CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

HAPSMITH, et al.,	)	
	)	**Consolidated**
Petitioners,	)	**Case No. 95-3-0075c**
	)	
v.	)	**FINAL DECISION AND ORDER**
	)	
CITY OF AUBURN,	)	
	)	
Respondent.	)	
	)	

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I. Procedural Background

On November 3, 1995, The Hapsmith Company (**Hapsmith**) filed a Petition for Review (the **Petition** or **PFR**) with the Central Puget Sound Growth Management Hearings Board (the **Board**), challenging the City of Auburn's (the **City**) adoption of a comprehensive plan (the **Plan**) pursuant to the requirements of the Growth Management Act (**GMA** or the **Act**). Hapsmith asserted "standing to bring this appeal pursuant to RCW 36.70A.280. Petitioner is aggrieved and adversely affected by the Comprehensive Plan." Hapsmith PFR, at 6.

On November 13, 1995, the Burlington Northern Santa Fe Railroad (**BN**, **BNSF** or the **Railroad**) filed a Petition for Review with the Board, asserting that it "has standing to appeal pursuant to RCW 36.70A.280(2)" and setting forth its appearances before the City concerning the proposed comprehensive plan. It also asserted standing pursuant to RCW 34.05.530, and described the nature of the impacts of the City's action. Finally, it asserted standing to appeal SEPA-related issues "pursuant to ch. 43.21C RCW," as an aggrieved party under SEPA. BNSF PFR, at 10-13.

On January 4, 1996, the Board entered a Prehearing Order (the **Prehearing Order**) in the above-captioned case. The Prehearing Order listed ten legal issues and scheduled deadlines for filing dispositive motions.

On January 22, 1996, the Board received from the City "Respondent City of Auburn's Motion to Dismiss Petitions of the Hapsmith Company and Burlington Northern Santa Fe Railway Company" (the **City's Motion**).

On January 31, 1996, the Board received "Hapsmith's Response to the Respondent's Motion to Dismiss" (**Hapsmith's Response**) and "Petitioner BN's Response to Respondent's Motion to Dismiss" (**BN's Response**).

On February 5, 1996, the City filed "Respondent City of Auburn's Reply to the Hapsmith Company's 'Response to Respondent's Motion to Dismiss'" and "Respondent City of Auburn's Reply to BNSF's Response to Motion to Dismiss."

On February 15, 1996 the Board issued an "Order on Motions to Supplement the Record and Order Modifying Legal Issue No. 4" (the **Order on Motions)**.

On February 21, 1996 the Board received "Petitioner BN's Prehearing Brief" (**BNSF's PHB**)and "Hapmith Company's Prehearing Brief" (**City's Brief**).

On March 13, 1996 the Board received the "Respondent City of Auburn's Hearing Brief."

On March 19, 1996 the Board received the "Hapsmith Company's Reply Brief" and "BN's Prehearing Brief to City's Hearing Brief."

A hearing on the merits was held on April 10, 1996, at the Board's office. Present were Board Members M. Peter Philley, Chris Smith Towne and Joseph W. Tovar, presiding officer. Eric Laschever appeared on behalf of the Railroad and John Keegan appeared on behalf of Hapsmith. Appearing for the City was J. Tayloe Washburn. No witnesses testified.

II. FINDINGS OF FACT

1. On April 28, 1993, the City Council approved Ordinance No. 4627, rezoning 60 acres of property from light industrial to heavy commercial, as requested by Hapsmith Properties IV. Ex. P-230. The purpose of the rezone was to allow for construction of a 2,035,000 gross square feet shopping complex (the **SuperMall**). Exhibit A attached to the Ordinance set forth a series of conditions to mitigate impacts of the development of the SuperMall. Finding of Fact No. 5 described the City's prospective rezoning of adjacent property to Light Industrial to "discourage the proliferation of 'spin off' commercial development in the vicinity." Ordinance No. 4627, Attachment B to Hapsmith PFR.

2. The Railroad has owned and operated a rail corridor within the City since 1888 and a rail yard since 1913. The City is located on the main north-south rail line and is the west end of an east-west rail line. BNSF PFR, at 2.

3. After the adoption of the GMA in 1990, the City Planning Commission began developing the City's comprehensive plan pursuant to the requirements of the Act. This planning process included public input and comment opportunities. Ex. 210, at 8-9.

4. On August 26, 1994, the City issued an environmental checklist on the draft amended Plan, pursuant to the requirements of the State Environmental Policy Act (**SEPA**). Ex. 153. A Proposed Determination of Non-Significance (**Proposed DNS**) for the proposed Plan was issued on September 9, 1994. Ex. P-G. On Sunday, September 11, 1994, the City published notice of the Proposed DNS in the *Valley Daily News*. Ex. P-H. This notice indicated that the City would not issue a final DNS until 15 days after the date of the notice. Ex. P-H. On October 18, 1994 an addendum to the checklist was issued. Ex. 154. On October 21, 1994, the final DNS was issued. Ex. 155. The City did not publish additional notice that it adopted the final DNS.

5. The City's environmental review procedures are set forth in Ordinance No. 4351. Rules for appeals of City actions are set forth at sections 16.06.340 through .430. Section .340 provides for appeal of a final threshold determination of significance, final determination of nonsignificance, or inadequacy of a Final EIS. Section .350 requires a written notice of appeal within ten days of the date of issuance of the final threshold determination of significance, final determination of nonsignificance, or Final EIS. City's Exhibits for Motion to Dismiss,

Ex. 243, at 14-15. Neither petitioner filed an administrative appeal with the City challenging the issuance of the DNS.

6. On September 26, 1994 City Planning Director Paul Krauss wrote to BNSF inquiring about the Railroad's plans for its rail yard. In the letter, the Director indicated that the City was in the process of completing its Plan and wanted to brief Railroad officials regarding the proposed Plan. Ex. P-211.

7. On October 17, 1994, the Assistant to the Chairman of the Railroad, D.J. Mitchell, wrote the City a response to its letter, indicating that the Railroad had not made a final decision regarding its properties, and inviting the City to call the Railroad to discuss the City's needs regarding its Plan. Ex. P-212.

8. During the review process, the Washington State Department of Transportation (**WSDOT**) commented on the draft Plan. In its comments, WSDOT noted that the BNSF Rail Yard was "currently inactive" but also noted that there were potential plans to convert the yard into an inter-modal facility. Ex. 57, at 2.

9. The Planning Commission sent the City Council its revised draft of the Plan in December, 1994. Ex. 242. The City Council's Planning and Community Development Committee reviewed and revised the Plan in early 1995 before recommending it to the full Council. Ex. 130. On April 17, 1995 the Council held a final public hearing on the Plan and closed the public record. Ex. 210.

10. In March 1995, Kurt Reichelt, the Railroad's Manager for Service Capability Development, met with City officials to discuss BNSF's interest in modifying the Rail Yard to provide intermodal capability. Declaration of Kurt Reichelt, attached to BNSF's petition.

11. On April 17, 1995, the City passed Resolution No. 2635 adopting a comprehensive plan pursuant to the provisions of Chapter 35A.63 RCW.

12. On June 30, 1995, the Railroad filed a petition for review with the Board, challenging certain provisions of the Plan; the petition was assigned Case No. 95-3-0050.

13. In July 1995, BNSF officials met again with City officials and submitted written materials about the proposed intermodal facility. These materials included a letter that expressed concerns with the Plan. BNSF PFR, at 11.

14. On August 25, 1995, the Railroad requested that the Puget Sound Regional Council (the **PSRC**) deny certification of the Transportation Element of the Plan. Ex. P-216.

15. On August 30, 1995, the Board issued an Order of Dismissal in Case No. 95-3-0050,

holding that the City was required to adopt its Plan by ordinance, pursuant to the authority and requirements of Chapter 36.70A RCW, and had not done so. The Order directed the City to comply with the Board's Order not later than October 6, 1995.

16. On September 1, 1995 the Railroad requested in writing that the City amend the Plan to provide for rail use. Ex. P-217. The City included this letter on its agenda for the September 5 meeting. Ex. P-C, at 5. *See also* Ex. P-227, at 5.

17. On September 5, 1995, Perry Weinberg spoke to the City Council on behalf of the Railroad, urging the City to delay consideration of the ordinance adopting the Plan and pointing out problems the Railroad had with the proposed Plan. Ex P-227, at 2-4.

18. On September 5, 1995, the City enacted Ordinance No. 4788, adopting the comprehensive plan pursuant to the authority and requirements of Chapter 36.70A RCW.

19. Notice of the City's adoption of the Plan was published in the *Valley Daily News* on September 11, 1995. BNSF PFR, at 2.

20. The Plan designates the Railroad's property as Light Industrial. Plan, Map 14.1. Chapter 14, Planned Areas, creates a 150-acre Railyard Special Planning Area. Plan, 14-18; Map 14.2.

21. The Plan designates property adjacent to the SuperMall as Light Industrial. The Plan also includes policies that purport to affect the development of land near the SuperMall. Chapter 3, Land Use, Objective 3 is intended "[t]o capture the retail market of customers visiting the SuperMall and strengthen Auburn's role as a major retail commercial center for the Region." Plan, at 3-28 and -29; Map 14.1.

22. Subsequent to completion of construction of the SuperMall, the City processed a development proposal for property across the street from the SuperMall. On August 25, 1995, a City staff member informed Holgate Properties, applicant, that:

> The Comprehensive Plan land use designation for the site is currently "Light Industrial." This was changed in 1993 during the rezoning and comprehensive Plan land use designation changes made for the SuperMall. The rezoning of your site from M1 [Light Industrial] to BP [Business Park] implements the Light Industrial designation without the need for a change in the Comprehensive Plan designation of the site. Ex. 235; Attachment C to Hapsmith PFR.

25. On November 17, 1995, BNSF submitted a Special Planning Area application for rezone to the City. The application sought to rezone the rail yard property, amend the Plan [to change the Plan's designation of the rail yard from Light to Heavy Industrial], and permit future construction of an intermodal hub facility. Ex. 225; Plan, Special Planning Areas, page 14-18,

Map 14.2.

III. ORDER ON MOTIONS

a. motions to supplement

The parties filed a number of Motions to Supplement. The Board ruled on many of these in the February 14, 1996, Order on Motions. Several other motions were subsequently filed. A summary of exhibits proposed in the motions to supplement, and the Board's ruling on each, follows.

Because the Board finds that Hapsmith lacks standing and dismisses its petition for review, it need not and will not rule on the admissibility of any proposed Hapsmith exhibits.

BNSF's Jan. 22, 1996 Motion to Supplement

Proposed Exhibit: documents	**Ruling**
1. Paul Krauss, "Final Staff Evaluation for Environmental Checklist SEP-0023-94" September 8, 1994	**Admitted**
2. City of Auburn, Planning & Community Development Dept., "Proposed Determination of Non-Significance SEP-0023094," September 9, 1994	**Admitted as part of record**
3. *Valley Daily News*, "Notice of Proposed Environmental Determination of Nonsignificance, Auburn, Washington," September 11, 1994	**Admitted**
4. City of Auburn Transportation Plan	**Admitted**
5. City of Auburn 1993 Capital Facilities Plan	**Admitted as part of record**
6. King County Growth Management Planning Council Countywide Planning Policies, Adopted by the King County Council Chair on August 15, 1994, ratified by the cities, November 21, 1994, printed January 31, 1995.	**Board takes notice. Board already has copies**
7. July 19, 1995 letter from Eric Laschever to Michael Reynolds	**Admitted**

8. August 14, 1995 letter from John J. Terpstra & M.R. Dinsmore to Auburn Mayor Charles Booth	**Admitted**
9. August 31, 1995 letter from Dick Ford and Perry Weinberg to Tayloe Washburn and Michael Reynolds	**Admitted**
10. September 13, 1995 letter from Paul Krauss to Rocky Piro, PSRC	**Denied**
11. November 8, 1995 letter from E. Laschever to M. Scaringi, WSDOT	**Denied**
12. November 16, 1995 letter from P. Krauss to M. Scaringi, WSDOT	**Denied**
13. November 17, 1996 letter from E. Laschever to R. Piro, PSRC	**Denied**
14. October 3, 1995 *Valley Daily News* article, "Rail Hub may sink in City's Legal Quagmire"	**Denied**
15. November 28, 1995 *Valley Daily News* article "Burlington Northern gives rail hub plan to Auburn"	**Denied**
16. City of Auburn's Index of Administrative record *BN v. City of Auburn*	**Admitted**

BN's Jan. 31, 1996 Second Motion to Supplement

Proposed Exhibit: documents	**Ruling**
1. Agenda for September 5, 1995 City Council meeting	**Admitted**
2. King County Comprehensive Plan dated December, 1994	**Official notice.**
3. Letter from Dick Ford to Mayor Booth, September 27, 1995	**Denied**
4. Letter from Mayor Booth to D. Ford, September 29, 1995	**Denied**
5. Letter from Paul Krauss to Eric Laschever, January 12, 1995.	**Admitted**

BN's Mar. 20, 1996 Motion to Supplement

Proposed Exhibit: documents	Ruling
1. Letter from Robert Brendza, BNSF, to Paul Krauss dated Feb. 13, 1996.	**Denied**

