and the like. Chapter 33B EMC.<sup>17</sup> The Code requires a re-designation of land for major-institution use to be accompanied by an institutional overlay zone and adoption of a master plan for the property.<sup>18</sup> The Board finds that this scheme – designed to protect all the parties, ensure thoughtful, inclusive planning, and provide long-term certainty – created an unanticipated snare for everyone in this case.

It was well known to the City and the neighborhood that Providence and the Community College had been working toward a land swap for ten or more years. Ex. 282, at 66-67. The deal finally came together in late 2006. Providence PHB, at 9-11. By then, Providence was well underway in a building program on its existing campus that would satisfy most of its expansion needs for many years. *Id.* As a condition of the land swap, Providence and the Community College agreed to seek re-designation of their respective properties, as proper zoning is a condition for Community College state funding grants and similarly a condition for the hospital to eventually obtain a Certificate of Need for more hospital beds from the State Department of Health. Ex. 1, at 21; Ex. 56, at 1286-87. In announcing the pending land swap and seeking re-designation, Providence made clear that its plan was to “land bank” the college property; that is, Providence had no immediate or short-term development plans for the additional land. NENA PHB, at 7; Ex. 192, at 2499.

Providence held pre-application neighborhood meetings on March 15, April 25, and June 12, 2007, with the pending land swap, land-banking proposal, and comprehensive planning process for the property on the agenda.<sup>19</sup> Providence submitted its application for re-designation and rezoning on June 28, 2007. Ex. 1. Providence sought approval of a building envelope to accommodate its long-term needs for uses such as:

#### Inpatient facilities

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<sup>16</sup> These statements constitute Findings of Fact by the Board.

<sup>17</sup> Exhibit B to City of Everett’s Rebuttal to Petitioners’ Response to Dispositive Motions.

<sup>18</sup> EMC 33B.030: “The institutional zone shall be established *only* in conjunction with a master plan which generally specifies the parameters for development of the property.” Emphasis added.

<sup>19</sup> The March 15, 2007, neighborhood meeting addressed Providence acquisition of College property which “represents a land bank for future planning.” Ex. 185, at 2468, 2499, 2501. The April 25, 2007, “land swap meeting” included discussion of the “comprehensive planning process for the athletic fields.” Ex. 185, at 2466, 2502. The June 12, 2007, neighborhood meeting addressed the “comprehensive planning process for the athletic fields on 13<sup>th</sup> Street.” Ex. 185, at 2464. Attendance sign-in sheets for these meetings are HOM. Ex. 2, 3, and 4.

Outpatient facilities  
Medical office buildings  
Medical support and service functions  
Medical center utilities  
Structured parking

*Id.* at 0020. Providence explained:

The request is for a non-project rezone ... [defined as a request] for areas when *a specific use or uses are not planned at this time* so that *the rezone is speculative in nature.... No specific construction projects are being proposed at this time* for the ECC [College] property under the R-2-I zoning. The purpose of the rezone request is to define the boundaries of the Medical Center's long-range development.

DSEIS at 0737. Emphasis supplied.

By October 2007, Providence was ready to break ground for a new hospital tower on its existing land as permitted in the earlier 2005 Master Plan. Providence determined that including utilities in the tower – boilers underneath, chillers on the roof, and the diesel generators required in the event of emergency power failures – would significantly reduce the space available for hospital services.<sup>20</sup> Plans were therefore developed to build a free-standing utility plant with capacity to serve any additional future development on the College property. The possible location of the plant was dependent, among other things, on the Community College schedule for replacing and demolishing its old gymnasium on the College property. *Id.* In October 2007, Providence amended its re-designation application to include building a Central Utility Plant on the north boundary of the College property. Ex. 3.

In November 2007, the Planning Commission held a scoping meeting for the SEPA review of both the Community College and Providence re-designation requests.<sup>21</sup> A public hearing on the DSEIS for both proposals was held on April 7, 2008.<sup>22</sup>

During this time, the Providence expansion plan began to evolve, largely in response to the City Code requirement that re-designation and application of an Institutional Overlay Zone must be accompanied by a Master Plan. It appears to the Board's reading of the record that Providence was pushed beyond its realistic planning horizon by the Overlay Zone and Master Plan requirements. Neighbors demanded more specifics than the "building envelope" proposed by Providence, as did the City staff and Planning Commission. The land swap between Providence and the Community College could not proceed without re-designation of the respective properties. However, the City's criteria and process for an Institutional Overlay Zone and Master Plan did not accommodate simply "land banking" the athletic fields for future hospital use.

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<sup>20</sup> Ex. 282, Transcript of August 20, 2009, City Council meeting (R. Shockey), at 37-38.

<sup>21</sup> Ex. 8, Agenda; Ex. 48, Minutes; Ex. 284, Transcript.

<sup>22</sup> Ex. 46, Agenda; Ex. 57, Minutes; Ex. 285, Transcript.

On June 2, 2008, the Planning Commission held a first hearing on the College and Providence proposals.<sup>23</sup> The plan presented by Providence at this meeting had moved the utility plant from the north edge of the property and toward the center of the fields. Ex. 130. The plan included medical offices and parking structures with height limits of 75' and 45' respectively and a hospital bed tower of 175'; these potential buildings were roughly conceptual. A number of the citizens who testified at the hearing, including several of these petitioners, continued to demand a more detailed plan.<sup>24</sup> City staff made no recommendation but asked that the Planning Commission continue the meeting until June 17. Prior to June 17, Providence asked the Commission for an additional extension and the meeting was set for July 7 (the Monday after a three-day Independence Day weekend). Providence's revised plan was not made available to the neighbors until July 1. NENA PHB, at 16.

Community frustration was intensified by the last-minute meeting changes, errors in posting notice, and the difficulties of analyzing the revised Providence proposals in the few days surrounding the Fourth of July. NENA Reply, at 2-3.<sup>25</sup>

Ordinance 3090-08 as adopted by the City Council contains several modifications to the building envelope originally proposed by Providence.<sup>26</sup>

- The footprint for 175' buildings was reduced from 5 acres to 2.3 acres and located to the southwest of the property, farthest from neighbors.
- The utility building was relocated from the north boundary toward the center of the property.
- The 35' vegetated buffer on the north and east boundaries was extended to the south side along 13<sup>th</sup> Street.
- Total square footage allowance was reduced from 1 million to 800,000 square feet.
- Heights of medical office buildings along the north of the property were reduced from 75' to 45'.
- Heights of medical offices on the east side were stepped back, from 45' along the frontage to 75' toward the interior of the property.

The adopted Master Plan provides for three phases of development. The Central Utility Plant is to be constructed in Phase 1.<sup>27</sup> Phase 2 will be construction of medical office buildings on the north and east of the property. There is no current target date for Phase 2 construction. The interim use of Phase 2 land is surface parking and construction staging. Phase 3 is a new bed tower in the 175' zone. The need for additional hospital beds is

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<sup>23</sup> Ex. 55, Agenda; Ex. 286, Transcript.

<sup>24</sup> See, e.g., criticism that Providence plan was incomplete, in Transcript of June 2, 2008, Planning Commission Hearing, Ex. 286, Gary Seagrave at 43, Melissa Stringer at 66, Jeff Gibson at 65, Jeffrey McClimans at 60.

<sup>25</sup> "The problems with the participation have to do with when and how the applicant and city released information and to what extent the public was able to react to said information."

<sup>26</sup> See Providence PHB, Attachments B and C.

<sup>27</sup> At the Hearing on the Merits, the parties indicated the project permit for the utility plant is currently under review. HOM, at 96.

acknowledged to be many years in the future. The interim use of this land is construction staging.

In light of the foregoing facts, the Board considers Petitioners' public-process challenges.

*Did Providence hold pre-application meetings as required by City Code?*

EMC 19.33B.030(B) provides:

Prior to the formal filing of an application for an institutional overlay zone, the sponsoring institution or the city, whichever initiated the establishment of the institutional overlay zone, shall hold public meetings to discuss the proposal and address the concerns of the affected area residents and property owners. The master plan shall reflect the various concerns raised through the public input process.

Petitioners correctly comment: "The pre-application public meetings process is deemed sufficiently important to merit a relatively detailed and specific section in the Everett Zoning Code. The public meetings are mandated to ensure the master plan shall reflect the various concerns raised through the public input process." NENA PHB, at 31.

The Board finds that the neighborhood meetings held March 15, April 25, and June 12, 2007, met the City Code requirement.<sup>28</sup> At that time, Providence was proposing to land-bank the College property. The Board finds that the land-swap and the comprehensive planning process for the athletic fields were on the agenda of those meetings, giving neighbors an opportunity to raise their concerns. The Board finds no support in the record for Petitioners' suggestion that, when Providence submitted its application for re-designation, it had any more specific plans for the property than its declared interim usage for construction staging and parking and a building envelope for eventual development. The fact that the plan was subsequently elaborated and became more specific doesn't render the pre-application meetings non-compliant with the City Code requirement.

*Did the City's notice boards meet standards?*

Petitioners raise objections to the placement of the notice boards for public hearings and to the City's failure to update them with accurate meeting dates. EMC 15.24.190 requires that signs be posted along every 150' of frontage and states that signs should be easily viewed on all sides fronting a street. Petitioners state that Providence posted notification only on two boards on dead end streets which are not traffic entrances to the property. NENA PHB at 9, 23. Petitioners contend: "The signs are indicative [of] the applicant's attempt to follow rules minimally to keep public participation quelled." *Id.* at 25. The City asserts that the property was posted in four locations. City PHB, at 10, Ex. 201, at 2989.

The Board has ruled that minor errors in one form of notice do not warrant a finding of GMA noncompliance in cases where other forms of notice were effective in reaching

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<sup>28</sup> See Ex. 185, at 2464, 2466, 2468, 2499, 2501, 2502.

interested persons. The facts in *Cave/Cowan v. City of Renton*, CPSGMHB Case No. 07-3-0012, Final Decision and Order (July 30, 2007), at 10-12,<sup>29</sup> and *Skills, Inc. v City of Auburn*, CPSGMHB Case No. 07-3-0008c, Final Decision and Order (July 18, 2007)<sup>30</sup> are analogous. In each of these cases, one or more of the notices provided by the City was defective. Nevertheless, the general public – and the petitioners in particular – received effective notice through other City-provided communications, such as direct mailing, City website, and newspaper notices. In each case, the petitioners themselves were actively engaged in the public process and not blindsided or misled by defects in the notices. RCW 36.70A.140 provides:

Errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed.

