CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

BURLINGTON NORTHERN RAILROAD, Petitioner, v. CITY OF AUBURN, Respondent.	)	**Case No. 95-3-0050** **ORDER OF DISMISSAL**

I. Procedural Background

On August 21, 1995, the Central Puget Sound Growth Management Hearings Board (the **Board**) held a prehearing conference in the above captioned matter at the Board's office, 2329 One Union Square, Seattle.Board members Chris Smith Towne and Joseph W. Tovar, Presiding Officer, were present.Petitioner Burlington Northern Railroad (**Burlington Northern**) was represented by Eric Laschever and Perry S. Weinberg. The Respondent City of Auburn (**Auburn** or **the City**) was represented by J. Tayloe Washburn and Mike Reynolds.

The Board discussed with the parties the possibility of settling or mediating their issues, emphasizing that the Board encourages such efforts and offers its assistance in facilitating mediation.The Board then reviewed its procedures for hearing, including motions; the composition and filing of the record and supplemental exhibits; the legal issues to be decided; and a final schedule of deadlines.The presiding officer stated that, from the petition for review, it was unclear whether the City had adopted its Comprehensive Plan (the **Plan**) by resolution or ordinance and asked that the City provide a copy of the adopting enactment.

On August 23, 1995, the Board received a letter from the City which transmitted a copy of Auburn Resolution No. 2635 (the **Resolution**), a Western Washington Growth Management Hearings Board Order Regarding Dispositive Motions in Case No. 94-2-0021, and a photocopy of RCW 35A.63.072.The letter stated that the City, in adopting the Plan by resolution, did so pursuant to RCW 35A.63.072, which requires that a comprehensive plan or part thereof be enacted by adoption of resolution and opined that the reference in RCW 36.70A.290(2) to adoption of Plans by ordinance constitutes "a technical error."The letter also observes that the Western Washington Growth Management Hearings Board reached a similar conclusion.

II.DISCUSSION

The Resolution is entitled:

> A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF AUBURN, WASHINGTON, ADOPTING AND APPROVING COMPREHENSIVE PLAN MAP AND TEXT AMENDMENTS FOR THE CITY OF AUBURN, WASHINGTON, PURSUANT TO THE PROVISIONS OF R.C.W. CHAPTER 35A.63 OF THE LAWS OF THE STATE OF WASHINGTON, DESIGNATING THESE AMENDMENTS AS GUIDELINES FOR EXERCISING THE CITY'S AUTHORITY UNDER THE WASHINGTON STATE ENVIRONMENTAL POLICY ACT (SEPA), AND DIRECTING THAT THIS RESOLUTION AND COMPREHENSIVE PLAN TEXT AMENDMENTS IT ADOPTS AND APPROVES BE FILED WITH THE AUBURN CITY CLERK AND BE AVAILABLE FOR PUBLIC INSPECTION.(Emphasis added).

The second and third WHEREAS clauses of the Resolution read:

> WHEREAS, the State of Washington adopted the Growth Management Act which required amendments to the City of Auburn Comprehensive Plan in order to comply with the Act; and
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> WHEREAS, the Growth Management Act required the adoption of King and Pierce County Countywide Planning Policies and Multicounty Policies which provide frameworks for planning for the jurisdictions within those areas to ensure consistency among comprehensive plans and that amendments were necessary to bring the City of Auburn Comprehensive Plan into compliance with these policies; and ...

Significantly, neither in the descriptive resolution title, nor anywhere in the body of the resolution, is there a statement that the Plan is being adopted pursuant to the requirements or authority of the Growth Management Act (**GMA** or the **Act**), Chapter 36.70A RCW.To the contrary, the above emphasized portion of the resolution title makes clear that this action is taken, not pursuant to the authority and requirements of the GMA, but rather of Chapter 35A.63 RCW.

Likewise, although the Resolution contains brief references to the GMA, such as the above cited WHEREAS clauses, and to a "Draft Capital Facilities Plan", nowhere is there an explicit statement that Auburn is adopting a GMA Plan.In fact, Section 2 of the Resolution states:

> Section 2.The aforementioned Comprehensive Plan Map and text amendments modify the Comprehensive Plan adopted on August 18, 1987 by Resolution 1703.(Emphasis added).