BN's April 3, 1996 Motion Requesting Judicial Notice of Constitutional Provisions, Statutes and Ordinances and Providing Supplemental Authority

Proposed Exhibit: documents	Ruling
1. Article 1, Sec. 16	**Board takes notice**
2. RCW 81.36.010 (re: railroads eminent domain)	**Board takes notice**
3. City of Auburn Ordinance 1428, pages 12 and 13, adopted in 1961	**Denied**
4. City of Auburn Ordinance 1663, pages 14 and 15, adopted in 1963.	**Denied**
SUPPLEMENTAL AUTHORITY State Ex. Rel. Northern Pacific Railroad Company v. Superior Court, 68 Wash. 397 (1912)	**Board takes notice**

Auburn's February 9, 1996 Motion

Proposed Exhibit: documents	Ruling
1. Letter from Tim Ceis to Paul Krauss, February 6, 1996	**Denied**

Auburn's March 6, 1996 Motion

Proposed Exhibit: documents	Ruling
1. Letter from Charles Howard, WSDOT, to Paul Krauss, dated February 16, 1996	**Denied**

Auburn's March 13, 1996 Motion

Proposed Exhibit: documents	Ruling
1. City of Auburn's 1952 Comprehensive Plan	**Denied**

2. A grading permit issued by the City to Union Pacific Railroad	**Denied**

Auburn's April 9, 1996 Motion

Proposed Exhibit: documents	**Ruling**
1. Aerial photos 1959; mid-1960's; 1987; 1995	**Denied. The 1995 photograph was allowed for illustrative purposes only.**
2. March 29, 1996 letter from Lynn Rued	**Denied**

B. CITY'S DISPOSITIVE MOTION

1. Subject matter jurisdiction as to Hapsmith

The City characterizes the Hapsmith Petition as asking the Board to review the City's interpretation of the Plan and to adjudicate the impacts of such an interpretation to specific parcels of land. The City's claim is based upon portions of the Hapsmith PFR that allege that Hapsmith is concerned with the application and interpretation of the City's final adopted Plan. The City contends that the Board does not have jurisdiction over interpretations of the Plan, but rather only over initial adoption of the Plan and subsequent amendments to it.

Hapsmith objects to the City's characterization of its PFR and argues in response that the issues it raises in its Petition do not ask the Board to review the City's subsequent interpretation of the Plan, but rather certain policies of the Plan already adopted.

Discussion

The Board's subject matter jurisdiction is specified at RCW 36.70A.280(1) entitled "Matters subject to board review," which provides as follows:

> (1) A growth management hearings board shall hear and determine only those petitions alleging either: (a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW.

As this Board has repeatedly indicated in prior decisions (*see Tracy v. Mercer Island*, CPSGPHB Case No. 92-3-0001 (1993), at 8-9; *Gutschmidt v. Mercer Island*, CPSGPHB Case No. 92-3-0006

(1993), at 7-9; and *Twin Falls, et al. v. Snohomish County*, CPSGPHB Case No. 93-3-0003 (1993), Order on Dispositive Motions, at 4-10 and 12), its subject matter jurisdiction is strictly limited to the matters specified in RCW 36.70A.280(1). This conclusion is bolstered by the legislature's use of the word "only" in the quote above from that statute, and the fact that RCW 36.70A.300(1) indicates that a board's final decision "... shall be based exclusively on whether or not a state agency, county, or city is in compliance with the requirements of this chapter, or chapter 43.21C RCW as it relates to plans, regulations, and amendments thereto, adopted under RCW 36.70A.040...."

The Board holds that it has subject matter jurisdiction over those issues raised by Hapsmith as set forth in the legal issues in the case. The issues raised by Hapsmith ask the Board to review whether the Plan, and specifically Policy LU-74,[1] violates portions of the GMA. The Board does not have jurisdiction over staff interpretations of the Plan that indicate how the Plan may be actually implemented in the future.

Conclusion

The Board does have jurisdiction to hear the issues set forth in Hapsmith's Petition and in the Prehearing Order, alleging that portions of a comprehensive plan violate the GMA.

2. Ripeness as to Hapsmith's GMA Issues

The City also argues that Hapsmith's claims are based on the City's interpretation of the Plan in conjunction with the Holgate application to develop property located adjacent to the SuperMall. Since the City has not made a final decision on the Holgate application, the City argues that Hapsmith's issues are not ripe for final review.

Hapsmith's response is that the City's premise is mistaken; Hapsmith is not challenging the City's application of the Plan but is attacking Policy LU-74 itself. The Plan has been adopted; therefore, issues regarding the policies in the Plan are ripe for review.

Discussion

Before an action may be reviewed by the Board the issues must be ripe. *Cities of Tacoma, Milton, Puyallup, and Sumner v. Pierce County*, CPSGMHB 94-3-0001, Order on Dispositive Motions) (1994), at 13. "A claim is fit for judicial decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *First Covenant Church v. Seattle*, at 400 *quoting Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 87 L.Ed. 2d 126, 105 S. Ct. 3108 (1985). There is a strong public policy in favor of judicial economy: to not review a question until it is ready.

The Board holds that the GMA issues in the Hapsmith case are ripe for review. While the facts as stated in Hapsmith's Petition suggest that Hapsmith is concerned about the possibility that the City will rezone land adjacent to the SuperMall without amending the Plan, the issues that Hapsmith asks the Board to review are based on the City's comprehensive plan. The Board must consider whether Policy LU-74 violates certain provisions of the GMA. The City's action in adopting the Plan is final. The issues before the Board are therefore ripe.[2]

Conclusion

The GMA issues that Hapsmith raises involve an actual policy adopted in the Plan that is ripe for Board review.

3. GMA Standing

Introduction

The GMA's standing provision, RCW 36.70A.280(2), provides as follows:

> A petition may be filed only by the state, a county or city that plans under this chapter, a person who has either appeared before the county or city regarding the matter on which a review is being requested or is certified by the governor within sixty days of filing the request with the board, or a person qualified pursuant to RCW 34.05.530.

RCW 36.70A.280(3) defines "person" broadly as meaning:

> ... any individual, partnership, corporation, association, state agency, governmental subdivision or unit thereof, or public or private organization or entity of any character.

In effect, then, a person has three potential methods for obtaining standing under the GMA. The first, is to have appeared before the county or city regarding the matter on which a review is being requested. This method is called "appearance standing." The second is certification by the governor within sixty days of filing the request for review with the Board. This method is not at issue in this case and will not be discussed further. The third is qualification pursuant to RCW 34.05.530, a section of the Administrative Procedure Act (**APA**). This method is referred to as "APA standing."

Positions of the Parties

Hapsmith Case

The City argues that Hapsmith does not have GMA standing in this case because it did not appear, nor did it demonstrate that it has been sufficiently aggrieved or adversely affected by the

City's action to obtain standing under the APA.

Hapsmith does not allege appearance standing, but instead claims that it has GMA standing because it meets the APA test for standing. Hapsmith contends that the SuperMall's interests are within the zone of interests required to show APA standing because commercial development of land adjacent to the SuperMall will frustrate the planning objectives of the City, particularly with regard to traffic movement. Hapsmith argues that it has alleged injury in fact because it has an interest in obtaining permits for the second phase of the SuperMall plan, and future development of the SuperMall may be adversely impacted if the infrastructure capacity of the area is saturated by other commercial development.

BNSF Case

The City argues that BNSF cannot meet either the appearance or APA standing tests and therefore it does not have standing under the GMA. Auburn maintains that BNSF did not appear before the City to comment on the Plan before the close of the public record. The City argues that a October 17, 1994 letter is insufficient to establish appearance standing because it is does not provide any substantive comments on the Plan. The City also notes that no other written comments were submitted by the Railroad before the close of public comment.

In addition, the City contends that the Railroad is neither aggrieved nor adversely affected under the test used to establish APA standing.

In contrast, BNSF attempts to demonstrate that it did appear before the City on the Plan, by setting forth incidences of its contacts with the City by attending a public meeting, by presenting its concerns at a public meeting, and by corresponding with the City. The Railroad also argues that it is both aggrieved and adversely affected and therefore also has standing under the APA requirements.

Discussion

Appearance Standing: BNSF Only

The Board has interpreted the "appearance standing" provision liberally. It is available to a person regardless if that person has been "injured" (i.e., a requirement of the separate APA standing test cited in RCW 36.70A.280(2)):

> Appearance before a local legislative body can be accomplished either [1] by personally appearing at a [public] hearing or meeting at some time during the process, [2] by personally appearing and participating or testifying at a [public] hearing or meeting during the process, or [3] by submitting written comments to the local jurisdiction or its agents... *Twin Falls et al. v. Snohomish County*, CPSGPHB Case No. 93-3-0003 (1993), Order

Partially Granting Petitioners' Motions to Supplement the Record and Order Granting County's Motion for Limited Discovery, at 6.

In essence, all one has to do to obtain "appearance standing" is to attend a public hearing or meeting, to participate by testifying at a public hearing or to submit a timely letter on the relevant subject. *Friends of the Law*, Order on Dispositive Motions, CPSGMHB Case No. 94-3-0003, (1994), at 17.[3]

Talking to a member(s) of a local government off the record (i.e., not at a public hearing or meeting) does not constitute appearance, but writing one letter will suffice to grant standing. *Friends of the Law*, Order on Dispositive Motions, at 9.

In addition to these requirements, for an organization to have standing, a member of that organization must identify him or herself as a representative of the organization, when that person attends the hearing or meeting, testifies at a hearing, or submits a letter on the subject. *Friends of the Law*, Order on Dispositive Motions, at 17.

The Railroad provides several instances that it claims grants it appearance standing. First, it claims that the March 1995 meeting between Railroad officials and the City's Planning Director, (*see* Finding of Fact No. 10) in which the siting of the intermodal facility was discussed, qualifies. However, this was an off-the-record meeting and not open to the public. Therefore, it does not grant the Railroad appearance standing.

Second, the Railroad points to correspondence between it and the City contained in the record. During the comprehensive planning process, the City contacted the Railroad by letter, inquiring about its plans for the rail yard (*see* Finding of Fact No. 6). The Railroad responded, by letter dated October 17, 1994, informing the City that it had not yet reached a decision regarding its plans for the Auburn Yard and inviting the City to contact it regarding the City's needs as related to the Plan (*see* Finding of Fact No. 7).

Third, BNSF contends that it sent other letters to the City Council regarding the Plan, but their transmittal occurred after the City claims it closed the record on April 17, 1995. Fourth, BNSF points to a September 5, 1995 public meeting where a representative of the Railroad addressed the City Council just prior to the Plan's being adopted by ordinance.

The Board holds that the Railroad does have appearance standing to challenge the City's Plan for failing to comply with the GMA. Although it is debatable whether BNSF's October 17, 1994 letter, by itself, establishes such standing,[4] subsequent letters that BNSF sent the City clearly confer such standing. *See* Ex. P-227, at 5.

The City contends that these subsequent documents were received in late August and early September, 1995 - well after the record had been closed in April. The Railroad never raised the issue whether closing the record nearly five months before formal adoption of the Plan violated RCW 36.70A.140, the Act's public participation provision. The Board notes that cities and counties must be careful in closing the record too early, mindful of the "early and continuous" language in RCW 36.70A.140 and cognizant of the fact that the underlying action in question is legislative, not quasi-judicial. Nonetheless, compliance with the public participation provisions of the Act is not at issue in this case.

The Board's holding is based instead on the fact that, despite the City's claim that the record was closed, it permitted BNSF to submit documents (*see* Ex. P-227, at 5) and allowed Mr. Weinberg to appear before the City Council. *See* Ex. P-227, at 2-4. If the record was indeed closed in April, the City should not have accepted the Railroad's August and September, 1995 letters, nor permitted Mr. Weinberg to appear before the City Council on September 5, 1995, just prior to the Council's voting to pass the ordinance in question.

APA Standing

The APA's standing provision, RCW 34.05.530, is specifically referred to in RCW 36.70A.280 (2). RCW 34.05.530 provides as follows:

> A person has standing to obtain judicial review of agency action if that person is <u>aggrieved or adversely affected</u> by the agency action. A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present:
>
> (1) The agency action has prejudiced or is likely to prejudice that person;
>
> (2) That person's asserted <u>interests</u> are among those that the agency was required to consider when it engaged in the agency action challenged; and
>
> (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action. Emphasis added.

The Board applies the analysis contained in *Trepanier v. Everett*, 64 Wan. App. 380, 824 P.2d 524, *review denied*, 119 Wn.2d 1012 (1992) to determine whether a person is "aggrieved or adversely affected" as that phrase is used in the above-quoted statute. *Friends of the Law*, Order on Dispositive Motions, at 15. A two-part test is involved. First, the petitioner must first be within the zone of interests affected by the GMA enactment in question. Second, the petitioner must allege an injury in fact. To meet the evidentiary burden when alleging an injury in fact, the petitioner must show that the government action will cause him or her "specific and perceptible

harm" and that the injury will be "immediate, concrete, and specific." *Leavitt v. Jefferson County*, 74 Wan. App. 668, 679, 875 P.2d 681 (1994), citing *Trepanier*, at 382-83.