In the present case, it appears that the error was corrected by the City, and additional notice boards were posted. Ex. 201, at 2989.

*Did the Planning Commission hold the pre-hearing workshop(s) required by the City Code?*

Everett’s adoption process for an Institutional Overlay Zone lays out a public adoption process in which the Planning Commission holds a public workshop in addition to a public hearing. EMC 19.33B.030(C) provides:

Upon filing a valid rezone application and the completion of the required environmental review process, the planning commission shall review the proposed master plan, rezone and any required amendments to the Everett general plan at public workshops and at least one public hearing at which the planning commission shall make a decision regarding the proposed institutional overlay zone.

The City’s process for review of an Institutional Overlay Zone provides this early opportunity for interaction between City staff, applicant, and interested citizens in order to identify and respond to public concerns in an interactive setting. As Petitioners point out, public hearings allow for presentations but not for discussions, answers to questions, and exploration of options as would be possible in a workshop format. NENA PHB, at 25-27.

In this case, no workshop took place. The City attempts to characterize two SEPA hearings as meeting the workshop requirement – the scoping meeting November 27, 2007,

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<sup>29</sup> “A review of the Record before the Board reveals several notices disseminated by the City in regard to the rezone of the Upper Kennydale area and therefore the resolution of this issue should not rest solely on a single notice as Petitioners argue.” *Id.* at 10.

<sup>30</sup> “The Board notes that the City acknowledges that several missteps occurred in this Plan amendment process and that notice to the citizens of Auburn could have been more detailed. However, in this context, the Board cannot conclude that the City was not guided by Goal 11 – to encourage citizen involvement in the planning process – or in violation of RCW 36.70A.035(1) - notice.” *Id.* at 12.

and the DSEIS hearing April 7, 2008.<sup>31</sup> The notice and agenda for each of these meetings makes clear that they were a part of the environmental review process.<sup>32</sup> The public workshops of EMC 19.33.B.030C are to take place “upon ... completion of the required environmental review process.” The process flowchart in the City’s Code clearly calls out workshops as a step between SEPA review and Planning Commission hearings. NENA Reply, Attachment B. The Board has read the transcripts of the relevant portions of both the SEPA meetings [Ex. 284 and 285] and concurs with Petitioners: neither meeting was the “workshop” contemplated by City Code in connection with an institutional overlay zone. Far from the interactive dialogue or information exchange that a public workshop would imply, at the April 7, 2008 hearing, the Providence spokesperson declined to respond to the comments or questions raised by citizens.<sup>33</sup>

The Board finds that the City failed to hold a pre-hearing workshop on the Providence proposal. The Petitioners looked to the Code and wanted to play by the rules, but they were short-changed when the City did not adhere to the process it had established.

*Was the Providence proposal modified without giving the public adequate opportunity for review and comment?*

From the beginning, Providence indicated it understood the College property was the only contiguous property on which it could expand and therefore it “views this property as a land bank to assure that in the future it can initiate programs that will meet the health care needs of Everett and Snohomish County.” FSEIS, at 4.40. As late as May 28, 2008, Providence stated:

PEMC is not requesting approval of a full master plan for development of the ECC Property at this time. With the exception of the Utility Building, there are no current plans to develop buildings on the site. ... When PEMC identifies the need to further develop the site, it will create a new master site development plan and submit individual building applications for review.

*Id.* At the June 2, 2008, Planning Commission Hearing, Providence stressed that its application was for a “land bank for the future,” anticipating future “thoughtful planning for specific uses” and “working with neighbors ... on a project-by-project basis.” Ex. 130, at 1770, 1774 (S. Anderson, power point).

Following the June 2, 2008, Planning Commission hearing, Providence modified its proposal and produced additional analysis.<sup>34</sup> These materials were provided to the

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<sup>31</sup> Ex. 283, Transcript of August 20, 2008, City Council meeting (A. Giffen), at 19.

<sup>32</sup> For scoping meeting, see Ex. 201, at 2966-76 and 2979-2981, announcing the Nov. 27, 2007, meeting as an EIS scoping meeting, and Ex. 47, at 0345, Agenda. For DEIS hearing, see Ex. 201, at 2939-2942 and 2949, announcing April 7, 2008 meeting as opportunity to comment on the DEIS, and Ex. 46, at 0341, Agenda.

<sup>33</sup> Ex. 285, Transcript of DSEIS public hearing April 8, 2008, at 16.

<sup>34</sup> Ex. 71, at 1413; Ex. 174, at 1966: report on “Population Growth, Bed Demand, and Physician Demand;” revised utility building location; revised air quality analysis; revised noise impact analysis; revised shadow impacts analysis; additional detail in Master Plan narrative, development standards, and design guidelines.

community on June 30. On July 7, City staff made its recommendation to the Planning Commission, and the Commission, after a public hearing, forwarded its recommendation to the City Council. The Petitioners state: “The plan that was eventually adopted did not come to fruition until June 30, 2008. The supporting evidence supplied at this time was rushed and did not give the public adequate time to review or comment prior to the Planning Director’s recommendation to the Commission to accept the new plan.” NENA PHB at 24. For the neighborhood groups, the short turn-around and lack of real dialogue smacked of back-room dealing, not the GMA required “early and continuous public participation.”

Two recent Board decisions deal with plans/development regulations that similarly “morphed” during the decision process. In each case, the neighbors filed similar GMA challenges alleging non-compliance with public participation requirements. The Renton City action challenged in *Cave/Cowan v. City of Renton, supra*, began with a property owner’s request to up-zone 3 in-city acres of blueberry farm to R-4. This led the City staff to review the zoning on the surrounding property and resulted in a staff recommendation to down-zone 49 acres of the surrounding neighborhood from R-8 to R-4. The City considered and adopted this expanded rezoning of the neighborhood without re-starting its amendment cycle. Robert Cave and John Cowan, who owned two of the down-zoned properties, argued that the City’s action on the “morphed” proposal failed to comply with requirements for notice and for early and continuous public participation, and unfairly condensed the time for public review. *Id.* at 7.

In *Cave/Cowan*, the Board found, notwithstanding the expedited timeline for review of the expanded rezone, the City provided “continuing opportunities for the public to provide input.” *Id.* at 13. Indeed, Mr. Cave and Mr. Cowan participated in hearings throughout the process. The Board rejected the argument that the changed proposal required the City to start its process over again. *Id.*

Similarly, in *Halmo, et al. v. Pierce County*, CPSGMHB Case No. 07-3-0004c, Final Decision and Order (Sept. 28, 2007), a controversial provision of the proposed Graham Sub-area Plan was introduced late in the process. After a four-year community planning process, the Graham Community Planning Board submitted its sub-area plan recommendations to the Planning Commission. At that point, County staff introduced a provision adopting an “essential public facility solid waste overlay” to recognize an operating landfill in the sub-area. CROWD – a neighborhood organization – contended that the County amendments were introduced too late for meaningful public process, especially in view of County Plan Policies requiring that the County “consult the host community” with regard to siting essential public facilities. *Id.* at 25. The Board disagreed, pointing to subsequent hearings and opportunities for correspondence with the County Council. The Board noted:

Pierce County’s proceedings were open, petitioners participated actively at all stages of the process, and comment was accepted up until the final vote of the County Council. No violation of .035 or .140 is apparent on the face of the matter.

*Id.* at 26.

In the case before us, the Board notes that the modifications and additional analysis submitted by Providence were in response to requests from City staff and Planning Commission, as well as to community demands. The need for more detail was apparently driven by the City code requirement for an Institutional Overlay Zone and master plan, rather than a mere re-designation to land bank the property, which had been Providence's intent. The Board sympathizes with the neighborhood participants – busy with their day jobs and their Fourth of July activities – yet having to scramble to respond to Providence's revised proposal on a very short turn-around.<sup>35</sup> However, the City's proceedings were open, and petitioners continued to provide input through August 20, 2008, when the Council vote was taken.

The public participation mandated by the GMA will often result in mid-stream changes to planning and regulatory proposals. A jurisdiction is not required to re-start its planning cycle in order to incorporate such changes, particularly where, as here, the changes result from requests that arise during the review process.<sup>36</sup> The Board finds and concludes that the City did not violate GMA requirements for an open public process by continuing to review and ultimately adopting the revised Providence master plan.

*Did Providence fail to work with its neighbors?*

Petitioners assert that, in addition to the GMA public participation requirements, Everett's Comprehensive Plan and city code impose a special duty on Providence to work with the neighbors in developing institutional overlays and master plan revisions.<sup>37</sup>

- Comprehensive Plan Land Use Policy 2.11.4, which specifically deals with Providence's future expansion states: "PEMC must work with the surrounding neighborhood residents in planning future expansions."
- The Institutional Overlay Zone process requires pre-application meetings "to discuss the proposal and address the concerns of the affected area residents and property owners. ... The master plan shall reflect the various concerns raised through the public input process."
- The Rezone Flowchart for Review Process V (including Institutional Overlay Zoning) includes a public workshop prior to Planning Commission consideration.<sup>38</sup>

Here, the Petitioners assert that meaningful opportunities for community input were especially frustrated by the evolution of the master plan following SEPA review. Petitioners state: "They filed their application in June of 2007. The utility building

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<sup>35</sup> Ex. 282, Transcript of Council meeting August 20, 2008, at 50-53 (G. Seagrave).

<sup>36</sup> A narrow exception is found in RCW 36.70A.035(2)(a); see *Pilchuck Audubon Society v. City of Mukilteo*, CPSGMHB Case No. 05-3-0029, Final Decision and Order (Oct. 10, 2005).

<sup>37</sup> NENA PHB, *passim*, summarized in HOM, at 83.

<sup>38</sup> NENA Reply, Attachment B.

information did not come until late October 2007. How could they have their master plan reflect the various concerns of the citizens if we didn't have the plan? The plan seems to be piecemealed in place from the start of the application." HOM, at 79.

The Board notes that, at some point during the process, the neighborhood organizers chose to take the position of simply opposing the proposed Overlay Zone rather than making further attempts to negotiate improvements. NENA PHB, at 18;<sup>39</sup> HOM, at 26-27.