The emphasized text would suggest to the casual reader that the Resolution simply amends a pre-

GMA comprehensive plan rather than adopts a GMA plan.While it is logical that pre-GMA comprehensive plans could serve as the foundation or nucleus of a GMA comprehensive plan, the requirement for plan adoption now resides in Chapter 36.70A RCW which specifically requires adoption by ordinance.RCW 36.70A.290(2) provides:

> (2) All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter or chapter 43.21C RCW must be filed within sixty days after publication by the legislative bodies of the county or city.The date of publication for a city shall be the date the city publishes the ordinance, or summary of the ordinance, adopting the comprehensive plan or development regulations, or amendment thereto, as is required to be published.Promptly after adoption, a county shall publish a notice that it has adopted the comprehensive plan or development regulations, or amendment thereto.The date of publication for a county shall be the date the county publishes the notice that it has adopted the comprehensive plan or development regulations, or amendment thereto.(Emphasis added.)

The Board fundamentally disagrees with the City's statement that "RCW 36.70A.290(2)... constitutes a technical error."There are good policy reasons why a GMA-required comprehensive plan should be adopted by ordinance rather than resolution. Because comprehensive plans are controlling documents under the GMA, rather than discretionary advice, or "a basic source of reference" (*see* RCW 35A.63.080) they now have the force of law, unlike the comprehensive plans adopted pursuant to Chapters 36.70 RCW and 35A.63 RCW.*See also* RCW 36.70A.120 which requires that each city and county planning under the Act shall perform its activities "in conformity" with its comprehensive plan.It is both appropriate and necessary that such binding laws be codified, as ordinances are and resolutions are not.

Apart from the sound policy rationale for requiring Plan adoption by ordinance rather than resolution, the Board is bound by the Act's clear and unambiguous language.If the notice that must be published is notice of adoption of an ordinance, then the inescapable legal conclusion is that GMA plans can only be adopted by ordinance.Furthermore, RCW 36.70A.290 was adopted more recently than RCW 35A.63.072.Although the legislature did not repeal the latter, the former is controlling.Clearly, the legislature is aware of the distinction between a resolution and an ordinance, unless it declares the two to be synonymous, which it did in RCW 36.70.020(12) and RCW 35A.63.010(7).The legislature did not make such a finding in Chapter 36.70A. RCW.[1] The Board respectfully disagrees with the Western Board's conclusion that "ordinance" is a generic term. The Board holds that a GMA comprehensive plan can only be adopted by ordinance. Therefore, the Board finds that Auburn has not adopted a comprehensive plan as required by RCW 36.70A.040 and .290(2).

III.ORDER

Based upon a review of the petition for review, the City's letter and its enclosures, the Act and the Board's Rules of Practice and Procedure, the Board enters the following ORDER:

> This case is **dismissed with prejudice** since the City has not taken the requisite GMA action.

The City has not adopted a comprehensive plan pursuant to the Act by virtue of the fact that it has not adopted a plan by ordinance.The deadline for adopting a comprehensive plan was July 1, 1994.RCW 36.70A.040.The City is ordered to adopt a comprehensive plan no later than **5:00 p. m.** on **Friday**, **October 6, 1995**,[2] and to do so by ordinance, and to publish notice of adoption of same in compliance with RCW 36.70A.290(2).

The Board's Order of Dismissal does not preclude any person from filing a "failure to act" petition for review at any time (*see* WAC 242-02-220(5)), nor should it be construed as a Board determination as to whether the City's comprehensive plan as drafted substantively complies with the GMA.In addition, the date of notice of adoption of the comprehensive plan will trigger the period for filing subsequent petitions for review.

NOTE:This Order of Dismissal constitutes a final order as specified by RCW 36.70A.300 unless a party files a Petition for Reconsideration pursuant to WAC 242-02-830.

So ordered this 30th day of August, 1995.
CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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M. Peter Philley
Board Member

_____
Joseph W. Tovar, AICP
Board Member

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Chris Smith Towne
Board Member

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[1] This Board has jurisdiction only over the Act and the State Environmental Policy Act as it applies to the GMA; it does not have jurisdiction where, as here, the enactment was done pursuant to the provisions of Chapter 35A.63 RCW.

[2] The City's August 23, 1995 letter indicates that it is prepared to adopt the identical plan by ordinance on

September 5, 1995.