The Board has held in a SEPA context:

> ...that petitioners who fail to make a satisfactory evidentiary showing of injury initially in their petition for review are subject to having the Board dismiss their SEPA claims for lack of standing. *WSDF v. Seattle [**WSDF I**]*, Order Denying WSDF's Motion for Reconsideration of Order Granting Seattle's Motion to Dismiss, at 4.

Subsequently, the Board held that:

> ... a petitioner must establish a *prima facie* case of standing in the petition for review, be it GMA or SEPA standing or both.
>
> RCW 36.70A.290(3) provides:
>
> > Unless the board dismisses the petition as frivolous or finds that the person filing the petition lacks standing, the board shall, within ten days of receipt of the petition, set a time for hearing the matter.
>
> The only way the Board can determine whether a petitioner has standing within ten days of receipt of a petition for review is to require petitioners to describe their standing in the petition for review. Accordingly, the Board's Rules of Practice and Procedure at WAC 242-02-210(2)(d) provide that a petition for review shall contain:
>
> > A statement indicating the basis of the petitioner's standing before the board;
>
> Petitioners have several mechanisms for alleging that they are within the zone of interests protected by SEPA and for showing that the challenged SEPA determination will cause them specific and perceptible harm. Petitioners can make the necessary showing:
>
> - as a narrative in the petition for review itself;
> - by attaching a declaration or affidavit to the petition for review; or
> - by incorporating by reference exhibits from the record below. *Pilchuck et al. v. Snohomish County*, CPSGMHB Case No. 95-3-0047 (1995), Order Granting Snohomish County's Dispositive Motion to Dismiss SEPA Claims, at 3.

Accordingly, a petition for review relying on the APA method to obtain GMA standing is subject to dismissal if it does not contain sufficient allegations of being within the required zone of

interests and having been injured in fact. *See Pilchuck*, at 3. **The Board holds that petitioners must specify within their petitions for review which method of standing allows them to proceed with a case before the Board. For instance, petitions for review relying upon APA standing must either allege that the petitioners are within the zone of interests of the GMA and that they have been injured by the local government's GMA action, or they must cite to the specific GMA standing provision under which they qualify (i.e., RCW 36.70A.280(2)'s language "qualified pursuant to RCW 34.05.530).** However, although the petition should also contain information that supports these allegations, it need not contain such evidence. Instead, if the petitioner's alleged standing is challenged, the petitioner will be given the opportunity to provide additional evidence in response.

Thus, petitioners must specify which method (appearance, APA or governor certification) they are relying upon to obtain GMA standing. The Board's holding in *Pilchuck* that a *prima facie* case must be made within a petition for review is **reversed**. Therefore, in considering the dispositive motion in this case, the Board will consider other evidence provided by the petitioners beyond that in the petition itself[5].

Hapsmith

Hapsmith alleged the following in its Petition for Review:

> Petitioner is an owner of the SuperMall and has standing to bring this appeal pursuant to RCW 36.70A.280. Petitioner is aggrieved and adversely affected by the Comprehensive Plan.

As the owner of property that is affected by the City's GMA action (the adoption of the City's Plan), Hapsmith is clearly within the zone of interests of the GMA. However, Hapsmith did not allege injury in fact in its petition for review. Moreover, Hapsmith failed to make a satisfactory evidentiary showing of that alleged injury. Policy LU-74 in the Plan affects property near and adjacent to the SuperMall. Although the type and intensity of future development of this land may have the potential to someday injure Hapsmith, because such development may overburden the infrastructure capacity of that area, this alleged injury is too speculative to confer APA standing. It does not constitute the immediate, concrete and specific harm necessary to obtain such standing. **The Board therefore holds that Hapsmith does not have standing pursuant to RCW 34.05.530.**

BNSF

BNSF alleged the following in its Petition for Review:

1. BNSF is aggrieved, adversely affected, and prejudiced by the Comprehensive

Plan's designation of the rail yard as "light industrial," which in general prohibits railroad uses. BNSF's injury is immediate, concrete, specific, direct, and substantial.

2. The light industrial designation does not permit any railroad uses, including the north-south main line, the east-west main line and the proposed intermodal facility at the rail yard. The Plan states that in the light industrial designation, all significant activities must take place inside buildings which would preclude virtually all rail activities, because they generally occur outdoors.

3. The light industrial designation directly affects BNSF's properties within the City and its ability to meet increasing freight and passenger transportation needs and demands. BNSF PFR, at 11.

BNSF is within the "zone of interests" sought to be protected by the GMA. BNSF is a private property owner of land that is affected by the City's Plan. Also, the Railroad's interest in meeting transportation needs, specifically rail use, qualifies it to fall under the umbrella of the GMA's zone of interests. Such interests were sufficiently alleged in the Petition for Review.

BNSF also sufficiently alleged an injury in fact in its PFR. The Plan designates the rail yard as "Light Industrial." In general, the light industrial designation prohibits railroad uses because the Plan states that all significant activities in this designation must take place inside buildings. *See* Plan, at 14-14. This practically precludes rail activities because they take place outdoors. These facts, as alleged in the Petition for Review, demonstrate that BNSF's injuries are immediate, concrete, and specific.

Therefore, the Board holds that BNSF has satisfied the standing requirement of RCW 34.05.530 and therefore also has APA standing to petition the Board on this matter.

Conclusion

Hapsmith did not obtain appearance standing to challenge the City's Plan before the Board. Although the SuperMall is within the zone of interests protected by the GMA, Hapsmith has not made a satisfactory showing of its injury in fact. Therefore, Hapsmith does not have APA standing to challenge the City's Plan. As a result, Hapsmith's GMA legal issues will be dismissed with prejudice.

The Railroad appeared before the City regarding the Plan and therefore has appearance standing to proceed with this case. In addition, the Railroad's property is within the zone of interests protected by the GMA and it asserted sufficient injury in fact in its petition for review to obtain APA standing.

Board Member Philley's Partial Dissent and Concurring Opinion

I respectfully **dissent** from a portion of the majority's ruling. I would not reverse the Board's *Pilchuck* holding that petitioners must make a *prima facie* case of standing in their petitions for review. The analysis and rationale for the *Pilchuck* decision remains sound and should not be reversed. This is particularly true in the context of the GMA. Even though the legislature in 1996 removed the appearance-only prong for achieving appearance standing, obtaining appearance standing under the GMA is still a fairly simple process: testify or submit written comments.

Thus, in light of the language in RCW 36.70A.290(3) that directs the Board to dismiss a case within ten days of filing for lack of standing, and the Act's public participation process requirements at RCW 36.70A.140 (which is implicitly a "two-way street" that also imposes a duty on the public to meaningfully participate in the process) I do not think it is asking too much of petitioners that they make a satisfactory evidentiary showing of standing in their petitions for review. Clearly, Hapsmith did not make such a showing of GMA standing in its Petition for Review. I would dismiss Hapsmith's GMA legal issues for that reason.

Were it not for the language of RCW 36.70A.290(3), I would concur with the majority. The majority's opinion is consistent with Washington common law that generally requires only notice pleading, with detailed follow-up permitted later. I simply believe that the specific language of the GMA controls over the common law.

I do **concur** with the majority that Hapsmith was unable to make the proper showing of immediate, concrete and specific harm even when it was given the opportunity to submit additional argument and facts beyond those established in the Hapsmith PFR. It was only able to show possible future injury. Thus, I too would not grant Hapsmith GMA standing even were I to agree that *Pilchuck* should be reversed.

4. SEPA: Exhaustion of Administrative Remedies

The City argues that Hapsmith and the Railroad's SEPA claims should be dismissed because the petitioners failed to exhaust the City's administrative remedies before appealing the DNS issued for the Plan to the Board. The City has in place a procedure for appealing a threshold determination and states that the time period for filing an appeal ended on November 4, 1994. The City also maintains that it provided constructive notice of the final DNS by publishing a notice of the proposed DNS on September 11, 1994 that contained a statement indicating when the DNS would become final.

Hapsmith claims that it was not obligated to exhaust the City's administrative remedies because the City failed to provide adequate notice of the "final" DNS. Hapsmith contends that since it would not be allowed to appeal the proposed DNS but only the final DNS, the City was required

to publish notice of the final DNS.

Discussion

SEPA requires petitioners to exhaust agency appeal procedures, if any exist, prior to seeking judicial review. RCW 34.21C.075(4) provides in part:

> (4) If a person aggrieved by an agency action has the right to judicial appeal and if an agency has an appeal procedure, such person shall, prior to seeking any judicial review, use such procedure if any such procedure is available, unless expressly provided otherwise by state statute.

On the issue of exhaustion of remedies, the Washington State Supreme Court has said:

> It is settled under the SEPA statute [i.e., RCW 43.21C.075(4)] that if an agency accords an aggrieved party an opportunity for administrative review, it must be exhausted *before* judicial review is sought. *State v. Grays Harbor County*, 122 Wn.2d 244, 249, 857 P.2d 1039 (1993) (emphasis in original).

The court referred to this as "...a strict exhaustion requirement in SEPA cases." *State v. Grays Harbor County*, at 249 (emphasis added).[6]

To determine whether the exhaustion requirement bars a SEPA claim, it must be decided:

> (1) whether administrative remedies were exhausted; (2) whether an adequate remedy was available; (3) whether adequate notice of the appeals procedure was given; and (4) whether exhaustion would have been futile. *Citizens for Clean Air*, 114 Wn.2d 20, 26,785 P.2d 447 (1990).

The City has a procedure for appealing a threshold determination such as the issuance of a DNS. *See* Finding of Fact No. 5. It is uncontested that neither Hapsmith nor the Railroad utilized the administrative appeal provisions in the City's SEPA ordinance to appeal the DNS to the City. However, the petitioners claim that the City's notice of issuance of the final DNS was deficient, therefore excusing the exhaustion requirement.

Notice of the proposed DNS was published in the *Valley Daily News* on Sunday, September 11, 1994. Under the heading, "NOTICE OF PROPOSED ENVIRONMENTAL DETERMINATION OF NONSIGNIFICANCE Auburn, Washington" the notice stated:

> The lead agency will not issue a final determination on this proposal for 15 days from the date of publication of this notice. Any person aggrieved by the City's determination may

file an appeal with the Auburn City Clerk within 10 days of issuance of the final determination. Ex. P-H.

The final DNS for the Plan was not issued until October 21, 1994. It is also undisputed that the City did not publish further notice to indicate that the final DNS had been issued.

WAC 197-11-340(2) indicates that the responsible SEPA official shall give notice of a DNS pursuant to WAC 197-11-510. That provision, in turn authorized notice by publication in a newspaper. The WAC does not distinguish between a "proposed" DNS and a "final" DNS. Upon receiving notice, the public may then submit comments to the lead agency within fifteen days of the date of issuance of the DNS. WAC 197-11-340(2)(c). If public comments are submitted during this fifteen day period, the responsible official shall reconsider the DNS. WAC 197-11-340(2)(f). The SEPA rules do not require that a second notice be published after the fifteen day period has elapsed.

In this case, notice of the proposed DNS was published on September 11 but the final DNS was not issued until October 21, 1994. Since the notice stated that the final DNS would not be issued for 15 days from the date of the notice (i.e., 15 days from September 11, 1994), a person reading the published notice would have expected the City to issue its final DNS as soon as September 26, 1994. An aggrieved person would then have had ten additional days from the date of issuance of the final DNS to file an administrative appeal with the Auburn City Clerk. Thus, the theoretical appeal period, based upon the information contained in the published notice, would have ended on October 7, 1994.

In fact, the City did not issue its final DNS until October 21, 1994. Therefore, pursuant to the information provided in the published notice, aggrieved persons actually had ten days from October 21, 1994, to file an administrative appeal with the Auburn City Clerk. Neither petitioner filed any such appeal by this November 1, 1994, deadline.

The City satisfied the notice requirements for the DNS issuance. The petitioners had fifteen days from the date that the notice was first published in which to comment upon the proposed DNS. They did not do so. Furthermore, any aggrieved person had ten days from the date the final DNS was issued to appeal to the Auburn City Clerk. No one did so. **Since no administrative appeals were filed during the applicable time frame, the Board holds that the petitioners failed to exhaust their administrative remedies.** Therefore, their joint SEPA issue, Legal Issue No. 8, will be dismissed with prejudice.

Applying the fourth prong of the exhaustion test, the Board notes that neither petitioner has alleged that filing an administrative appeal would have been a futile effort. Therefore, the futility defense to the exhaustion requirement is not applicable in this case.

Hapsmith also claims the SEPA issue before the Board is not the City's issuance of the DNS but the City's failure to withdraw it after significant new information became available which indicated probable significant adverse environmental impacts. Since there is nothing in the record that indicates that the City has an appeals procedure for challenging a failure to withdraw a DNS, Hapsmith argues that it had no remedy to exhaust.