With the relationship in this posture, it is perhaps not surprising that only a few modifications were made to the original conceptual application and utility plant proposal in response to the community outcry.<sup>40</sup> Providence agreed to move the utility plant from its northern border toward the center of its property, reduce its total square footage, and plan for one mega-tower instead of two. The City staff required an upper-level set-back at 45' for buildings along the perimeter of the property. The City and Providence contend that these changes to the plan demonstrate responsiveness to neighborhood concerns.

The neighbors disagreed. From their perspective,

[T]he new plan was wholly inadequate and made nearly no concessions. ... Neighbors wanted to see a plan that integrated utilities into the large acute care tower. ... A general layout of the land was finally provided ... [and filled in with 75' leased office space, another 175' hospital tower, another parking garage]. There was zero open space and the height limits and setbacks had not been addressed."

NENA PHB, at 17. The Petitioners state:

If they had marked up the setbacks, lowered the building heights, restricted the leased commercial office space [so] it would[n't] be right on the neighbors' property, tossed in a playground, left some open space or required the utility building to be integrated into their 2005 master plan, we would not be here today.

HOM, at 23. These were the concerns that had been consistently asserted by the Petitioners throughout the public process. See., e.g., Ex. 237, at 3016.

The Board notes once again that GMA public process requirements do not guarantee that citizens who participate in land use activities will be satisfied with the outcomes adopted by the City. Indeed, project proponents are seldom entirely satisfied, either. Similarly,

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<sup>39</sup> "I felt like we should try to work together and negotiate with the Hospital and set some reasonable setbacks, and reasonable height limits, integrate the utilities, give back some public open space, but after the last Hospital information meeting [July 1, 2008], my position changed after hearing what they had to say and we are back to just reject this rezone." Transcript, July 7, 2008 Commission Hearing, at 28 (G. Seagrave).

<sup>40</sup> Providence characterizes the changes as significantly scaling back the original preferred proposal. Providence PHB, at 3.

neither the GMA nor the City can guarantee good-faith communication among the parties to land use issues, which are often highly contentious.

Here, the City's procedures for Institutional Overlay Zone review held out expectations for a collaborative dialogue between Providence and its neighbors in developing long-term hospital expansion plans. At various times during the process, both Providence and the neighbors hoped that some level of dialogue could be established. Unfortunately, as it turned out, Providence's intent of merely de-designating and "land banking" the athletic fields for future growth had to be modified to meet the City's requirements for master plan specificity. The Petitioners and others raised their objections and offered alternatives at public meetings and in letters and emails. However, the City Council chose to adopt an Ordinance that largely supported the Providence proposal. The Petitioners have not demonstrated a violation of GMA public participation requirements.

### Conclusion

Ordinance 3090-08. The Institutional Overlay Zone and Master Plan proposed by Providence and adopted by the City of Everett establishes a building envelope on the College fields sufficient to accommodate any likely hospital-related development for the next three decades or more. In the near term, the only project actually planned is the central utility plant. In the interim, Providence may pave over all the existing athletic fields or otherwise put them off limits for the community.

An Alternative. As the Board sees it, a more reasonable approach would have resulted in a modest master plan with the allowance immediately needed for the central utility plant and construction staging but otherwise providing a low-scale building envelope and interim preservation of some open fields. A Comprehensive Plan policy amendment specific to Providence (e.g., Land Use Policy 2.11.4) would state the City's intent to amend the building envelope and accommodate more intensive development in the future when Providence was ready to apply for additional facilities.

The GMA Standard of Review. However, the Board is **not empowered to substitute its judgment** for the decisions of the Everett City Council, even though, in our judgment, there was a better route the Council might have taken. Rather, the Board's task is to determine compliance with the Growth Management Act, and demonstrating non-compliance is the Petitioners' burden.

Conclusion. In reviewing the lengthy record of the public process in this matter, the Board is not persuaded that GMA public participation requirements were violated. There were errors in the procedure; however, the City clearly notified its citizens, listened to their concerns, and provided opportunities for public input. The lengthy City Council meeting transcripts demonstrate that City Council members genuinely understood the concerns raised by residents on both sides of the dispute and that their decision in adopting the Ordinance was informed by the public process.

The Board finds and concludes that Petitioners have **failed to carry their burden** of proving non-compliance with the GMA requirements for notice and public participation –

RCW 36.70A.035 and .140. – or that the City’s action was not guided by GMA Goal 11. Legal Issue No. 1 is **dismissed**.

## **B. CONSISTENCY - Legal Issue No. 2**

The Prehearing Order states Legal Issue No. 2 as follows:

*Issue 2. Consistency.* The City of Everett’s adoption of Ordinance 3090-08 failed to comply with RCW 36.70A.070, RCW 36.70A.130, and the City of Everett Comprehensive Plan Policies adopted pursuant to the same, requiring that Comprehensive Plan policies, goals and maps be internally consistent and that zoning amendments be consistent with and implement the Comprehensive Plan, in that:

- (a) Ordinance 3090-08 is inconsistent with Land Use Policy 2.5 (calling for the protection of established residential neighborhoods from further encroachment by hospitals and requiring compact hospital growth, visual compatibility and protection from traffic and parking impacts).
- (b) Ordinance 3090-08 is further inconsistent with Land Use Policies 2.10 and 2.7 requiring coordination between agencies on hard-to-site facilities, and evidence that other communities have accepted a fair share of these “hard-to-site” or essential public facilities.
- (c) Ordinance 3090-08 is further inconsistent with Comprehensive Plan policies (including but not necessarily limited to Chapter 1.X.H.2) requiring a showing of sufficiently changed circumstances to justify Land Use and Zoning Map amendments.

### Applicable Law

The GMA requires that city plans and development regulations be consistent. RCW 36.70A.070 (preamble) states: “The [comprehensive] plan shall be an internally consistent document and all elements shall be consistent with the future land use map.” RCW 36.70A.130 makes clear that the requirement of consistency applies to amendments of the plan and development regulations. Section .130(1)(d) specifies: “Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.”

In addition to the requirement of consistency, the GMA imposes a special standard for comprehensive plan and development regulation amendments that deal with essential public facilities: local governments “may not preclude” essential public facilities. RCW 36.70A.200 contains the GMA requirements concerning planning for the siting of essential public facilities (**EPFs**). The relevant provisions are as follows:

(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.

CTED’s guidelines in WAC 365-195-340(1)(a)(i) explain that essential public facilities may include facilities “provided by private entities subject to public service obligations.”

### *Comprehensive Plan Policies*

The Land Use Element of the Everett Comprehensive Plan contains three sets of policies relevant to the City’s decision in this case – Land Use Policies 2.5, 2.10, and 2.11. Relevant portions of these policies are set forth below.

#### **2.5 Hospital and Clinic Land Use Policies**

Hospitals and many clinics in Everett have located in residential areas either prior to any zoning regulations or under the more permissive regulations of the previous zoning code. While providing many benefits to the community, these medical-related land uses have also had impacts upon the residential areas in which they have located, including increased traffic and parking congestion, escalating land costs, and elimination of housing stock. The policies of the Land Use Element allow for the continued development, expansion and operation of hospitals and clinics within those residentially-zoned areas currently designated for hospitals, clinics and medical related uses on the Land Use Map, and protect from further encroachment the residential neighborhoods adjoining the area where these medical-related land uses are located.

**Policy 2.5.1** Protect established residential neighborhoods from further encroachment by hospitals, clinics and other related medical activities and limit such uses to commercially-zoned areas and to those residentially-zoned areas where such uses are already well-established and designated by the Land Use Map. (See Policy 2.11.4)

**Policy 2.5.2.** Confine hospitals and medical clinics presently located in residential areas to compact configurations developed intensively rather than allowing them to sprawl into neighborhoods and eliminate housing stock.

**Policy 2.5.3.** Require development, expansion and remodeling of hospital and clinic activities to be visually compatible with and minimize the parking and traffic impacts upon established residential areas.

## **2.10 “Other Land Uses” or “Hard to Site Facilities” Land Use Policies**

Certain essential uses necessary to support urban development, such as colleges, hospitals ... are frequently not welcomed by neighborhoods near where such uses may be proposed. ... The following policies shall apply to the siting of “other land uses” or “hard to site facilities”:

**Policy 2.10.4.** Land uses that meet the description of “essential public facilities” which serve a countywide, regional or statewide need shall not be permitted in Everett unless the proponent demonstrates that other communities have accepted a fair share of essential public facilities.

## **2.11 Specific Geographic Areas Land Use Policies**

**Policy 2.11.4** Everett Community College – Colby Campus of Providence Everett Medical Center (PEMC). [As amended in 2005] Everett Community College (ECC) and the Colby Campus of the Providence Everett Medical Center are large institutional facilities located in the Northwest Everett neighborhood. In 2005, the City Council approved Comprehensive Plan map amendments, along with master plans for both facilities that are implemented through Institutional Overlay zones. The PEMC master plan provides for phased hospital development through 2015, while the ECC master plan provides for phased development through 2011.

The approved PEMC expansion includes significant intensification of use on the hospital properties as well as expansion to the east of the current site. The expansion to the east will result in the relocation and/or demolition of a block of homes in the Donovan Historic District (Block 248). Future expansions beyond the approved 2015 development will require additional review by the city, which may consist of amendments to the Institutional Overlay zone and Comprehensive Plan amendments. PEMC must work with the surrounding neighborhood residents in planning future expansions. Any future expansions must use existing hospital properties more intensively, excepting transitional buffer area, or extend from Block 248 to the north and northeast. No further homes may be lost to hospital expansion beyond the approved Master Plan area. Future expansion to the east of Oakes Avenue beyond Block 248 is prohibited.

### *Positions of the Parties*

Petitioners begin by calling out a sentence of RCW 36.70A.070(1) that pertains to the mandatory land use element of comprehensive plans :

Wherever possible, the land use element should consider utilizing urban planning approaches that promote physical activity.

Petitioners argue that paving the College fields is inconsistent with this requirement.<sup>41</sup>

Looking at Land Use Policies 2.5 and 2.7, Petitioners argue that the Providence expansion is inconsistent with these policies because the neighborhood is not being protected from further encroachment by the hospital, the plan allows sprawl into the neighborhood rather than compact configuration of hospital uses, there is no visual compatibility between a block of 75' tall buildings a mere 35' from historic cottages, and neighborhood quality is seriously degraded by allowing leased office buildings to replace open space. NENA PHB, at 34-35.

Land Use Policy 10 concerns "hard-to-site" facilities, specifically including colleges and hospitals. Policy 2.10.4 requires the proponent to demonstrate that other jurisdictions in the County have accepted a fair share of such facilities. Petitioners critique Providence's Summary Findings with Respect to Medical Need as a "flimsy document" and note that it was not even produced until the July 7, 2008 Commission hearing. *Id.* at 36. Petitioners contend that the long-term growth in need for acute care facilities in Snohomish County would be better served by planning a hospital to the north of Everett. They further contest the estimation for physician's offices and the need to have them on site, rather than in a commercial zone. The projected calculation for physician demand contains "too many assumptions and not enough detailed analysis." *Id.* at 38. Even if the hospital itself is an essential public facility, Petitioners assert, that doesn't support the plan for buildings to be leased out for medical offices. *Id.*

Finally, Petitioners protest that there are no changed circumstances to support rezoning the College Property, as required by City rezoning criteria. The only change is the ownership of the property, which is not enough to justify rezoning. *Id.* at 39.

The City urges the Board to reject NENA's appeal to the physical activity provisions of RCW 36.70A.070(1), suggesting that this is a "new issue," and further arguing that the "physical activity" language refers to the totality of the Everett Comprehensive Plan, not each discrete decision. City PHB, at 15.

The City points out that the primary comprehensive plan policy applicable to this case is Policy 2.11.4, which specifically addresses the future growth of Providence. *Id.* at 16. According to the City, Policy 2.11.4 clearly anticipates Providence's expansion onto the college fields: "Any future expansions must use existing hospital properties more intensively or extend from Block 248 to the north and northeast." The Policy provides that "no further homes may be lost due to hospital expansion." The City contends that this language explicitly authorizes expansion onto the College fields as an alternative to more intensively developing the existing hospital campus. *Id.*

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<sup>41</sup> Petitioners also reference RCW 36.70A.070(5)(d)(i)(C). The City points out that this provision relates only to rural areas. The Board agrees.

Addressing the “fair share” requirement, the City rejects NENA’s suggestion that the policy requires rigorous fact-finding, a definitive showing of need, or a differentiation between hospital beds and medical offices. *Id.* at 18, citing Ex. 199. The City contends that a projection of growth consistent with the current percentages of service offered is “fair.” Ex. 199.

The City asserts that, under state law, it is unnecessary to demonstrate changed circumstances to support a rezone if the new zoning implements a comprehensive plan policy, citing *Bjarnson v. Kitsap County*, 78 Wn.App. 840, 889 P.2d 1290 (1995). According to the City, the decision of the College to consolidate its campus and to make the athletic fields available to Providence is a change anticipated in the Everett Comprehensive Plan. “The College Property’s availability is exactly the change in circumstance the City Council anticipated might occur that would make hospital use on the College Property possible.” City PHB, at 20.

Providence contends that, because the college property was already designated for institutional use, its rezoning for hospital expansion does not represent “further encroachment” or “sprawl into neighborhoods,” and thus is not inconsistent with Land Use Policies 2.5.1 and 2.5.2. Providence PHB, at 40. Providence points to the master plan conditions for landscaped buffer, traffic management, upper-level setback and design guidelines to argue that the Policy 2.5.3 requirements of visual compatibility and minimized impacts are also addressed. *Id.* at 41.

Providence argues that the burden is on Petitioners to present evidence contravening the City’s finding with respect to fair share; merely critiquing the evidence relied on by the City is not enough. *Id.* at 42. As to changed circumstances, Providence states:

The ‘right’ of Providence to purchase the ECC site is a dramatic change from where things stood in 2005. This consolidation opportunity for Providence (and for the college) came after years of unproductive negotiations between Providence and ECC, and constitutes, in itself, a change in circumstances that would support the city’s rezone decision.

*Id.* at 43.

### Board Discussion

#### Statement of Facts<sup>42</sup>

Providence is a regionally significant health facility serving a fast-growing quadrant of the Central Puget Sound metropolitan area. Ordinance 3090-08, Findings 2-4. It is the sole provider of hospital services for the City of Everett. Ex. 1, at 0022. In 2007, Providence had 25,000 admissions, 103,000 emergency department visits (the highest volume of any emergency department in the state), and 500,000 outpatient visits. *Id.* Providence is the second largest private employer in Snohomish County, with 3,500 employees in all its

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<sup>42</sup> These statements constitute Findings of Fact by the Board.

facilities. Providence PHB, at 4. The continued growth of Providence medical services in Everett is one of the “basic assumptions” of Everett’s Comprehensive Plan. Comprehensive Plan, Introduction, at 17;<sup>43</sup> Land Use Element, at 11.

The 2005 Comprehensive Plan amendments dealing with Providence arose out of the controversy connected with Master Plan revisions in that year which allowed the hospital to expand onto Block 248, demolishing or relocating 22 of the historic Donovan homes. Ex. 56, at 1253. Prior to 2005, Providence had been unsuccessful in attempting to negotiate acquisition of the adjacent College athletic fields.<sup>44</sup> The need to provide more hospital beds became acute, and Providence applied for an Institutional Overlay Zone and Master Plan to expand on the property it owned on Block 248. At the time, Providence argued that it had no other options for its essential growth,<sup>45</sup> and that the expansion allowed on Block 248 would serve its needs for at least a decade.<sup>46</sup>

The City Council ultimately granted the application. Ex. 16, Ordinance 2850-05. Providence then relocated 11 of the historic homes and demolished the rest. A 1000-car garage was built on Block 248 and has been completed. A new 175’ hospital tower is under construction on Providence’s original campus. Ex. 56, at 1255. Less than three years after the grant of the 2005 amendments, Providence and the College negotiated their land swap and Providence submitted the present application.

In enacting the 2005 Master Plan that allowed Providence to expand onto Block 248, the City Council amended its Comprehensive Plan to indicate the requirements for any future Providence growth. Ex. 16. Those provisions were contained in the language of Land Use Policy 2.11.4 adopted in 2005.

*Is the Ordinance consistent with the City’s Land Use Policies?*

The Board’s review begins with Policy 2.11.4 [2005] – the specific policy adopted by the City Council in its 2005 Comprehensive Plan to address the actions before us.<sup>47</sup> Because

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<sup>43</sup> Basis assumption 2: “...[A]s the population of the area continues to grow and age, [Everett’s] role as the activity center for ... medical ... services within the county will grow.” *Id.*

<sup>44</sup> Ex. 282, Transcript City Council meeting August 20, 2008 (Council President Nielsen), at 106.

<sup>45</sup> Ex. 56, at 1287 (“at that time there was no viable alternative”).

<sup>46</sup> Ex. 56, at 1370 (citing DeGroot – “Once we reach 500 beds, we will be as big as a hospital needs to be”); Ex. 57, at 1378-79 (citing conclusion that hospital expansion not required for at least another twenty years).

<sup>47</sup> **Policy 2.11.4 Everett Community College – Colby Campus of Providence Everett Medical Center (PEMC).** [As amended in 2005] Everett Community College (ECC) and the Colby Campus of the Providence Everett Medical Center are large institutional facilities located in the Northwest Everett neighborhood. In 2005, City Council approved Comprehensive Plan map amendments, along with master plans for both facilities that are implemented through Institutional Overlay zones. The PEMC master plan provides for phased hospital development through 2015; while the ECC master plan provides for phased development through 2011.

The approved PEMC expansion includes significant intensification of use on the hospital properties as well as expansion to the east of the current site. The expansion to the east will result in the relocation and/or demolition of a block of homes in the Donovan Historic District (Block 248). Future expansions beyond the approved 2015 development will require additional review by the city, which may consist of amendments to the Institutional Overlay zone and comprehensive Plan amendments. PEMC must work with the surrounding

this policy directly addresses future Providence expansion, it governs and may be used to interpret the more general language in the other cited land use policies.<sup>48</sup> Policy 2.11.4 [2005] expressly linked the College master plan and the Providence master plan. The policy acknowledged the approved Providence expansion onto Block 248 and relocation/demolition of the block of historic homes. Then the following requirements were laid out for future hospital growth:

- Future expansions beyond the approved 2015 development will require additional review.
- Providence must work with the surrounding residents in planning future expansions.
- Future expansions must *either* use existing hospital properties more intensively *or* extend from Block 248 to the north and northeast (i.e., college athletic fields).
- No further homes may be lost to hospital expansion.
- Future expansion to the east of Oakes Avenue beyond Block 248 is prohibited.

The Board finds the City’s action largely consistent with this policy. First, there has been additional review – and more will be required – for the future expansion. Second, surrounding residents were notified and engaged in the process, though they protest that Providence did not genuinely “work with” them. Third, Providence opted to expand onto the college property rather than use existing property more intensively. Fourth and fifth, there is no expansion east of Block 248 and no loss of homes due to the expansion.

Ordinance 3090-08 amends Policy 2.11.4 to read as follows:

**Policy 2.11.4** [2008] Everett Community College and Providence Everett Medical Center are large institutional facilities located in the Northwest Everett neighborhood. In 2005, and again in 2008, City Council approved Comprehensive Plan map amendments, along with master plans for both facilities that are implemented through Institutional Overlay zones. The PEMC master plan provides for phased hospital development beyond 2030, while the ECC master plan provides for phased development through 2015.

The 2005 approved PEMC expansion included significant intensification of use on the existing hospital properties as well as expansion to Block 248. No further homes may be lost to hospital expansion beyond the approved Master Plan area. Future expansion to the east of Oakes Avenue beyond Block 248 is prohibited. In 2008, the City Council approved an amendment to the Comprehensive Plan and a Rezone of the ECC athletics property on the north

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neighborhood residents in planning future expansions. Any future expansions must use existing hospital properties more intensively, excepting transitional buffer area, or extend from Block 248 to the north and northeast. No further homes may be lost to hospital expansion beyond the approved Master Plan area. Future expansion to the east of Oakes Avenue beyond Block 248 is prohibited.