The Board has previously held that the exhaustion doctrine did not bar an action challenging the County's failure to withdraw a DNS when the County did not have an appeals procedure for DNS withdrawals. *Kitsap Citizens for Rural Preservation v. Kitsap County, (**KCRP**)* CPSGMHB Case No. 94-3-0005 (1994). The same facts exist in this case. The City does not have an appeals procedure for challenging its failure to withdraw a DNS. Therefore there was no remedy for the Petitioners to exhaust as to this claim. However, a significant difference does exist between this case and the *KCRP* case. In the latter, the SEPA legal issue before the Board clearly involved a withdrawal of a DNS. Withdrawals of a DNS are addressed by WAC 197-11-340(3). In contrast, here Legal Issue No. 8 is the only SEPA issue before the Board. It provides:

> *Does the City's adoption of the Plan fail to meet the requirements of Chapter 43.21C RCW because significant environmental impacts were not reviewed in an environmental impact statement?*

This issue does not ask the Board to review the City's failure to withdraw the DNS. Instead, the language suggests that the intent of the question is to challenge the original issuance of the DNS. Since Hapsmith failed to exhaust its remedies regarding the DNS issuance, and its petition for review and the agreed legal issue failed to allege a violation of WAC 197-11-340(3), the City's motion to dismiss Legal Issue No. 8 will be **granted**.

Conclusion

Both petitioners failed to exhaust the administrative remedy available for challenging the City's DNS issuance. In addition, Hapsmith failed to raise in its petition for review the issue of whether the DNS issued by the City should have been withdrawn. Therefore, Legal Issue No. 8 will be dismissed with prejudice.

5. SEPA Standing

Discussion & Conclusion

Because the Board has concluded that neither petitioner exhausted its administrative remedies, the Board need not determine whether the petitioners have SEPA standing to raise Legal Issue No. 8.

6. Failure to State a Legally Cognizable Claim as to Legal Issues 4, 5, 6 and 7.

Because the Board was unable to rule on the City's Motion to Dismiss prior to the hearing on the merits in this case, it will make its determination on the substance of Legal Issues Nos. 4, 5, 6 and 7 below. Therefore, the City's Motion to Dismiss these issues will be denied.

Conclusion

The Board will deny the City's Motion to Dismiss Legal Issue Nos. 4, 5, 6 and 7. Each of this legal issues is ruled upon below.

IV. LEGAL ISSUES AND DISCUSSION

Because of the Board's rulings above, only BNSF's GMA-related legal issues remain before the Board. These issues primarily have to do with the Railroad's property within the City.

BNSF has owned and operated a rail corridor since 1881, and a railyard since 1931, in the City of Auburn, using the facilities to provide regional and national freight and passenger rail services. A north-south rail line bisecting the city lies immediately east of "C" street SW; a east-west line lies immediately north of State Route 18, terminating at the north-south line. BNSF Prehearing Brief, at 2. The railyard is adjacent to the north-south line, south of SR 18. The north-south lines are nearing capacity, and BNSF anticipates growth in freight and passenger movements which will be difficult to accommodate without system improvements. BNSF is planning to reactivate its east-west route from Auburn through Stampede Pass, and to develop an Intermodal Hub Center in Auburn. Ex. P-216, at 1-2.

BNSF Legal Issue No. 1

Does the Plan fail to comply with the requirements of RCW 36.70A.070 because it is internally inconsistent?

Positions of the Parties

BNSF's Position

BNSF argues that the Plan is internally inconsistent for three reasons. First, the Transportation Element and Capital Facilities Plan are based on different (unspecified) assumptions. Second, the Light Industrial designation for the railyard is inconsistent with Plan policies LU-114 and -115. BNSF argues that, given the location of its property in the central and southern portions of the "Region Serving Area" of the City, and the long-term use of that property for railroad purposes, the Plan should have assigned it a Heavy Industrial land use designation. Third, BN contends that the Plan's failure to include a valid transportation element creates a fatal inconsistency. BNSF PHB, at 32-33.

City's Position

The City responded to the Railroad's first and third arguments in its response to Legal Issues Nos. 2 and 3 (City's Brief, at 34-41.) As to the second claim, the City contends that BNSF's Auburn Yard does not meet the heavy-industrial criteria of the Plan (found at LU-113 through -116), because it is adjacent to residential and commercial uses, and it is not separated from other land uses; it is not located between the City's two rail lines, as contemplated by LU-114, and lies outside of the central part of the City's "Region Serving Area," and the policy emphasis of LU-115 is on currently developed large-scale industrial uses, while the Railroad's use has been comparatively inactive and is not large scale. It further points out that the site meets the Plan's criteria for light-industrial designation. City's Brief, at 41-42.

Discussion

The preamble to RCW 36.70A.070 requires that "[t]he plan shall be an internally consistent document ..." The Board must determine whether the designation of the Railroad's property as Light Industrial is internally inconsistent with the Plan's policies for designating property as Heavy Industrial.

Plan Provisions

Objective 11.5 of the Plan's Land Use chapter provides for identification of areas appropriate for heavy industrial uses, and sets forth four policies. Only the three policies quoted below are at issue:

> LU-113 Heavy industrial uses shall be separated from lighter industrial, commercial and residential areas.
>
> LU-114 The most appropriate areas for heavy industrial uses are in the central part of the Region Serving Area adjoining the rail lines.
>
> LU-115 Heavy industrial uses are appropriate in the southern portion of the Region Serving Area which is now developed in large industrial facilities.. Plan, at 3-39.

Policy LU-113

The Plan's land use designations are shown on Map 14.1, entitled "Comprehensive Plan." The map designates various land uses within the City, including Heavy and Light Industrial; Heavy, Light and Neighborhood Commercial; Office; and various classifications of Residential among others.

Objective 6.1 in the Land Use chapter of the Plan states that designations shall:

> ... physically separate region serving employment centers and other regionally oriented land uses from areas that are residential or local in character while ensuring that regional facilities strengthen the community as a whole and enhance downtown Auburn. Plan, at 3-10.

Map 14.1 shows six islands of lands designated as Heavy Industrial within the City. All of the parcels designated Heavy Industrial are adjacent to lands within the City limits that have been designated Light Industrial, Heavy or Light Commercial, High or Moderate Density Residential, Open Space or Public. On its west boundary, the Railroad site adjoins lands primarily designated Heavy Industrial; on the east, the adjoining lands are primarily designated Heavy Commercial along with Heavy Industrial and a small strip of land that is designated High Density Residential. The property's northern boundary abuts State Route 18 and downtown Auburn while the southern boundary adjoining lands designated Heavy Commercial.

Policy LU-114

Under Objective 6.1, Policy LU-3 describes the preferred use for regionally oriented land uses, and defines the "Region Serving Area":

> Areas on the valley floor which are suitable to support large scale economic development projects should be reserved, for the most part, for uses which support Auburn's role as a regional employment and commercial center (to be known as the Region Serving Area -- See Map 3.2). Plan, at 3-10.

Map 3.2, entitled "Urban Form," delineates all lands within the municipal boundaries as either "Community", "Region" delineation or "Downtown." The lands designated as "Region" are generally bounded on the north by S. 277th St. and 52nd St. NE; on the east by "I" St. NE, Auburn Way, and "A" St. SE, with the exception of the "Downtown"; on the south by the King-Pierce County line, and on the west extending generally to the municipal boundaries with the exception of an area east of the West Valley Highway. The property at issue here is designated within the "Region" and is located on the southeastern edge of that classification.

A substantial portion of the land within the City limits located between the two north-south rail lines is designated Heavy Industrial; all of the land between these two main lines is classified as within the Region Serving Area. *See* Maps 3.2 and 14.1.

The Board holds that the Railroad has failed to show how the designation of its property as Light Industrial is inconsistent with Policy LU-114. Of the six islands of land designated Heavy Industrial, all but two are within the Region Serving Area. The two outside the Region Serving Area appear to be the fourth and fifth largest of the six islands. They are located adjacent

to the Railroad's property. Consequently, these two islands are adjacent to the southeastern boundary of the Region Serving Area.

Policy LU-114 indicates that the "most appropriate area for heavy industrial uses are in the central part of the Region Serving Area..." That is precisely where the three largest islands of Heavy Industrial lands are located. LU-114 does not mandate that the Railroad's property, even though it is located on the edge of the Region Serving Area and adjoins a rail line, be designated Heavy Industrial -- it simply indicates the most appropriate location for such a designation. Thus, even if BN's land were located "in the central part of the Region Serving Area," Policy LU-114 does not dictate that all lands within the Region be designated Heavy Industrial.

Policy LU-115

Finally, the Board holds that the Railroad has not met its burden of proof in showing how the designation of its property as Light Industrial is inconsistent with Policy LU-115. As the discussion regarding Policy LU-114 indicated, BN's property forms the southeastern edge of the Region Serving Area. However, the Railroad's property constitutes a small portion only of "the southern portion of the Region Serving Area" as discussed in Policy LU-115. But for the sliver of BN's property that comprises the southern boundary of the Region Serving Area, the rest of that area's southern portion has been designated Heavy Industrial.

Even if BN's property comprised a larger portion of the southern boundary of the Region Serving Area, Policy LU-115 does not require that all properties located there must be designated as Heavy Industrial. Instead, it simply indicates that Heavy Industrial uses are appropriate in that area of the City.

The City argues that Policy LU-115 imposes a condition on lands in the southern portion of the Region Serving Area in order for them to be designated Heavy Industrial: they must now, at the time the Plan was adopted, be developed in large scale industrial facilities.[7] Because of the Board's holding above, it need not determine whether the Railroad's existing facilities on the site, its trackage, constitute "industrial facilities." The Board notes that, even if railroad trackage by itself constitutes "industrial facilities," the record is fairly clear (although not undisputed) that BN's existing facilities were not "large scale" at the time the Plan was adopted.

The Board points out that the City is not bound to designate the Railroad's property as Light Industrial. The ultimate designation of any property remains in the local jurisdiction's discretion so long as the designation complies with the requirements of the Act and is internally consistent.

Conclusion No. 1

The Railroad has not met its burden of showing how the designation of its property as Light Industrial is internally inconsistent with Land Use Policies LU-114 and -115 in the Plan.

BNSF Legal Issue No. 2

Does the Plan fail to comply with the requirements of RCW 36.70A.070(6) because the City has not prepared a valid transportation element?

Positions of the Parties

BNSF's Position

There are two prongs to Legal Issue No. 2. The first deals with 10-year traffic forecasting. The Railroad asserts that the Plan's Transportation Element does not comply with RCW 36.70A.070 (6)(b), which provides that the transportation element include a subelement on facilities and service needs, including:

> (iv) Forecasts of traffic for at least ten years based on the adopted land use plan;

In challenging the analysis, BNSF points to the City's document itself, which states that the Plan's forecasting methodology, called trend analysis, is generally used for periods of less than ten years, and notes that the method cannot predict changes in basic traffic patterns or changes in traffic impacts originating outside the city. Ex. 131, at 7-13. BNSF cites to a Washington State Department of Transportation (**WSDOT**) comment on the draft City Plan that recognized the "limitations of trend analysis" and encouraged the City to work with the Puget Sound Regional Council (**PSRC**) on the development of a more appropriate traffic forecasting methodology, the "T-Model-2." Exhibit R-57, WSDOT Attachment, at 1.

The second prong of Legal Issue No. 2 is BNSF's allegation that the City's funding capability analysis fails to include documentation showing how transportation needs will be measured against probable funding resources. It argues that the City thus fails to comply with RCW 36.70A.070(6)(c)(i), which provides that the transportation element shall include a finance subelement including:

> An analysis of funding capability to judge needs against probable funding resources:

BNSF argues that rather than supply the necessary analysis, the City instead simply states that the CFP presents a "fundable construction program." BNSF argues that the Plan "lacks an accessible analysis [to support]... this conclusion." BNSF PHB, at 31.

BNSF also notes that the City's analysis focuses on funds sufficient for facilities needed at the

time of buildout of the "current comprehensive plan," and asserts that it is the City's pre-GMA 1986 plan, not the 1995 Plan, that formed the basis for the analysis. It asserts that the use of different assumptions in the Capital Facilities Plan (**CFP**) and the Transportation Element constitute an internal inconsistency in the Plan which violates the GMA.

City's Position

The City briefs Legal Issues 2 and 3 together. A statement of its position on Legal Issues 2 and 3 is grouped below.

BNSF Legal Issue No. 3

Does the Plan fail to comply with the requirements of RCW 36.70A.070(6) because the transportation element does not assess the impacts on adjacent jurisdictions, the region and the State?

Positions of the Parties

BNSF's Position

The Railroad argues that the Plan does not meet the specific requirements of RCW 36.70A.070(6)(d) which provides that a transportation element shall include subelements, including:

> Intergovernmental coordination efforts, including an assessment of the impacts of the transportation plan and land use assumptions on the transportation systems of adjacent jurisdictions; Emphasis added.

BNSF argues that the Plan's Transportation Element is not coordinated with the Preliminary State Multi-Modal Transportation Plan (the **Preliminary WSDOT Plan**), issued in December 1994. Exhibit P-159. The Preliminary WSDOT Plan identifies freight rail capacity constraints as a state problem and identifies a number of rail service objectives including:

> WSDOT should encourage regional and local growth management plans and transportation plans to include consideration for existing or potential rail lines or corridors...
> ....
> WSDOT should support adequate rail system capacity and rail access to intermodal terminals through projects, such as grade-crossing improvement projects, signalization, railroad/street grade separations, intermodal facilities, port access projects, congestion reduction improvements, facilities and equipment, rail service restoration and supporting services... Preliminary WSDOT Plan, at 45.

BNSF argues as evidence that the City did not consider the Preliminary WSDOT Plan in the

development of its Plan, that neither the Plan nor the index of the record in this case initially submitted by the City made mention of it. BNSF PHB, at 21. It argues that the Plan fails to provide for future use of existing rail corridors and the Railyard and is therefore inconsistent with the above cited objectives from the Preliminary WSDOT Plan.

The Railroad also argues that the Transportation Element is not coordinated with the Metropolitan Transportation Plan (the **MTP**) adopted by the PSRC in May of 1995. Exhibit P-160. It points out that the PSRC is the region's Regional Transportation Planning Organization, and that the MTP is the regional transportation plan, and cites portions of the MTP that recognize the importance of intermodal activities, including the following:

> Freight and goods transportation forms an ***integral part of the logistics system of every business in the region.*** In addition, markets and firms outside the region ***depend upon modal and intermodal facilities*** in the central Puget Sound region. Ex. P-160, at 59 (emphasis as added in BNSF's PHB).

BNSF also cites a number of specific MTP policies which further the objective of improving freight mobility, including:

> RT-8.1 Develop multi-modal transportation systems by supporting the efficient movement of freight and goods.
>
> RT-8.3 Give high priority to preservation and rehabilitation projects which increase effective multimodal and intermodal accessibility.
>
> RT-8.5 Encourage public and private sector partnerships to identify freight mobility improvements which facilitate convenient intermodal transfers. Ex. P-160, at 19-22.

BNSF argues that the Plan is uncoordinated with these policies because "... it is inattentive to freight issues and precludes rail improvements and intermodal operations, limits mobility options and inhibits efficient freight movements and intermodal transfers." BNSF PHB, at 22.

The Railroad also argues that the Plan is uncoordinated with the Regional Guidelines and Principles identified in RCW 47.80.026, which address such issues as "freight transportation and port access" and "railroad right-of-way corridors and intermodal connections."[8] These principles were adopted into the MTP as guidelines to guide local governments in developing transportation elements as required by RCW 47.80.026. Ex. 160, at C-7. BNSF argues that the Plan frustrates freight transportation, makes rail uses in a critical rail corridor a nonconforming use, and precludes development of a critical intermodal connection, and therefore it is not coordinated with the Regional Guidelines and Principles.

City's Position re: Legal Issues 2 and 3

The City argues that its Transportation Element does assess the impact on adjacent jurisdictions. It cites to its distribution of the Plan to and consultation with the adjacent cities of Sumner, Kent, and Federal Way, as well as consultation with the Muckleshoot Tribe, Pierce County and the Regional Transit Authority. City PHB, at 35. With respect to the MTP, the City points out that it does not specifically describe the BNSF proposed intermodal facility as warranting priority attention or treatment on a regional policy basis. In refuting the alleged inconsistency with the Preliminary WSDOT Plan, the City cited the WSDOT conclusion that the draft Plan was "consistent with regional policies in Vision 2020". Ex. 57, at 6 (checklist).

The City characterizes the BNSF criticism of the trend analysis 10-year traffic forecasting methodology as "quibbling." It argues that this methodology is well-established, that the City recognized its shortcomings and compensated for them, and that, at any rate, the Act does not prescribe any particular methodology for traffic forecasting. Moreover, the City agues that, "... because the Plan is relatively unchanged since the 1986 Plan, it is appropriate that growth trends based upon the 1986 Plan be used for the 10-year traffic forecast." City PHB, at 37.

The City further argues that the Plan did account for traffic generated outside the City by coordinating with the jurisdictions that prepared the land use plans and performed the transportation analyses for those areas (i.e., King and Pierce County, primarily). In a related vein, it points out that, regardless of whether portions of the potential annexation areas are annexed or not, because those areas are within the urban growth area (**UGA**), traffic improvements will presumably be required by the jurisdiction with authority to analyze those traffic impacts and require mitigation.

With respect to the alleged inadequacy of funding for future transportation needs, the City responds that the Washington State Department of Community, Trade and Economic Development (**CTED**) and the WSDOT concluded otherwise. The City states that CTED has praised Auburn's CFP as "outstanding" and "excellent" (Ex. 26, at 1). In answering the question of whether the transportation element was coordinated with the CFP, WSDOT concluded that it was (Ex. 57, at 5 (checklist)). With regard to the unincorporated areas adjacent to Auburn, the City points out that both King and Pierce Counties' Plans contain CFPs that address the costs of development in the UGAs and that inter-jurisdictional negotiations are underway to address cost allocations for these areas. City PHB, at 40.

The City refutes the BNSF argument that the CFP's reliance on the 1986 Plan somehow renders the 1995 Plan flawed. The City repeats its position that the City's 1986 Plan is nearly identical to the 1995 Plan. It argues that there was "no material change in the land use designations and

related transportation infrastructure needs have not materially changed since 1986." City PHB, at 40. It further argues that the addition of the Potential Annexation Areas (**PAAs**) to the City's Plan in 1991 (Ex. 129, at 13-7 and Ex. 127, at 3-8) refutes the BNSF allegation that the Plan addressed by the CFP did not include the PAAs. The City argues that the CFP states that the traffic generated by the PAAs and the related traffic infrastructure within the City can be funded, and that King and Pierce Counties have determined that they can fund the traffic needs within their respective PAAs.

Discussion re: Legal Issue 2

The Act does not require the use of any particular methodology for the 10-year traffic forecast. The nature of traffic forecasting is that it applies a methodology to data and assumptions to generate a prediction of the likely future. **The Board holds that where, as here, the Act does not prescribe a particular methodology, a state or local government is free to employ its own methodology, provided that it is supported by objective data and credible assumptions.**

In the present case, the City's use of the trend analysis method was within the City's discretion, particularly in view of its recognition of the limitations of that model and the measures taken to compensate. Nevertheless, the Board is concerned about the City's assumption that there have been no significant land use or transportation changes between the adoption of the 1986 pre-GMA plan and the 1995 Plan. The Board takes official notice of the planning and construction of the SuperMall and the Auburn Downs racetrack in the years subsequent to the 1986 Plan (or the 1991 Plan Update for that matter) and the City's population increase during these years. **The Board holds that the City's trend analysis does not comply with RCW 36.70A.070(6) because it relies upon a faulty assumption, that no significant changes occurred within the City between 1986 and the adoption of the Plan.**

As to the traffic generated from outside the City, the Board concurs with Auburn's position that the land use decisions for those areas, and their traffic consequences, were addressed by King and Pierce Counties and that it is not reasonable to expect the City to do more than participate in the inter-governmental negotiations it has underway to address cost-sharing for improvements within the City attributable to projects outside the City and within the PAAs.

Turning to the matter of the alleged failure of the CFP to analyze needs against probable resources, the Board rejects BNSF's argument. The CFP contains graphic, narrative and tabular analysis of needs and probable funding sources, including: summarization of the "Forecast of Future Needs" (CFP, at 27); System Needs for particular road segments, including capital financing of solutions (e.g., CFP, at 30); a Financial Program Plan that identifies funding tools, sources of long term public capital and near term developer contributions (CPF, at 127-134); and

an identification of street capital improvement projects by year, street, number and potential funding source (CFP, at 176-179.) Accordingly, **the Board holds that the Plan does not fail to comply with RCW 36.70A.070(6)(c)(i).**

Conclusion No. 2

With regard to the traffic forecasting portion of Legal Issue No. 2, the Board concludes that the City has failed to comply with RCW 36.70A.060(b)(iv). The Plan's 10-year traffic forecast was based upon the flawed assumption that there have been no significant changed circumstances since the 1986 comprehensive plan. Prominent and intensive traffic-generating projects in the City, such as the SuperMall and Auburn Downs, that have been planned and constructed within the past several years move this assumption beyond the realm of credibility.

The City is free to continue to utilize its trend analysis methodology; however, the 10-year traffic forecast will be remanded with instructions to revisit the assumptions for the forecast and make appropriate revisions, making appropriate acknowledgment of the SuperMall, Auburn Downs and any other significant changed circumstances since 1986 and future changes expected as a result of the 1995 Plan. In the alternative, the City may demonstrate where such information exists in the record.

With regard to the finance portion of Legal Issue No. 2, the Board concludes that BNSF fails to carry its burden to prove that the CFP is not in compliance with RCW 36.70A.070(6)(c)(i).

Discussion re: Legal Issue 3

As written, Legal Issue No. 3 asks whether the Plan fails to comply with RCW 36.70A.070(6) due to its failure to assess the impacts on three different named entities or groups of entities: (1) adjacent jurisdictions; (2) the region; and (3) the State. In answering this legal question, the Board first notes that the only duty explicitly created by RCW 36.70A.070(6) is to assess the impacts on "adjacent jurisdictions." No mention of either the region or the State appears in the only statutory section cited in Legal Issue No. 3. Nonetheless, the Board will discuss each of these three prongs in turn.

As to the matter of "adjacent jurisdictions," there is no explicit definition of such in the Act. It is logical to assume that the term "jurisdictions" refers to other entities with a duty to plan under the Act, which is to say cities and counties; however, it is less apparent what the Act intends by the word "adjacent." The dictionary meaning of "adjacent" provided by *Webster's II New Riverside University Dictionary*, (1988), Houghton-Mifflin Co., Boston, is:

> 1. close to: NEARBY. 2. Next to: ADJOINING...*core meaning*: sharing a common boundary. *Webster's*, at 78.

The jurisdictions which share a common boundary with Auburn are the cities of Kent, Algona, Pacific, and King and Pierce counties. While Auburn does not touch Federal Way, their UGAs do, and even their city limits are very "close to" and "nearby" one another. Thus, the only duty upon Auburn created by RCW 36.70A.070(6)(d) is that it ".. [assess] the impacts of the [Auburn] transportation plan and land use assumptions on the transportation systems of ... [the cities of Kent, Algona, Pacific and Federal Way and the counties of King and Pierce]."

The City argued that it sent copies of the draft plans to these entities, as well as to the Muckleshoot Tribe and the RTA, and that it consulted with these same entities. However, it did not provide documentation of such consultation, or documentation that, as a result of such consultation, it took any specific action. As the Board held in *West Seattle Defense Fund v. City of Seattle* (***WSDF I***) CPSGMHB Case No. 94-3-0016 (1995), the requirement to assess traffic impacts on adjacent jurisdictions requires some showing of the actual assessment. **Therefore, the Board holds that the City has not complied with RCW 36.7OA.070(6)(d).** Although the City may have coordinated its transportation activities with adjacent jurisdictions, the record does not so indicate. Furthermore, the record fails to indicate any assessment whatsoever of the impacts of the Auburn Plan on adjacent jurisdictions.

Turning to the other prongs of Legal Issue No. 3, the Board notes that it could simply decline to comment. Because the MTP and the Preliminary WSDOT Plan[9] do not constitute the "transportation systems of adjacent jurisdictions," compliance of the Plan with those documents is not a justiciable matter under RCW 36.70A.070(6)(d). In order to attack the alleged lack of GMA-required coordination or consistency of the Plan with the MTP, the Railroad would have had to allege noncompliance with other provisions of the Act, such as RCW 36.70A.210. Moreover, the Board points out that it only has jurisdiction over those matters listed in RCW 36.70A.280(1).

While the City may have, in fact, failed to achieve either coordination or consistency with the MTP, the Board need not and will not make such a determination because that is not the issue before it. Nevertheless, in view of the serious and legitimate interests articulated by both BNSF and the City, and the substantial public interest that would be served by a mutually agreeable resolution of this matter, the Board is compelled to comment.

While the City is correct that neither the MTP nor the Preliminary WSDOT Plan explicitly names the Auburn Railyard as a high regional priority for an intermodal facility, there are many policy statements in both documents that provide strong direction to the City to acknowledge these regional and statewide policies more directly in its Plan, and the City would be well advised, in its compliance with the remand order, to consider those regional and statewide policies carefully. The Board elsewhere in this decision directs the City to amend its Plan to provide for a process to

site essential public facilities, and likewise concludes that an intermodal facility of the type described by BNSF is an essential public facility. Regardless of whether the MTP or the Preliminary WSDOT Plan explicitly names the Auburn Railyard as a site for an intermodal facility serving the Ports of Tacoma and Seattle and much of Western Washington, all the evidence before the Board indicates that the City must plan for this eventuality.

At the same time, the City has made a number of credible points about the serious localized consequences of siting an essential public facility such as BNSF has described for its property. The Board has also concluded that the Special Planning Area designation for the Railyard is an innovative comprehensive plan technique authorized by RCW 36.70A.090 to enable the City to articulate its legitimate site and off-site issues in the form of a more detailed localized planning document. The planning process described by the City in its briefing and in the Plan itself (Plan, at 14-16 to 14-18) provides the opportunity for the concerned state, regional and local agencies to craft appropriate site design standards and identify the necessary infrastructure improvements and mitigations. Such a planning process provides a reasonable framework for the City to articulate its legitimate concerns, and for other public agencies and the Railroad to respect and creatively respond to those concerns.