<sup>48</sup> “It is a basic rule of statutory construction that when there is a conflict between a statutory provision that treats a subject in a general way and another treats the same subject in a specific way, the specific statute will prevail.” *Westcott Homes LLC v Chamness*, 146 Wn. App. 728, 734, 192 P.2d 394 (2008).

side of 13<sup>th</sup> Street for future expansion by PEMC. This action was preceded by an agreement between PEMC and ECC to exchange properties to provide for the long term expansion needs of both institutions. The approval of the ECC Property for PEMC use for hospital and related medical activities is governed by an Institutional Overlay Zone Master Plan, that includes development standards and design guidelines to guide the future phasing of development on the property beyond 2030. No additional expansion of hospital and related medical uses into abutting residential areas shall be permitted.

The Board finds this amended policy consistent with the direction in the 2005 policy – again, acknowledging the linkage between the expansion plans of the College and Providence, and allowing Providence to expand onto the College fields so that no more homes would be demolished.

Land Use Policy 2.5.1, which prohibits “further encroachment by hospitals” into established residential neighborhoods, explicitly cross-references Policy 2.11.4, thus incorporating the option of Providence expansion onto the athletic fields. By necessary implication, hospital use of the athletic fields is *not* an encroachment into the residential area.

Land Use Policy 2.5.2 is specifically directed at prevention of demolition of housing: “Confine hospitals and medical clinics presently located in residential areas to compact configurations developed intensively rather than allowing them to sprawl into neighborhoods and eliminate housing stock.” The land swap here, which exchanges institutionally-zoned land between the College and the hospital, does not on its face “encroach” on a residential neighborhood, and certainly does not “sprawl into neighborhoods and eliminate housing stock.” No homes are displaced and only institutional land is re-designated.<sup>49</sup>

The Board cannot find that the City’s action allowing Providence expansion on the College fields is inconsistent with the cited land use policies.

*Is the Ordinance consistent with the “fair share” requirement of Land Use Policy 2.10.4?*

RCW 36.70A.200(5) provides:

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

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<sup>49</sup> The Board has no sympathy for the Intervenor’s argument that the College could have built big buildings on its fields under the prior designation. The fact of the matter is that Providence proposes to pave over athletic fields for parking lots and construction staging in the near term. As experienced by many neighbors, their quiet historic residential area has become a multi-year construction zone, with an anticipation of more “industrial-sized” buildings casting shadows, blocking views, and irrevocably altering the neighborhood character. The Board has to agree that Land Use Policy 2.11.4 anticipates this development, but its impacts should not be underestimated.

“Essential public facilities” are defined in the statute as “those facilities that are typically difficult to site, such as ... in-patient facilities.” RCW 36.70A.200(1). It is well settled that expansion or improvement of an essential public facility may not be precluded by local plans or regulations.<sup>50</sup> The location and development needs of a countywide, statewide or regional facility are not decided by the receiving jurisdiction, but by the appropriate regional or state agency.<sup>51</sup> A city cannot reject the siting of an essential public facility on the grounds that other jurisdictions have not taken an equitable share of such facilities. *Hapsmith I v. City of Auburn*, CPSGMHB Case No. 95-3-0075c, Final Decision and Order (May 10, 1996), at 40 (intermodal rail yard); *DOC/DSHS v. City of Tacoma*, CPSGMHB Case No. 00-3-0007, Final Decision and Order (Nov. 20, 2000) (work release center).

Everett’s Comprehensive Plan Land Use Policy 2.10 addresses “certain essential uses necessary to support urban development, such as colleges, hospitals [that] are frequently not welcomed by neighborhoods near where such uses may be proposed.” Everett’s Land Use Policy 2.10.4 requires the proponent of an essential public facility to demonstrate that other communities have accepted a fair share of such uses as a condition of siting the facility in Everett.<sup>52</sup>

**Policy 2.10.4.** Land uses that meet the description of “essential public facilities” which serve a countywide, regional or statewide need shall not be permitted in Everett unless the proponent demonstrates that other communities have accepted a fair share of essential public facilities.

In *Halmo v. Pierce County, supra*, the neighbors challenged the County’s decision to adopt an Essential Public Facilities [EPF] Overlay Zone for an existing privately-owned landfill. The neighbors asserted that Pierce County’s comprehensive plan EPF policies required a consideration of fair distribution of solid waste facilities throughout the County. They argued that the County should not have adopted the overlay zone without first initiating a siting process to determine equitable distribution, as required by its policies. In rejecting CROWD’s argument for county-wide distribution, the Board commented: “EPFs are in many cases unique facilities, with the location pre-selected by the proponent agency, so that the siting process is necessarily local, rather than county-wide.” *Id.* at 32. The Board approved Pierce County’s EPF Overlay Zone for the landfill.

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<sup>50</sup> *City of Des Moines v. Puget Sound Regional Council*, 97 Wn. App. 920, 988 P.2d 993 (1999) (SeaTac Airport); *Cascade Bicycle Club v. King County*, CPSGMHB Case No. 07-3-0010c, Final Decision and Order (July 23, 2007), at 18-19 (Burke-Gilman Trail).

<sup>51</sup> *King County v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order (Oct. 13, 2003), at 14 (sewage treatment plant); *DOC v. City of Lakewood*, CPSGMHB Case No. 05-3-0043c, Final Decision and Order (Jan. 31, 2006) (work release facility).

<sup>52</sup> Petitioners here criticize the Providence statement of need for future hospital beds as a “flimsy document,” but the building of a bed tower on the College property will not be based on this statement of need; it will require a certificate of need issued by the Department of Health. The “flimsy document” merely supports Providence’s present land banking of the College property for future possible growth in medical uses.

The Board reaffirms its earlier rulings that local “fair share” policies for regional EPFs are not enforceable under the GMA. *Hapsmith I v. City of Auburn, supra*; *DOC/DSHS v. City of Tacoma, supra*.

*Has the City shown the changed circumstances needed to support amending the land use map and comprehensive plan policies?*

The Everett Comprehensive Plan in its Introductory section describes the process and criteria for amendments to the land use map (Chapter 1.X.H) and plan policies (Chapter 1.X.I). Parallel considerations in these sections include:

- Circumstances related to the subject property and area in which it is located have changed sufficiently since the adoption of the plan to justify change in land use designation.
- Assumptions on which the designation or policy was based are erroneous, or new information is available.
- Proposed change promotes a more desirable growth pattern for the community as a whole.
- Consistency or conflict with other policies.

The present case involves two essential public facilities. One is the largest regional hospital in Snohomish County, which, though privately owned, provides essential community medical services, including emergency services and charity care. Ex. 282, at 29. The other is a large and fast-growing community college serving 19,000 students per year. Ex. 282, at 4. After over a decade of unproductive negotiations, the two institutions in late 2006 agreed to a land swap that would allow each to expand in a contiguous area around its core campus. As the City describes it, this arrangement “has allowed two vital institutions to consolidate themselves in a way which makes a tremendous amount of sense for those institutions, for the city as a whole, and for the region.” HOM, at 40.

The Board concurs with the City that the agreement of these two major institutions and the opportunity for each to pursue a more cohesive growth plan is a “changed circumstance.” The prior designation of the College athletic fields and the 2005 master plan for the Providence facility were based on an assumption that the College continued to need its athletic fields for its recreational programs. That assumption is now changed. The proposed land swap is more than a private land acquisition; rather, it allows two of the City’s major institutions to pursue a more desirable, coordinated growth pattern. The Board finds that the action meets the criteria set forth in the Comprehensive Plan introduction.

The Board further concurs with the City and Providence that “changed circumstances” are not required to support a request for a rezone to effectuate an adopted comprehensive plan. *Bjarnson v. Kitsap County, supra*.

### Conclusion

The Board finds and concludes that Petitioners **have not carried their burden** of demonstrating that the adoption of Ordinance 3090-08 was inconsistent with the Everett Comprehensive Plan policies. The Board concludes that the City's action **complies** with RCW 36.70A.070 and .130. Legal Issue No. 2 is **dismissed**.

### **C. SEPA – Legal Issue No. 3**

The Prehearing Order states Legal Issue 3 as follows:

*Issue 3. SEPA.* The City's adoption of Ordinance 3090-08 failed to comply with the State Environmental Policy Act (SEPA) (Ch. 43.21C RCW) in that the amendments and plan inconsistencies they gave rise to, including but not limited to the approval of the new 175-foot height limits to accommodate a future hospital tower to match the one approved in 2005, were not addressed or, in some instances, not adequately addressed, in the City's SEPA review. The City's SEPA review was further inadequate in that it failed to include reasonable alternatives, particularly those inescapably required in the context of a requested rezone of third party property by a private applicant.

### Positions of the Parties

Petitioners contend that the environmental review for Ordinance 3090-08 was non-compliant with SEPA for two reasons:

- First, there was inadequate analysis of alternatives, both for siting the hospital's overall growth and for providing the necessary utility services. NENA PHB, at 40-41.
- Second, specific questions about impacts submitted in the SEPA process received only pro forma answers. *Id.* at 41-42.

In particular, citizens requested study of the alternative of integrating the utilities into the hospital bed tower which was still in design phase at the time. *Id.* at 41.<sup>53</sup> They urge that environmental review for the whole expansion plan should have analyzed the option of more intensive use of the existing campus, which contains obsolete buildings. NENA Reply, at 14. Petitioners assert that many of their SEPA questions or suggestions for alternatives were dismissed on grounds directly at variance with prior Providence assertions during the 2005 process. HOM, at 76-77.

The City responds that SEPA authorizes reliance on previously-prepared environmental reviews. City PHB, at 21. The City contends that its 2008 SEPA review incorporated the alternatives for hospital expansion analyzed in its 2005 SEPA process and included

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<sup>53</sup> See, e.g., Ex. 265, at 3091-93.

additional alternatives identified by members of the public in response to the 2008 SEPA scoping:

- Seagrave proposal to locate utility functions on the existing campus. FSEIS 4.41.
- Harber proposal to locate further expansion on Broadway. FSEIS 4.42.
- Alternative of having medical gas delivered. FSEIS 4.42.

The City asserts that the level of analysis was much greater than required for a non-project EIS, particularly in relation to the utility plant, where the impacts of air emissions, noise and shade were studied. City PHB, at 23-24. Finally, the City states that SEPA does not require analysis of impacts on neighborhood property values because economic impacts are not within the scope of SEPA. *Id.* at 24-25.

Providence likewise points to the alternatives reviewed in 2005 as well as those in the 2008 FSEIS, arguing that the SEPA guidelines permit the City to screen out alternatives that are not feasible. Providence PHB, at 47. Providence points out that it prepared additional technical analysis for environmental review of the proposed utility plant, covering, in particular, air quality, noise, and shadows. *Id.* at 48, Ex. 53, at 550-560, 813-850.

Petitioners reply that the alternative sites for hospital expansion reviewed in the 2005 FSEIS “were for a facility that has already been sited [the first bed tower], and have no bearing on the new expansion.” NENA Reply at 14.

### Board Discussion

#### Statement of Facts<sup>54</sup>

The Providence re-designation application for the College property was amended in October 2007 to include a specific plan for a stand-alone utility building along the north border of the property. Ex. 3. This Central Utility Plant (CUP) was the only building project included in the otherwise-conceptual master plan. The proposed building would replace a previously-approved plant on the existing campus at Colby and 13<sup>th</sup> Street. Ex. 50, at 0375; Ex. 57, at 1381.

The utility building was planned to contain the required heating and cooling systems for the new bed tower to be built under the 2005 plan. It would be sized to allow the addition of equipment to serve future expansion, including eventually a second bed tower. It would house the diesel generators required to ensure continuous operation of critical medical operations in the event of a power outage. It would also store medical gases in the amount required by federal regulation to be stored on-site. *Id.*<sup>55</sup>

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<sup>54</sup> These statements constitute Findings of Fact by the Board.

<sup>55</sup> As described in the DSEIS, the 39,000 square foot utility plant would have four functions:

- 10 megawatt emergency generator
- 5,100 ton chilling plant, cooling towers, and pumps
- Boiler plant with 92,150 MBh operational capacity

The FSEIS reviewed the impacts of a large free-standing utility building at the north of the property. Providence provided shadow studies for a 50' structure at this site. FSEIS, Appendix B, at 1242-44; Ex.7. Potential noise from heating and cooling operations was evaluated against the Everett nighttime code maximum of 45 db. FSEIS at 4.36. Monthly test runs of the emergency generators were designed within the Everett daytime limits of 55 db. *Id.* at 4.37. Vibrations from the generators and chillers were reviewed by an acoustical engineer, finding no vibration likely to be experienced outside the building. *Id.* at 4.38. Providence indicated that sound attenuators, mufflers on exhaust systems, and other design solutions would be used to buffer utility noise. *Id.*<sup>56</sup>

Emissions from operations of the diesel generators and boilers were assessed against EPA and OSHA standards and the rules of the Puget Sound Clean Air Agency (requiring Best Available Control Technology). *Id.* at 4.37.<sup>57</sup> A wind tunnel consultant conducted a computer simulation of the stack height and wind effects, in the context of nearby homes and the hospital bed tower, to ensure that the concentration of any pollutants in the exhaust stream would not exceed OSHA standards for public health. *Id.* The City's staff report to the Planning Commission for its June 2, 2008, meeting listed a number of required mitigations for utility building air quality and noise impacts. Ex. 56, at 1267.

Neighborhood opposition to construction of the utility plant along the north border of the College property, and some flexibility from the College in its transition plans, resulted in some redesign of the proposed utility building and re-location toward the center of the College property. In the new location, it will eventually be screened from the neighborhood by other hospital campus buildings. Providence submitted an updated shadow study, an updated noise report, including noise mitigation incorporated in the facility design, and an updated air quality analysis based on the new location. Ex. 184, at 2225.

Notwithstanding this change in the proposal, Petitioners remained skeptical of the sufficiency of the environmental review for the project.

*Were alternatives to the Providence expansion and utility plant adequately considered?*

First, the Board notes that SEPA specifically authorizes a jurisdiction to incorporate environmental analysis from earlier SEPA reviews. RCW 43.21C.034. The SEPA guidelines state: "The SEIS should not include analysis of actions, alternatives, or impacts that is in the previously-prepared EIS." WAC 197-11-620. Similarly, the SEPA regulations that apply specifically to Comprehensive Plan amendments and other GMA actions authorize a city to use alternatives "considered and screened earlier as part of a public GMA planning process." WAC 197-11-235(6)(ii). The Board finds that the City

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- Medical gas storage and distribution

<sup>56</sup> Ex. 6, Providence Everett Medical Center Central Utility Plant Noise Mitigation, by Sparling, at 0191-0200.

<sup>57</sup> Ex. 5, Health Criterion Addendum to Final Report, by Cermak, Peterka, Petersen, Wind Engineering and Air Quality Consultants, May 9, 2008, at 0155-56; FSEIS, Appendix B, at 1217-41.

appropriately incorporated material from its 2005 SEPA review, including the analysis of alternatives.

Second, the SEPA guidelines require the analysis of off-site alternatives to private requests for a rezone with an important exception for rezones where “the rezone is for a use allowed in an existing comprehensive plan that was adopted under review under SEPA.” In this case, Everett’s Land Use Policy 2.11.4 expressly allows future expansion of Providence facilities *either* through more intensive use of its existing site *or* by extending to the north and northwest (i.e., the College athletic fields). The Board finds that SEPA does not require a more elaborate analysis of off-site alternatives for the Providence expansion.

The Board notes that, as an essential public facility, Providence had programmatic reasons for preferring the College property for its long-term growth:

One of the questions asked of us was what about the Pacific or the Broadway Campuses that we have? They don’t offer the adjacencies or the efficiencies of expansion and proximity that the Community College property does. It’s better to centralize tertiary high-level clinical services on one site, rather than building smaller less comprehensive facilities in multiple places. ... Therefore the Everett Community College property is the only viable property for us for that type of expansion.<sup>58</sup>

Third, for the utility plant, the question is whether on-site alternatives were adequately assessed. Here, the Board notes at least four alternatives were screened or evaluated: the 2005 plan for a free-standing plant on the old campus, the NENA proposal to incorporate utilities into the bed tower (and other facilities as they are constructed), the October 2007 proposal for a plant on the north border of the College fields, and the adopted plan for a differently configured plant nearer the center of the College property. Alternate configurations of the stacks were also reviewed.

Petitioners urge that incorporating utilities into commercial buildings as they are needed puts noisy boilers below ground and cooling fans high in the air where emissions and noise are readily disbursed. By contrast, a massive stand-alone utility building in a low-scale residential neighborhood is not only visually obtrusive but emits noise and air pollutants at the neighborhood level. Petitioners object that the option of incorporating utility services in the hospital bed tower was never studied – merely “screened out.”

Providence contends that, given the unique service requirements that govern hospital design, incorporating utilities into a bed tower would dramatically reduce the floors available for nursing beds; Providence therefore judges that alternative “unfeasible” because it doesn’t allow Providence to meet its objectives.<sup>59</sup> In the FSEIS, Providence states:

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<sup>58</sup> Ex. 282, Transcript of August 20, 2008, City Council meeting, (D. Brooks, Providence CEO), at 33.

<sup>59</sup> Ex. 282, Transcript, at 36-37 (utilities in tower would displace 170 beds, would displace 100,000 sf of clinical program: S. Anderson)

Locating the utility functions in the new hospital tower on the existing campus was investigated and determined not to be feasible due to the limited footprint available and the zoning height restrictions of the site. The square footage required to accommodate the air intakes and exhaust for the generators and boilers would significantly reduce the square footage available for necessary clinical programs.

Undergrounding the Utility Building has a significant cost premium and makes removal and replacement of major equipment difficult. It also exacerbates the difficulty of reducing noise generated by equipment. In the current design, the mass of the building is being used to dampen the noise generated by the cooling towers and the intake for the generators, both of which must be above grade.<sup>60</sup>

Scott Anderson, Providence facilities manager, summarized in his testimony at the June 2, 2008, Planning Commission meeting:

We looked at the possibility of trying to put some utility function under the medical tower. And the problem is the amount of air intake and air exhaust is so great that you lose a very significant piece of the usable footprint of the building. ... So we ... couldn't meet the clinical program if we put the utility function under the building.<sup>61</sup>

The Board finds Providence's reasoning persuasive. The SEPA guidelines allow a proponent to screen out alternatives that are not feasible, that is, alternatives that cannot "obtain or approximate a proposal's objectives at ... lower environmental cost." WAC 197-11-440(5)(b). Having demonstrated that incorporating utilities into the medical tower would substantially limit achievement of the hospital's clinical program, Providence appropriately focused on options for a free-standing utility plant, which provides the additional long-term benefit that it can be sized and configured with capacity and flexibility to serve the long-term needs of medical service on the campus. The Board finds and concludes that the SEPA analysis of utility plant alternatives was adequate.

*Were the impacts of the Providence expansion and utility plant adequately addressed?*

Petitioners assert that the questions they asked in commenting on the Draft SEIS were not thoroughly answered, or at best, pro forma answers were provided.

The Board has reviewed the Draft and Final SEIS. The Board finds that the impacts of the central utility plant - the primary focus of Petitioners' comments - were carefully reviewed by engineers and consultants with appropriate expertise. The following technical reports were provided in connection with the utility plant proposal:

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<sup>60</sup> FSEIS, at 4.41.

<sup>61</sup> Transcript, June 2, 2008, Planning Commission meeting, at 30 (S. Anderson).

- Air quality analysis. Ex. 5, at 155-188.
- Noise. Ex. 6, at 190-200.
- Shadow studies. Ex. 7, at 203, 205, 207, 209.

In the Final SEIS, Providence responds to each of the questions and comments submitted orally or in writing. In many cases, Providence points to external standards - for noise (set by the City of Everett), for air quality and health (established by OSHA and EPA, and in some cases administered by the Puget Sound Clean Air Agency), for diesel fuel storage tanks (set by EPA), for medical gas storage (also a federal requirement) – and shows that its proposal will meet the applicable standards. The Board does not find these answers evasive. Further, many specifics are documented in the technical reports.

#### Conclusion

The Board finds and concludes that Petitioners **have not carried their burden** of demonstrating that the City failed to comply with the SEPA requirements cited above. Legal Issue No. 3 is **dismissed**.