Conclusion No. 3

The Plan fails to comply with the requirements of RCW 36.70A.070(6) because the transportation element does not assess the impacts on adjacent jurisdictions. The transportation element will be **remanded with instructions to perform and document the required analysis**.

BNSF Legal Issue No. 4

Does the Plan fail to comply with the requirements of RCW 36.70A.070(6) and RCW 36.70A.210 because its failure to allow for continued railroad uses and an intermodal freight facility are inconsistent with King County County-wide Planning Policies (KCCCPs)?

Positions of the Parties

BNSF's Position

The Railroad alleges that the Plan does not comply with RCW 36.70A.210 and RCW 36.70A.070 (6) because it is inconsistent with King County Countywide Planning Policies (**KCCPPs**) FW-20, T-16 and ED-6. These three policies within the KCCPPs provide:

> FW-20 In recognition of the fact that King County is the regional freight distribution hub and a major international trade gateway, and that freight transportation is one of the state's most important basic sector economic activities, goods mobility by all modes shall be

included as a component of comprehensive plans.

> T-16 Transportation elements of Comprehensive Plans shall reflect the preservation and maintenance of transportation facilities as a high priority to avoid costly replacements and to meet public safety objectives in a cost-effective manner.
>
> ED-6 Local jurisdictions' comprehensive plans shall include policies intended to foster: The development and retention of those businesses and industries which export their goods and services outside the region. These businesses and industries are critical to the economic strength and diversification of the economy. Emphasis added.

The Railroad argues that the Plan fails to include a freight mobility component contrary to the direction of KCCPP FW-20. BNSF concedes that there is mention of this topic in the Plan, but characterizes it as a "cursory mention [that] does not reflect the importance that FW-20 places on this "important basic sector economic activity." BNSF PHB, at 18.

With respect to T-16, the Railroad argues that the Plan would prohibit new rail uses and eventually extinguish rail activities from the Railyard, forcing system improvements elsewhere at considerable expense. This would be contrary to the direction of T-16 to avoid costly replacements of transportation facilities that can and should be preserved and maintained.

With respect to ED-6, the Railroad argues that the Plan frustrates, rather than fosters, export generating businesses and industries by virtue of its negative effect on the future operation and improvement of rail facilities, including potential intermodal facilities.

City's Position

The City argues that WSDOT, as the state agency charged with ensuring a vital statewide transportation network, is a more objective and credible source than BNSF in determining whether or not the Transportation Element of the Plan complies with the KCCPPs. It points out that WSDOT found that the draft Plan complies with the KCCPPs. Ex. 57, at 2 (checklist).

The City argues that BNSF focused much of its criticism on the draft Plan, rather than the adopted Plan, and that the latter has a very comprehensive discussion of multimodal transportation strategies. It cites to its discussion regarding Legal Issue No. 6 in support of the proposition that the Plan has a policy commitment to a multimodal strategy, the Plan includes a freight movement section, and the Plan acknowledges the existing and possible future uses of the Auburn Railyard.

The City argues that BNSF's allegation of the Plan's inconsistency with the KCCPPs is based

upon faulty premises -- namely, that the Plan does not allow for continued railroad uses at the Auburn Yard and does not provide BNSF with a process to have its proposed intermodal freight facility considered by the City. It points out that current railroad uses are legally permitted nonconforming uses under the Plan (Ex. 128, the City's non-conforming use provision) and that BNSF is currently pursing modernization of its Auburn Yard as an intermodal hub freight facility through the City's Special Planning Areas process. City PHB, at 27. Therefore, the City argues, the Plan is not, as a matter of law, inconsistent with the KCCPPs.

In the alternative, the City argues that any inconsistency with the KCCPPs is a direct result of BNSF's failure to share its intermodal plan with the City during the review of the Plan, and that BNSF's omission does not render the Plan inconsistent with the KCCPPs or the GMA. City PHB, at 29.

Discussion

The Board holds that BNSF has failed to carry its burden to prove how the Plan fails to comply with KCCPPs FW-20 or ED-6. ED-6 provides a statement of intent and direction (i.e., "foster" the development and retention of ... businesses and industries ...) but contains no objective or tangible measure by which to evaluate compliance by a local plan. The term "foster" is synonymous with "encourage" or "promote" and, as such, not a very directive policy statement.

FW-20, by contrast, explicitly requires that plans "... [include] ... a component regarding "goods mobility by all modes." It is unclear what is intended by the term "component;" perhaps something less than an "element" of a plan, but almost certainly something more than the "cursory mention" that BNSF alleges was contained in the draft Plan. The Board concurs with the City that the adopted Plan contains analysis and a number of policies addressing "multimodal" transportation. For example, the Plan provides:

> The encouragement and support of multimodalism, transportation demand management, and transportation system management are key components in the City's approach to addressing its transportation needs. Plan, at 7-2.

Map 7.4 depicts major freight routes in the City. Also:

> As shown in the map, freight movement in Auburn is accomplished by truck and by train. Both the Burlington Northern and the Union Pacific Railroads have rail lines extending through Auburn to the north and south. The Burlington Northern track to the east begins in Auburn and roughly follows the route of SR - 18. In addition, Burlington Northern has a major railroad yard in Auburn (south of SR - 18 between A and C Streets SE). Railroad

> operations at the yard have been reduced significantly over the years, however, Burlington Northern may have plans to convert this yard sometime in the future into an inter-modal facility where freight is transferred between trains and trucks. The City has concerns about this possibility as it would have significant impacts on the City in terms of transportation and other issues. The City expects to play an active role in the development review and approval of any plans to expand operations at the site. Plan, at 7-26.

While the Transportation Element of the Plan, for various reasons detailed elsewhere in this decision, will be remanded to the City, the reasons do not include failure to comply with FW-20. **The Board holds that the Plan does include a component addressing goods mobility by all modes.**

T-16 is a different matter. It requires that the transportation elements of plans reflect as a high priority the preservation and maintenance of existing facilities in order to avoid having to incur expense in replacing them. Elsewhere in this order (*see* Legal Issue No. 5 below), the Board concludes that the Plan lacks a process to site essential public facilities (**EPF**) and orders the City to include such a process. To the extent that certain provisions of the Plan, such as the requirement that all uses in a light industrial area be within structures, could thwart or needlessly obstruct the operation of an EPF, such provisions are inconsistent with KCCPP T-16.

Accordingly, **the Board holds that to attempt to cause BNSF's present railroad use or the potential future intermodal facility use to locate to some other site not now presently owned by BNSF, or to force the Railroad to enclose its facilities within buildings, would, at the very least, result in significant avoidable expense. Accordingly, the Board further holds that the portion of the Plan discussed in Legal Issue No. 5 below (i.e., at 14-14) that requires significant activities on lands designated as Light Industrial to take place inside buildings, is not consistent with Policy T-16 in the KCCPPs.**

Conclusion No. 4

The specified portion of the Plan (at 14-14) fails to comply with RCW 36.70A.210 because it is not consistent with KCCPP Policy T-16.

BNSF Legal Issue No. 5

Does the Plan fail to comply with the requirements of RCW 36.70A.200 by not providing for siting of essential public facilities?

Discussion

RCW 36.70A.200, entitled "Siting of essential public facilities," provides in part:

> (1) The comprehensive plan of each county and city that is planning under this chapter shall include a process for identifying and siting essential public facilities....

Therefore, the first question the Board will examine under this issue is whether Auburn's Plan contains such a process. **The Board holds that the Plan does not comply with RCW 36.70A.200 because it fails to contain a process for identifying and siting essential public facilities**. The Plan does not have a provision specifically labeled "essential public facilities." This by itself is not a fatal error because there is a discussion of "regional facilities" in the capital facilities chapter. The introductory paragraph to the four policies under this heading provides:

> The siting of a public facility of regional or statewide significance within an area can have major impacts on its residents. Jurisdictions which accept such facilities should receive public amenities or other facilities which help balance these negative impacts. Essential public facilities that are county-wide or statewide in nature (e.g., solid waste and/or hazardous waste facilities) must meet existing state and local laws and regulations requiring specific siting and permitting requirements. Plan, at 5-15, -16.

Policy CF-62 constitutes the Plan's procedural essential public facility provision. It states:

> The City shall work within the structure of the Growth Planning Council or its successor <u>to develop a process for the siting of public capital facilities of a countywide or statewide nature</u> as outlined within the King County Countywide Planning Policies. Plan, at 5-15 (emphasis added).

In effect, CF-62 constitutes a *process to establish a process* for identifying and siting essential public facilities. However, the Act requires that the Plan contain an actual process for identifying and siting such facilities. **Therefore, the Board holds that CF-62 does not comply with RCW 36.70A.200(1).** The Board's holding does not prevent a city or county from copying or incorporating by reference the essential public facilities identification and siting process of another jurisdiction. Whether a local government elects to develop its own process or borrow another jurisdiction's process falls within its sound discretion. This discretion may be limited by other requirements. In this case the City argues that the King County County-wide Planning Policies (**CPPs**) at S-1 require all King County jurisdictions to use the essential public facilities process adopted by the Growth Management Planning Council.[10] City's Motion to Dismiss, at 24 and City's Response, at 31. The problem with CF-62 is that the City in effect elected to rely on a process yet to be established through the Growth Management Planning Council.[11]

While there may be legitimate policy and legal reasons as well as practical concerns that suggest

or even require intergovernmental coordination between jurisdictions in developing an identification and siting process, and the Board is not critical of the City for attempting to do so (and, for that matter, the Board is not critical of the county-wide planning policies for requiring uniformity), RCW 36.70A.200(1) requires each city and county to establish such a process. While Auburn may elect (or be required) to copy the Growth Management Planning Council's process in its Plan, or incorporate that process by reference into the Plan once that process has been completed, at the time Auburn adopted its Plan, the regional identification and siting process referenced in CF-62 had not been established.

Therefore, in order for the City to comply with RCW 36.70A.200(1), Auburn had an obligation to establish its own identification and siting process. In short, a city or county cannot rely on an unfinished process of another jurisdiction to meet the Act's requirements. However, a city or county can, if it elects or is required to by county-wide planning policies to do so, utilize the completed process of another jurisdiction to meet the requirement of RCW 36.70A.200(1).

The Board concurs with the Railroad's assessment of the other three policies (CF-63 through 65) that they fail to establish the required process for essential public facilities.

Next, the Board examines whether a railroad's facilities, such as its trackage, a railyard or an intermodal rail facility, constitute an essential public facility. The City contends that these facilities are currently not designated essential public facilities by any state, local or city agency. City's Response, at 31. RCW 36.70A.200(1) indicates that:

> ...Essential public facilities include those facilities that are typically difficult to site, such as airports, state education facilities and state or regional transportation facilities, state and local correctional facilities, solid waste handling facilities, and in-patient facilities including substance abuse facilities, mental health facilities, and group homes. Emphasis added.

Previously, the Board has noted that:

> Significantly, essential public facilities may be large or small, many or few, and may be either capital projects (e.g., airports and prisons) or uses of land and existing structures (e. g., mental health facilities and group homes). The characteristic they share is that they are essential to the common good, but their local siting has traditionally been thwarted by exclusionary land use policies, regulations, or practices. For this reason, RCW 36.70A.200 has, in effect, pre-empted such behavior. *Children's Alliance v. Bellevue*, CPSGMHB Case No. 95-3-0011, Final Decision and Order, (July 25, 1995), at 8.
> ...
> The legislature included RCW 36.70A.200 in the GMA for a reason: "essential public

> facilities" such as group homes are typically difficult to site. They are precisely the types of land uses which provoke "NIMBY" (Not in My Backyard) responses.... *Children's Alliance*, at 19.

The Board holds that any railroads with facilities, such as trackage, railyards and intermodal centers, that serve the region or state, as a matter of law, constitute state or regional transportation facilities and therefore are essential public facilities. This holding is based on the common knowledge that these facilities are typically difficult to site (*see* RCW 36.70A.200(1)) and a review of the Act's third planning goal which seeks to encourage the development of multimodal transportation systems. *See* RCW 36.70A.020(3); *see also* RCW 47.06.010, RCW 47.76.200 and RCW 47.80.011.

The next question is whether the Plan precludes the siting of such essential public facilities as railroads and their associated facilities, since RCW 36.70A.200(2) provides in part:

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

Policy CF-63 states:

> State or regional transportation facilities should be designed and located to compliment the Auburn Comprehensive Plan. Plan, at 5-16.

The Board holds that Policy CF-63 does not, by itself, violate RCW 36.70A.200(2); it does not preclude the siting of essential public facilities.

Policy CF-65 states:

> Public and quasi-public facilities having service areas that extend substantially beyond the City limits should be restricted to the Region Serving Area of Auburn. Such facilities should be located in relationship to transportation facilities in a manner appropriate to their transportation needs. Extensive buffering from adjacent uses may be required. Facilities which generate a significant amount of truck traffic should be located on major arterial streets.

The Board holds that the Railroad has not met its burden of showing that Policy CF-65 violates RCW 36.70A.200. The BN property is located within the Region Serving Area. Plan, Map 3.2.

Portions of Policy CF-64 are another matter. Although this policy explicitly does not violate

RCW 36.70A.200(2), it implicitly may show the City's intent not to site essential public facilities within the Auburn city limits. For example, CF-64 provides in part:

> ... Special effort shall be given to distributing facilities throughout the region... Facilities which are typically difficult to locate because of local resident opposition should be equitably distributed throughout the region so that a few communities or areas are not required to receive more than their fair share of these types of facilities. It is recognized that some state or regional facilities may impose certain detrimental effects on the Auburn community if located in our City.... Plan, at 5-16 (emphasis added).

The Board nonetheless holds that Policy CF-64 does not violate the Act. The Board points out, however, that the City cannot rely on CF-64 to deny a permit application for an essential public facility. In effect, the City is talking to itself through this policy; the City does not have the authority to set binding legislative policy outside its city limits. Although the City is free to acknowledge and discuss the difficulty in siting essential public facilities, it cannot require other jurisdictions to make "special effort" to distribute essential public facilities equitably throughout the region. More importantly, the City cannot utilize this policy to reject the siting of an essential public facility on the grounds that other jurisdictions have not taken an equitable share of such facilities.

BN also contends that the Plan's Railyard Special Planning Area precludes the siting of essential public facilities. That provisions states:

> This approximately 150 acre Special Planning Area is located in the south-central portion of the City and surrounded by SR-18 to the North, Ellingston Road to the South, C Street SW to the west and A Street SE to the East. The Special Planning Area should consider both sides of C Street and A Street. Consideration should be given to:
>
> 1. The needs of Burlington Northern.
>
> 2. Providing pedestrian, bicycle and vehicular access across the site to connect the southeast and southwest sides of the city.
>
> 3. Providing a more visually appealing "entry corridor" into the City from the south along A and C Streets.
>
> 4. Allowing for a mix of uses including single and multifamily development and commercial and industrial uses where appropriate. Plan, at 14-18; *see also* Map 14.2 (emphasis added).

The Board holds that the Railroad has not met its burden of showing how the Railyard Special Planning Area Plan provision violates RCW 36.70A.200(2). Certainly a policy that dictates consideration of the Railroad's needs does not preclude the Railroad from siting future essential public facilities. Moreover, although a mix of uses may be allowed, this possibility is limited to instances "where appropriate," presumably as judged by the landowner.

Finally, the Railroad argues that the Plan's designation (see Map 14.1) of its railyard as light industrial precludes the siting of essential public facilities. In Chapter 14, "Comprehensive Plan Map," -- which discusses the land use designations on the Comprehensive Plan map -- under the heading "Industrial Categories," the Plan contains language regarding "Light Industrial." The description of light industrial provides in part:

> ... <u>All significant activities</u> [within lands designated as Light Industrial] <u>shall take place inside buildings</u>... Plan, at 14-14 (emphasis added).

The Board takes official notice of the fact that the nature of many railroad activities involving the movement of large trucks and trains cannot practicably take place entirely inside buildings. Moreover, the Board concludes that the activities of a railroad are significant. **Therefore, the Board holds that the portion of the Plan (at 14-14) describing light industrial categories and requiring that activities falling within such categories take place inside buildings violates RCW 36.70A.200(2) because it precludes the siting of new or expanded railroad facilities, such as an intermodal facility.** The City must remedy this violation by deleting or modifying the above-quoted policy, or by establishing a process for siting essential public facilities that would control over policies such as the one quoted above, or by otherwise bringing the Plan into compliance with the Act.

<u>Conclusion No. 5</u>

Railroads with facilities that serve the region or state are essential public facilities as defined in RCW 36.70A.200(1). The Plan does not comply with RCW 36.70A.200. First, the Plan does not contain a process for siting essential public facilities. Policy CF-62 (Plan, at 5-15) does not constitute such a process. Second, the Plan's description of light industrial categories (Plan, at 14-14) violates RCW 36.70A.200(2) because it precludes the siting of essential public facilities since it requires that all significant activities in areas designated light industrial take place inside buildings.

BNSF Legal Issue No. 6

Does the Plan fail to comply with RCW 36.70A.020(3) and (6)?

<u>Discussion</u>

RCW 36.70A.020(3)

RCW 36.70A.020 requires cities and counties to be guided by the Act's planning goals when developing their comprehensive plans and development regulations. Subsection (3), the transportation planning goal, states:

> Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.

BN contends that the Plan discourages rail transportation and thus violates this planning goal. BN's Prehearing Brief, at 12-13. The Railroad alleges that the City is attempting to extinguish rail uses because the Plan treats BN's railyard as a nonconforming use. The Railroad argues that case law dictates that nonconforming uses are disfavored and the policy of zoning legislation is to phase out such uses. BN's Prehearing Brief, at 12-13, citing *Anderson v. Island County*, 81 Wn.2d 312, 501 P.2d 594 (1972). Finally, BN contends that the Plan's acknowledgment of the existence of the railroad and its railyard does nothing to encourage multimodal transportation systems. BN's Prehearing Brief, at 14.

The Plan does quote the Act's transportation planning goal. Plan, at 1-21. Chapter 7 of the Plan, in turn, is its transportation element. A portion provides:

> The high cost, together with the difficulty of continually expanding the City road network to meet increased demand and the lowering of the region's air quality, have placed an emphasis on encouraging modes of travel other than the automobile (multimodalism), decreasing the demand for travel (transportation demand management) and encouraging more efficient use of the existing infrastructure (transportation system management). <u>The encouragement and support of multimodalism</u>, transportation demand management, and transportation system management are key components in the City's approach to addressing its transportation needs.
>
> ...
>
> GOAL 16 TRANSPORTATION SYSTEM
>
> Auburn will plan, expand, and improve its transportation system in cooperation with adjacent and regional jurisdictions to ensure concurrency compliance with the Growth Management Act, and <u>to provide a safe and efficient multimodal system that</u> meets the community needs and facilitates the land use plan. Plan, at 7-2 (emphasis added); *see also* Plan, at 1-35.

The transportation element discusses the City's roadway system, mass transit, non-motorized modes of transportation (bicycle, pedestrian), air transportation, and freight. The non-motorized modes provisions repeat:

> The encouragement of modes of travel other than the automobile (multimodalism), is one of the key transportation policies of the City of Auburn and the region.... This plan seeks to encourage the development of an environment that will make the use of alternative transportation modes an attractive option to the automobile.
>
> Objective 16.9 In the interest of improving air quality, preserving existing street capacity and enhancing total system connectivity, future transportation planning will incorporate and promote multi-modal and non-motorized modes of transportation. Plan, at 7-22 (emphasis added).

Under the subheading "Freight," the Plan states:

> The movement of freight throughout the City is an important function of Auburn's transportation system. The major freight routes within Auburn are displayed in Map 7.4.
>
> As shown on the map, freight movement in Auburn is accomplished by truck and by train. Both the Burlington Northern and the Union Pacific Railroads have rail lines extending through Auburn to the north and south. The Burlington Northern track to the east begins in Auburn and roughly follows the route of SR-18. In addition, Burlington Northern has a major railroad yard in Auburn (south of SR-18 between A and C Streets SE). Railroad operations at the yard have been reduced significantly over the years, however, Burlington Northern may have plans to convert this yard sometime in the future into an inter-modal facility where freight is transferred between trains and trucks. According to Burlington Northern, plans at this time are tentative. The City has concerns about this possibility as it would have significant impacts on the City in terms of transportation and other issues. The City expects to play an active role in the development review and approval of any plans to expand operations at the site.... Plan, at 7-26 (emphasis added).

The Board holds that the Railroad has not met its burden of showing how the above-referenced provisions in the Plan (Plan, at 1-35 and Chapter 7) violate the Act's planning goal to encourage multimodal transportation systems. BN makes the allegation that the Plan "seeks to extinguish rail uses at the railyard and fails to address ongoing uses of the main-line corridors." BN's Prehearing Brief, at 12. BN's claim that the Plan fails to recognize mainline corridors is erroneous. Map 7.4 clearly depicts two north-south mainlines. Although not as clearly labeled, BN's east-west route is also shown on the map.

As for claiming that the Plan attempts to extinguish rail uses, BN never cites specifically to where the Plan does this. A review of the transportation element's discussion of freight indicates an acknowledgment that Burlington Northern has a major railyard in Auburn. While the Plan also

indicates that operations have been "reduced significantly over the years," and that the City has concerns about BN's tentative intermodal facility plans, these statements by themselves do not constitute an attempt to "extinguish" rail uses. Moreover, the last sentence quoted above implicitly indicates that the City will approve BN's plans to expand its railroad operations, albeit after "active" review by the City. Presumably, the City's active role involves how it will treat the Railroad's nonconforming uses.

BN has not cited to where the Plan treats the railyard as a nonconforming use. BN does cite, however, to the City's admission that "... the City has for over 30 years designated BNSF's Auburn Yard as "light industrial" and that rail uses have been nonconforming uses for that entire time...." City's Reply to BNSF's Response to Motion to Dismiss, at 5. Recently, the Board reviewed the status of nonconforming uses in Washington caselaw.[12] Although it is true, as BN asserts, that the phasing out of nonconforming uses is the general purpose of zoning legislation, local jurisdictions retain a large amount of discretion as to if and when such a phasing out will occur, or if expansion of nonconforming uses will be permitted. Although BN may have legitimate concerns as to whether any future expansion of its existing railyard is permitted by the City, that is not the issue before the Board. Instead, the Board must determine whether the Plan fails to comply with RCW 36.70A.020(3). BN has not met its burden of showing how the transportation chapter of the Plan violates the Act.

The Board does hold, however, that the portion of the Plan discussed above in Legal Issue No. 5 regarding the description of light industrial that requires all significant activities within the light industrial designation to take place inside a building (Plan, at 14-14), does have the effect of discouraging multimodal transportation systems and therefore does not comply with RCW 36.70A.020(3). The Board takes official notice of the fact that many intermodal activities cannot take place indoors. The Plan therefore discourages such activities, at least in areas designated light industrial. If the City intends to force inside significant activities that take place on lands designated light industrial, it will have to acknowledge necessary exceptions for essential public facilities such as intermodal facilities.

RCW 36.70A.020(6)

The Act's property rights goal at RCW 36.70A.020(6) states:

> Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

BN contends that the City acted arbitrarily in violation of the second sentence of this goal by adopting a Plan that designated the land where the railyard is located as light industrial even

though the City is aware that the Railroad is not abandoning the site. BN's Prehearing Brief, at 15. BN also claims that the City discriminated against the Railroad by requiring a level of detail from BN (i.e., a project-level proposal) that it did not require from other property owners. BN's Prehearing Brief, at 16.

In order for petitioners to prevail in this type of challenge, they must prove that the action taken by a city or county is both arbitrary and discriminatory**. The Board holds that BN has not met its burden of proving that the City acted in an arbitrary and discriminatory manner against the Railroad in adopting the Plan**. BN cites to Ex. P-218, a September 13, 1995 letter from Paul Krauss, the City's Director of Planning and Community Development to Rocky Piro of the Puget Sound Regional Council. Although the information in that letter may indicate the City's intent as to the Railroad's plans, the Board must base its decision on whether the enactment in question violates the GMA; not whether a staff member's opinion or directive violates the Act.

The fact that the City's Plan designated BN's property as light industrial (and thus left "unchanged" the historic designation and zoning of the past thirty years [*see* Ex. P-218, at 1]) does not show arbitrary and discriminatory action. The Railroad's complaint is that the City made this designation despite being aware that the Railroad did not intend to abandon the site. The Board notes that the Plan specifically recognizes the railyard by noting that the property is a "major railroad yard" even though operations have been "reduced significantly." Plan, at 7-26. This language says nothing about the Railroad's abandoning the property; it acknowledges a reduction in operations but also indicates that BN may have plans for an intermodal facility. This is not arbitrary and discriminatory action.

BN's complaint about discriminatory action is also rejected. By definition, the purpose of special plan areas is:

> To allow large areas within the City, under a single or a coordinated management, to be developed as a planned unit. This designation can also be used to provide flexibility when there is uncertainty regarding how an area may be most appropriately developed in the future. Plan, at 14.16 (emphasis added).

The Plan's use of a "Special Planning Area" designation for the BN site appears to the Board to be an "innovative technique" (*see* RCW 36.70A.090) and/or a subarea plan (*see* RCW 36.70A.080 (2)). Such planning approaches may more precisely reflect the unique history and circumstances of an area and provide for better policy guidance for future development or illustrate the need for further refinement. As indicated in Legal Issue No. 5, the Plan violates the Act because it does not contain a process for siting essential public facilities. **However, the Board holds that the creation in the Plan (at 14-18) of the Railyard Special Planning Area does not constitute arbitrary and discriminatory action.**

Jurisdictions are free to designate areas that are subject to additional or more detailed planning such as the "special planning areas" technique used by Auburn. Such localized planning does not automatically constitute discriminatory action. The Board also notes that, contrary to the Railroad's claim that it alone was singled out, in addition to the railyard, special planning areas were created for Academy, Auburn North Business Area, Downtown, Lakeland Hills, Lakeview, Mt. Rainier Vista, Stuck River Road and Drive In Theaters. *See* Plan, at 14-16 through 14-20.