#### **D. HISTORIC PRESERVATION - Legal Issue No. 4**

The Prehearing Order states Legal Issue No. 4 as follows:

*Issue 4. Historic Preservation.* The City of Everett’s adoption of Ordinance 3090-08 failed to be guided by RCW 36.70A.020(13), and City regulations and policies adopted pursuant thereto, calling for the preservation of historically-significant lands, sites and structures, including but not limited to Everett Comprehensive Plan Chapter 8 Urban Design Element Goal 8.1, 8.2, 8.5, and Objective 8.5.3 dealing with new development that is next to designated historic buildings.

#### Applicable Law

RCW 36.70A.020(13) is the historic preservation goal of the GMA:

(13) Historic preservation. Identify and encourage the preservation of lands, sites, and structures that have historical or archaeological significance.

Everett Comprehensive Plan chapter 8, Objective 8.5.3 deals with new development that is next to designated historic buildings:

Objective 8.5.3. To require new development that is next to a designated historic building to reflect a sensitivity to the height, mass, proportion and design characteristics of the older structure.

### Positions of the Parties

Petitioners argue:

[T]he Ordinance allows large structures with minimal setbacks to be built adjacent to historic homes. This does not reflect sensitivity to height, mass, proportion or design characteristics of the Historic Donovan District homes that are adjacent to the [College] property.

NENA PHB, at 43.

The City responds that only one home in the Donovan District is across the street from the College property. Ex. 16, at 282. This home is separated from future Providence development by the city right-of-way, a 35-foot buffer, and the requirement of modulation of building heights along that border. City PHB, at 25.

Providence contends that the 2005 Comprehensive Plan policy directing hospital expansion onto the College athletic fields was designed to avoid further encroachment into the Historic Donovan District and to ensure no further demolition of Donovan homes. Providence PHB, at 50.

At the Hearing on the Merits, Petitioners clarified that they were concerned about the contextual effect of the hospital's development plan, not any threatened demolition of Donovan homes. They stated that their issue was "what will go on the field adjacent or across from these historic homes and how will that fit into the historic look of these ... they are cottage-style homes. They are very small homes." HOM, at 60.

### Board Discussion

#### Statement of Facts<sup>62</sup>

The Donovan homes in Northeast Everett are representative of a national campaign started by the Department of Labor in the 1920's that promoted the construction of small, well-built homes of fairly uniform design. The Donovan District has been recognized as historically significant to the City of Everett since 1986, providing "an exemplary local representation of the social and architectural changes that swept the United States during the 1920's and shaped the cities of today." Ex. 279, at 3622. The Everett Comprehensive Plan 10-Year Update DEIS [Feb 18, 2005] described the District:

The character of the Donovan homes and the unity of the District are unique. The homes, conspicuous for their modesty, are noteworthy for their quality construction and details such as arched porch entrances, simple leaded glass, interior coved ceilings and tile fireplaces. They are well built with quality materials and workmanship. The district is a more valuable historic resource than the houses individually, because the collection of 80 of these uniform

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<sup>62</sup>These statements constitute Findings of Fact by the Board.

homes has remained virtually unchanged since their construction. The heart of the Donovan district is the 1300 block of Oakes Ave. This is the only full block in the Donovan District which has Donovan homes on both sides of the street, therein preserving the historic features of both the homes and the streetscape of the 1920's.

Ex. 279, at 3622.

In approving the 2005 Master Plan, the City of Everett allowed Providence to remove the 22 Donovan homes on the west side of the 1300 block of Oakes Ave. Twelve of the homes were relocated and the rest were razed, making room for Providence to build a 1000-car parking garage that has recently been completed.

The Ordinance contemplates a new large building on the north side of the District as part of Phase 2 of the new Master Plan. This might be doctors' offices or ancillary medical facilities. The approved building envelope requires a 35-foot vegetated setback, then allows 75' building height with a setback at the 45' level. No additional homes will be removed or demolished, but the visual impact on the historic district will be significant.

*Was the City's action guided by GMA Goal 13 and consistent with Comprehensive Plan Objective 8.5.3?*

Understandably, neighborhood grief and anger at the gutting of the District as a result of the 2005 Plan runs deep, the more so because, at the time, hospital expansion onto the athletic fields was not judged to be a viable option. There is no present cure for this prior unfortunate decision.

However, with the 2008 Master Plan, it appears to the Board that the City has recognized the importance of managing the scale and adjacency of Providence expansion adjoining the Historic District. Where Providence proposed 75' medical office buildings across the street from a Donovan Home, the City is requiring a 35' landscaped setback, a 45' building frontage, and then a step back to 75'. Further, Design Review will be required prior to any project approval. This will provide an additional opportunity for thoughtful architectural treatment that is sensitive to the "height, mass, proportion and design" of the historic district.

### *Conclusion*

The Board finds and concludes that Petitioners have **failed to carry their burden** in demonstrating that Ordinance 3080-09 is inconsistent with Everett's historic preservation policies and not guided by GMA Goal 13. Legal Issue No. 4 is **dismissed**.

## **VI. ORDER**

Based upon review of the Petition for Review, 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:

- Petitioners **failed to meet their burden** of proving that the City of Everett's enactment of Ordinance No. 3090-08 did not comply with the cited provisions of the GMA or SEPA and was not guided by GMA Goals 11 and 13. Petitioners' Legal Issues are **dismissed with prejudice**.
- The Petition for Review is **dismissed**.

So ORDERED this 28th day of April, 2009.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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David O. Earling  
Board Member

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Margaret A. Pageler  
Board Member

### **DISSENTING OPINION OF BOARD MEMBER McGUIRE**

I respectfully dissent. While I agree with my colleagues' analysis of many of the specific details in the case, I reach a different conclusion.

Upon reading the lengthy record in this case and hearing arguments of the parties, I am left with "the firm and definite conviction that a mistake has been committed." In granting the Institutional Overlay Zone and Master Plan for maximum build-out on the athletic fields, the City compounds its prior regrettable decision which allowed the gutting of the Donovan Historic District for expansion of Providence.

I would remand the Ordinance to the City to take action consistent with the GMA public process requirements and with the City's own regulations and Comprehensive Plan provisions.

The GMA requires local procedures that "provide for early and continuous public participation in the development and amendment of comprehensive land-use plans and development regulations implementing such plans." The City of Everett's procedures for

re-designation of institutional land, including its Overlay Zoning and Master plan adoption, set out an appropriate and open process that meets the spirit and intent of the GMA.<sup>63</sup> The City simply failed to provide the GMA-required and the City code-required public participation in this case.

What went wrong? First, the Providence re-designation application in June 2007 was merely conceptual; it lacked the specificity of a master plan. Providence wanted to land-bank the property – ensuring that it was designated for eventual hospital and medical-related uses. Yet the building envelope they proposed for these non-specific and unplanned uses was large enough to accommodate a million square feet of development. In October 2007, Providence added one specific proposal – the central utility plant – taking up less than 20% of the footprint of the property. Following environmental review (again, non-project SEPA analysis), the Planning Commission held its public hearing. This was almost a year after submission of the application.

What the Planning Commission heard on June 2, 2008, was that Providence *did not really have a plan* for the College property. Providence *thought* that at some time in the future they would need an additional bed tower (or two). Providence *supposed* that medical office buildings and medical service functions and more structured parking might be developed.

Providence CEO Dave Brooks testified at the hearing:

The focus here is about land banking for the future. With one exception which is the plan for the utility building, at this point we have no specific plans for the land. We need to do thoughtful planning on that. Environmental issues change. Healthcare issues change. Other dynamics change. And we need to be able to plan accordingly. ... And again, the utility building is the immediate plan. Now the rest of this at this point is for land banking for future healthcare development.”<sup>64</sup>

Scott Anderson, Providence Assistant Administrator for Facilities, stated that providing a plan “that was more definitive than simply blocks of space ... [was] difficult to do at this point in time because again, this is basically a land bank exercise with the exception of one building. But what I had the architects do is really take the million square feet that we’ve asked to be able to develop and we’ve analyzed from a traffic point of view, and representationally lay it out on the site.”<sup>65</sup> Mr. Anderson cautioned that use, location and configuration of buildings were all estimates.

At the Board’s Hearing on the Merits, Charles Maduell, the attorney for Providence, underscored that the 2005 Master Plan for Providence meets its growth needs for the next

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<sup>63</sup> The City contends that this process was not adopted to comply with the GMA; nevertheless, this is the City process applicable to institutional re-designation and rezoning, which requires, in Everett’s system, amendment of the comprehensive plan and development regulations.

<sup>64</sup> Ex. 286, Transcript, June 2, 2008 Planning Commission hearing at 21.

<sup>65</sup> *Id.* at 23.

ten years and beyond. He stated that the College property is needed for growth beyond that time frame, but, except for the central utility plant, there are no specific plans. Mr. Maduell paraphrased Mr. Anderson's comments at the June 2, 2008, Planning Commission hearing:

We can try and give you more specificity of what we might do, but you have to understand that we're not going to be coming back for development permits for these projects. We're not going to be implementing this for another 10, 15, 20 years. And what I tell you today may not resemble what we are going to be proposing then because we don't know....You can quibble about how many beds will be needed in 15, 20 years, but I don't think you can quibble about the need for growth.<sup>66</sup>

At least one of the Planning Commissioners recognized that Providence really *didn't have a plan* that would support the building envelope they were requesting. Planning Commissioner Moore questioned the approach of approving phased development so far out into the future rather than dealing with applications for more intensive development when plans have matured:

[Y]et today we have very little information to understand why, at this point in time, as a part of the land transaction, is it's key to get some of these major complements including a total height of 175 feet versus something that could come back in the future at a point in time when more information is available.<sup>67</sup>

In other words, *re-designate the property with a realistic plan that meets current needs and include language in the Comprehensive Plan amendment (Policy 2.11.4) that states the City's intent to accommodate growth through more intensive development when future plans are ripe.*

However, the City failed to take the logical step of down-scaling the building envelope for the Overlay Zone to accommodate the actual plan on the table – a central utility plant and some construction staging. Instead, the City sent Providence back for a purely speculative exercise of imagining how they might someday fill out their over-sized building envelope. By the time this new filled-out, hypothetical master plan was submitted, neighbors and the general public (indeed, the City itself), had a scant seven weeks to respond. And response was complicated by Providence's acknowledgement that the new plan was essentially a guesstimate.

On this record, I must concur with the Petitioners that the City failed to comply with the GMA requirement for early and continuous public participation and was not guided by GMA Goal 11. Petitioners were notified and participated early in general discussions about land banking, and about the Central Utility Plant, but the detailed master plan was formulated *too late* and on *too speculative* a basis for reasoned public review. My

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<sup>66</sup> HOM, at 61.

<sup>67</sup> Ex. 286, Transcript, at 73.

conclusions are underscored by the requirements of the City’s land use policies and procedures that are directly applicable to this case.

- The City’s land use process directed specifically at institutional expansion – Review Process V – calls for extra efforts to “*address the concerns of affected area residents*” [EMC 19.33B.030(B)], starting even prior to the master plan application.
- The City’s 2005 land use policy directed specifically to Providence expansion [Land Use Policy 2.11.4] required: “PEMC must *work with the surrounding neighborhood residents* in planning future expansions.”

Filling out an over-sized building envelope with speculative uses, and doing so at the tag end of a year-long process, vitiates public participation that may have been properly commenced early in the cycle.

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Edward G. McGuire, AICP  
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.<sup>68</sup>

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<sup>68</sup> Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate Court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

## APPENDIX A

### North Everett Neighbor Alliance, et al v. City of Everett CHRONOLOGY OF PROCEEDINGS

On November 3, 2008, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the North Everett Neighbor Alliance and Neighbors for Neighborhoods (together, **Petitioners** or **NENA**). The matter was assigned Case No. 08-3-0005, and is hereafter referred to as *NENA v. City of Everett*. Board member Margaret Pageler is the Presiding Officer for this matter. Petitioners challenge the City of Everett's (**Respondent** or **City**) adoption of Ordinance No. 3090-08 amending the City's Comprehensive Plan and certain development regulations and adopting the Master Plan for Providence Regional Medical Center Everett<sup>69</sup> (**Providence Everett** or **PEMC**). The basis for the challenge is non-compliance with various provisions of the Growth Management Act (**GMA** or **Act**) and the State Environmental Policy Act (**SEPA**).

On November 10, 2008, the Board issued a Notice of Hearing establishing the tentative schedule for the case.

On November 13, 2008, the Board received a Notice of Appearance from Eric Laschever of Stoel Rives LLP on behalf of the City of Everett.

On November 26, 2008, the Board received Providence Regional Medical Center Everett's Motion to Intervene.

On December 4, 2008, the Board conducted the Prehearing Conference in the Olympic Room, 20<sup>th</sup> Floor, 800 Fifth Avenue, Seattle. Board member Margaret A. Pageler, Presiding Officer in this matter, conducted the conference, with Board member David Earling also in attendance. Gary P. Seagrave was spokesperson for Petitioner North Everett Neighbor Alliance, with Julie Seagrave also in attendance. Krista and Jeffrey McClimans were spokespersons for Petitioner Neighbors for Neighborhoods, with Annie Lyman, Sally Stapp, Garrik Hudson-Falcon, Barbara Lamoureux, and Kimber O'Connor also in attendance. The City of Everett was represented by Eric Laschever. Deputy City Attorney David Hall also attended. Proposed Intervenor Providence Everett was represented by Charles Maduell of Davis Wright Tremaine LLP. At the outset of the Prehearing Conference, the Board considered and orally granted the Motion to Intervene.

The Board then discussed with the parties the possibility of settling or mediating their dispute to eliminate or narrow the issues. The Board encourages such efforts and can arrange for mediation or settlement assistance by members of the Eastern or Western Growth Management Hearings Boards. If the parties are pursuing settlement, with or without Board assistance, they may so stipulate in a request for a settlement extension, which must be signed by the City and Petitioners. The Board is empowered to grant settlement extensions for up to ninety days.

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<sup>69</sup> Providence Everett Medical Center (PEMC) has changed its name to Providence Regional Medical Center Everett (Providence Everett). The names may be used interchangeably in these proceedings.

The Board then reviewed its procedures for the Hearing, including the composition and filing of the Index to the Record Below, Core Documents to be provided by Respondent, Exhibit Lists and Supplemental Exhibits, Dispositive Motions, the Legal Issues to be decided. and a Final Schedule of deadlines. A number of adjustments to the case schedule were agreed to by the parties.

On December 5, 2008, the Board received the City of Everett's Index of Record, stating that the City anticipates filing a Supplement to the Index that will include additional documents identified by Petitioners, including the transcripts to various hearings.

On December 8, 2008, the Board received Petitioners' Clarification of Legal Issues as requested by the Board at the Prehearing Conference.

On December 10, 2008, the Board issued its Prehearing Order and Order on Intervention.

On December 22, 2008, the Board received City of Everett Filing of Core Documents:

City of Everett 2007 Comprehensive Plan Update  
Draft Supplemental Environmental Impact Statement, March 17, 2008  
Final Supplemental Environmental Impact Statement, May 22, 2008

#### *MOTIONS*

On December 15, 2008, the Board received the City of Everett's Dispositive Motion, with three attachments, and Providence Regional Medical Center Everett's Motion to Dismiss Certain Claims, with two attachments. The City of Everett and Intervenor Providence Everett requested dismissal of Petitioners' issues as applied to Ordinance 3090-08 Section 2 (rezoning) and Section 3 (master plan). They also requested dismissal of references in Legal Issues 1 and 5 to noncompliance with EMC Title 15 and Chapter 19.33B.

On December 23, 2008, the Board received Petitioners' Motion to Supplement Record, with Exhibit A: a letter to Eric Laschever dated December 17, 2008, attaching an email string between Jeffrey McClimans and City of Everett staff dated August 26, 2008.

On December 23, 2008, the Board received City of Everett's Second Supplemental Index of the Record. The Second Supplement listed the preliminary agendas and minutes for City Council meetings on August 20 and 27, 2008, and the email from Jeffrey McClimans dated August 27, 2008.

On January 5, 2009, the Board received City of Everett's Response to Petitioners' Motion to Supplement the Record, attaching an updated Index of the Record in three exhibits (**Updated Index**). The Updated Index indicates corrections and additions identified by the City subsequent to the Second Supplemental Index of the Record.

On January 7, 2009, the Board received Petitioners' Response to Respondents Dispositive Motions and (Second) Clarification of Legal Issues (**NENA Response**), withdrawing Legal Issue No. 5. Petitioners made no further objection to the City's Index.

On January 14, 2009, the Board received City of Everett's Rebuttal to Petitioners' Response to Dispositive Motion (**City Reply**), with 3 attachments, including Chapter 15 EMC and chapter 19.33B EMC. The Board also received Intervenor's Rebuttal to Petitioners' Response to Motion to Dismiss (**Providence Everett Reply**).

On January 20, 2009, the Board received Petitioners' Objections to City and Providence Rebuttals in Support of Their Dispositive Motions.

On January 23, 2009, the Board received City of Everett's Response to Objections to City and Providence Rebuttals. The Board also received Intervenor's Rebuttal to Petitioners' Response to Motion to Dismiss.

On January 26, 2009, the Board issued its Order on Motions. The Board also issued an Order Amending Hearing Schedule [10:00 a.m. March 9, 2009].

### *BRIEFING AND HEARING ON THE MERITS*

On February 10, 2009, the Board received Petitioners' Opening Brief, with – exhibits.

On February 20, 2009, the Board received City of Everett's Motion to Supplement the Record, with 5 exhibits.

On February 23, 2009, the Board received Intervenor's Motion to Supplement the Record and Declaration of Michael Gaffney.

On February 23, 2009, the Board received Intervenor's Prehearing Brief and City of Everett's Prehearing Brief. The Board also received Petitioners' Rebuttal to City of Everett's Motion to Supplement the Record.

On February 26, 2009, the Board received City of Everett's Reply to Petitioner's Response to Motion to Supplement the Record.

On March 2, 2009, the Board received Petitioners' Reply Brief and Response to PEMC's Motion to Supplement the Record.

The Hearing on the Merits was convened at 10:00 a.m., March 9, 2009, in the Chief Sealth Training Center, 20<sup>th</sup> Floor, 800 Fifth Avenue, Seattle. Board members Edward McGuire, David Earling, and Margaret Pageler, Presiding Officer, were present. Gary Seagrave was the spokesperson for Petitioner North Everett Neighborhood Alliance, and Jeffrey McClimans was spokesperson for Neighbors for Neighborhoods. Also in attendance for petitioners were Julie Seagrave, Sally Stapp, Annie Lyman, Kimber O'Connor, and Barbara Lamoureux. Respondent City of Everett was represented by Eric Laschever, accompanied by Everett Planning Director Dave Koenig. Intervenor Providence Regional Medical Center Everett was represented by Chuck Maduell with John Keegan and Providence staff Scott Anderson, Mike Gaffney, Patricia DeGroot, and Cheri Russam. Court reporting services were provided by Katie Eskew of Byers and Anderson, Inc. The Hearing on the Merits afforded the Board an opportunity to ask questions clarifying important facts in the case and providing better understanding of the legal arguments of the parties.

The Board invited the parties to provide supplemental briefing on the relevance of its Final Decision and Order in *Halmo v. Pierce County*, CPSGMHB Case No. 07-3-0004c (Sept. 28, 2007). The Board ordered a transcript of the hearing. The hearing was adjourned at 1:20 p.m.

The Board received the transcript of the hearing on March 18, 2009 (**HOM**).

Supplemental Briefing was submitted as follows:

- March 17, 2009 – City of Everett’s Submittal of Legislative History Regarding RCW 36.60A.140.
- March 18, 2009 – Petitioner’s Objection to the City of Everett’s Continued Briefing.
- March 19, 2009 – Petitioners’ Comment Brief Ordered at Hearing on the Merits (**NENA Halmo Brief**).
- March 19, 2009 – City of Everett’s Briefing Regarding *Halmo v. Pierce County* (**City Halmo Brief**).
- March 19, 2009 – Intervenor’s Supplemental Brief on *Halmo v. Pierce County* (**Providence Halmo Brief**).
- April 20, 2009 – City of Everett’s Statement of Supplemental Legal Authority.
- April 22, 2009 – Petitioner’s Objection to the City of Everett’s Statement of Supplemental Legal Authority.