Conclusion No. 6

That portion of the Plan (at 14-14) that describes light industrial designations (and requires significant activities there to be conducted indoors) violates RCW 36.70A.020(3) because it discourages rather than encourages intermodal transportation systems. The Railroad has not met its burden of showing how the Plan fails to comply with RCW 36.70A.020(6).

BNSF Legal Issue No. 7

Does the Plan fail to comply with the requirements of RCW 36.70A.070(4) because the utilities element does not provide for railroad uses?

Discussion

RCW 36.70A.070(4) requires each comprehensive plan to contain:

> A utilities element consisting of the general location, proposed location, and capacity of all existing and proposed utilities, including, but not limited to, electrical lines, telecommunication lines, and natural gas lines.

Other than listing the examples of utilities quoted above, the Act does not define the term "utilities." The Railroad contends that the Plan fails to comply with RCW 36.70A.070(4) because the utility element fails to include railroads. BNSF relies on RCW 64.04.180 for its assertion that railroads are public utilities and therefore must be addressed in a utilities element. BN's Petition for Review, at 9. RCW 64.04.180[13] describes when railroad properties are available for public use as utility corridors or transportation corridors. The Railroad also argues that because Chapter 84.12 RCW (Assessment and Taxation of Public Utilities) taxes railroads as "public utilities" along with electric light and power companies, telegraph companies, toll bridge companies, steamboat companies and logging railroad companies, railroads are utilities for purposes of RCW 36.70A.070(4). In addition, BNSF quotes a standard dictionary definition of the term "utility":

> A public service, such as gas, electricity, water or transportation. BN's Prehearing Brief, at 33, quoting the *American Heritage Dictionary*.

The Board notes that another standard dictionary defines "utility" as:

> 4. a) something useful to the public, esp. the service of electric power, gas, water, telephone, etc. b) a company providing such a service. *Webster's New World Dictionary of the American Language* (Second College Edition 1984), at 1565.

One dictionary includes transportation within the definition of "utility" -- another does not. Without straying too far into the "dueling dictionaries," the Board notes that its decision must be made in context of the GMA. **The Board holds that for purposes of RCW 36.70A.070(4), railroads are not utilities**. Although the Board has rejected the Railroad's argument, it was not a frivolous argument.[14] RCW 64.04.180 does refer to utility corridors. However, the statute also refers to "transportation" corridors. The distinction between utilities and transportation is discussed further below. Regardless of any distinction, pursuant to RCW 64.04.180, railroad properties only become available for public use if the railroad operations have ceased. Therefore, this section is not relevant or particularly helpful.

More importantly, the Board must review this issue in context of the GMA. Nothing in the Act supports BN's argument that railroads should be considered in the utilities element. Nowhere in the Act are railroads defined as utilities. The fact that Chapter 84.12 RCW treats railroads in the manner it does is irrelevant in a GMA context. Moreover, in examining both RCW 36.70A.070 (4) and (6), the Board concludes that railroads more closely fall within the transportation element than the utilities element. If the utilities element listed transportation as it does electric, telecommunications and natural gas lines, the Board might reach a different result.

Without railroads or transportation being specifically listed in the utilities element, the Board has determined that railroads fit more closely in the transportation element. The Procedural Criteria bear this out. They recommend that cities and counties prepare transportation elements of their comprehensive plans that contain sections on rail, both passenger and freight. WAC 365-195-325 (2)(a)(v). In contrast, WAC 365-195-320, which addresses the utilities element of a comprehensive plan, does not mention railroads.

The Board also notes that the transportation element has more stringent requirements than the utilities element. In addition, the Act explicitly requires the transportation element to be consistent with the land use element, while such an explicit requirement is not contained in RCW 36.70A.070(4). Accordingly, more stringent analysis is required under the transportation element than under the utilities element. **The Board holds that, given the nature and size of railroads and their potential impact on land use planning, sound policy dictates that railroads be**

considered under the transportation element rather than in the utilities element of a comprehensive plan.

Conclusion No. 7

The Plan does not fail to comply with RCW 36.70A.070(4) because the utilities element does not provide for railroad uses.

V. ORDER

Having reviewed the above-referenced documents and having deliberated on the matter the Board enters the following order:

1) The City's Motion to Dismiss the Hapsmith Petition for lack of GMA standing is **granted.** The Hapsmith portion of this consolidated case is **dismissed with prejudice**.

2) The City's Motion to Dismiss the BNSF Petition for lack of GMA standing is **denied.**

3) The City's Motion to Dismiss BNSF Legal Issues Nos. 4, 5, 6 and 7 is **denied.**

4) The City's Motion to Dismiss Joint BNSF/Hapsmith Legal Issue No. 8, dealing with SEPA, is **granted**. Legal Issue No. 8 is **dismissed with prejudice.**

5) The City's Comprehensive Plan is in **compliance** with the requirements of the GMA, with the following exceptions:

A) The transportation element's trends analysis forecasting method is **remanded** with instructions for the City to bring its traffic forecasting analysis into compliance with the Board's Final Decision on that matter in this case.

B) The transportation element is **remanded** with instructions for the City to prepare an assessment of the City's transportation plan on adjacent jurisdictions and incorporate that assessment into the Plan.

C) That portion of the description of Light Industrial designations that requires all significant activities to occur inside (Plan, at 14-14) is **remanded**. The City shall either delete or modify this language, create an exception that permits the siting of essential public facilities, or otherwise bring this provision into compliance with the Act.

D) Policy CF-62 (Plan, at 5-15) is **remanded** since it does not constitute a process for siting essential public facilities. Until and unless the Growth Management Planning Council or its successor adopts a process for siting essential public facilities and the City

then adopts that process, the City must adopt its own process for siting essential public facilities.

Pursuant to RCW 36.70A.300(1)(b), the City is given **until 4:00 p.m**. on **Friday**, **October 11, 1996**, to comply with this Final Decision and Order. The City shall file by **4:00 p.m. on Monday, October 21, 1996**, one original and three copies with the Board and serve a copy on the Railroad of a statement of actions taken to comply with the Final Decision and Order. The Board will then promptly schedule a compliance hearing to determine whether the City has complied.

So ORDERED this 10th day of May, 1996.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
M. Peter Philley
Board Member

_____
Joseph W. Tovar, AICP
Board Member

_____
Chris Smith Towne
Board Member

Note: This Final Decision and Order 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.

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[1] Policy LU-74 provides:

> Additional commercial development of land near the SuperMall shall be limited to those properties whose existing zoning and comprehensive plan designation allow for commercial uses. This development must meet the following conditions:
>
> a) If the new development is on industrially zoned property, the development shall be limited to office, entertainment, or other uses, e.g. motels, which complement the uses at the SuperMall. General retail uses

would only be allowed in limited instances and only if incidental and subordinate to another use on the site.

b) Small, individual commercial developments are discouraged.

c) The traffic impacts of the commercial development shall receive significant consideration and will be mitigated as referred in this Plan. Plan, at 3-29.

d)

[2] Since the City has not taken action on the Holgate Properties application, review of that decision is not yet possible. Furthermore, legal issues regarding that process are not presently before the Board.

[3] The legislature amended RCW 36.70A.280(2) in 1996 (*see* Substitute Senate Bill No. 6637)as follows, which effectively removed the first method of appearance standing:

> A petition may be filed only by: (a) the state, or a county or city that plans under this chapter; (b) a person who has (~~either appeared~~) participated orally or in writing before the county or city regarding the matter on which a review is being requested; ((~~or~~)); (c) a person who is certified by the governor within sixty days of filing the request with the board; or (d) a person qualified pursuant to RCW 34.05.530. (1996 legislative amendments are shown with strikethroughs and underlining).

[4] In order to meet the appearance standing requirement, the Railroad's October 17, 1994 letter must be "regarding the matter on which a review is being requested." RCW 36.70A.280(2).

[5] While future petitioners are encouraged to provide enough evidence to support an assertion of injury in fact at the time that petitions for review are filed, the Board acknowledges that there are practical reasons why this may not occur. For instance, some petitioners, particularly *pro se* appellants, may be unaware of a need to include such evidence at that time. The Board has chosen not to automatically dismiss petitions which fail to make a satisfactory evidentiary showing in a petition, but instead to provide challenged petitioners the opportunity to provide satisfactory proof if their standing is challenged.

[6] The Board has previously determined that SEPA's reference to "judicial review" in RCW 43.21C.075(4) includes review by a quasi-judicial growth management hearings board. *Association of Rural Residents v. Kitsap County*, CPSGMHB Case No. 93-3-0010, Order Granting Dispositive Motions (February 16, 1994), at 6.

[7] An alternative way to read LU-115 is that it simply characterizes (all) of the "southern portion of the Region Serving Area" as appropriate for heavy industrial use. Under either reading of LU-115, the City has discretion to permit the uses that BNSF has described for its property.

[8] RCW 47.80.026 provides:

> Each regional transportation planning organization, with cooperation from component cities, towns, and counties, shall establish guidelines and principles by July 1, 1995, that provide specific direction for the development and evaluation of the transportation elements of comprehensive plans, where such plans exist, and to assure that state, regional, and local goals for the development of transportation systems are met. These guidelines and principles shall address at a minimum the relationship between transportation systems and the following factors: Concentration of economic activity, residential density, development corridors and urban design that, where appropriate, supports high capacity transit, freight transportation and port access, development patterns that promote pedestrian and nonmotorized transportation, circulation systems, access to

> regional systems, effective and efficient highway systems, the ability of transportation facilities and programs to retain existing and attract new jobs and private investment and to accommodate growth in demand, transportation demand management, joint and mixed use developments, present and future railroad right-of-way corridor utilization, and intermodal connections. Examples shall be published by the organization to assist local governments in interpreting and explaining the requirements of this section.

[9] While the Board agrees that WSDOT has an important role to play in the successful resolution of regional transportation matters, the Act does not create an explicit duty on the City to comply with the Preliminary WSDOT Plan. Further, the record does not indicate that the "preliminary" WSDOT Plan was more than a draft, nor was evidence entered of a "final" WSDOT Plan.

[10] RCW 36.70A.210(3)(c) requires county-wide planning policies to contain policies addressing the siting of public capital facilities of a county-wide or state-wide nature. Subsection (3)(d) requires policies that address county-wide transportation facilities and strategies.

[11] The Board rejects the City's argument that WAC 365-195-340(2) requires it to comply with the CPPs. That provision, contained in the Procedural Criteria, is a recommendation only and not binding. On the other hand, the Board has held that comprehensive plans must be consistent with CPPs.

[12] In *Peninsula Neighborhood Association v. Pierce County*, CPSGMHB Case No. 95-3-0071 (March 20, 1996), at 24-25, the Board noted:

> In Washington, it is clear that the general policy and purpose of zoning legislation is to phase out nonconforming uses, being, as they are, inconsistent with the ultimate object of zoning regulations. *State ex rel. Smilanich v. McCollum*, 62 Wn.2d 602, 607, 384 P.2d 358 (1963); *State ex rel. Miller v. Cain*, 40 Wn.2d 216, 221, 242 P.2d 505 (1952). Accordingly, as a general rule preexisting nonconforming uses are not to be perpetuated. *State v. Dupay*, 4 Wn. App. 530, 531, 482 P.2d 794 (1971). However, by the same token, although not favored in the law, nonconforming uses are vested property rights which are protected. *Summit-Waller Assn. v. Pierce County*, 77 Wn. App. 384, 388, 895 P.2d 405 (1995); *Van Sant v. Everett*, 69 Wn. App. 641, 649, 849 P.2d 1276 (1993). Therefore, governments have the option of not forcing a discontinuance of nonconforming uses. *Pasco v. Rhine*, 51 Wn. App. 354, 362, 753 P.2d 993 (1988); *Seattle v. Martin*, 54 Wn.2d 541, 342 P.2d 602 (1959). Likewise, a policy of controlled expansion or extension of nonconforming uses is within the discretion of the legislative body concerned, just as the severity of limitations in the phasing out of nonconforming uses is discretionary. *Bartz v. Board of Adjustment*, 80 Wn.2d 209, 217, 492 P.2d 1374 (1972). Therefore, under the common law, it is up to the judgment of the individual local authority to decide whether or not nonconforming uses may continue, and if so, to what degree they may be extended or expanded.

[13] RCW 64.04.180 "Railroad properties as public utility and transportation corridors--Declaration of availability for public use--Acquisition of reversionary interest," states:

> Railroad properties, including but not limited to rights-of-way, land held in fee and used for railroad operations, bridges, tunnels, and other facilities, are declared to be suitable for public use upon cessation of railroad operations on the properties. It is in the public interest of the state of Washington that such properties

retain their character as public utility and transportation corridors, and that they may be made available for public uses including highways, other forms of mass transportation, conservation, energy production or transmission, or recreation. Nothing in this section or in RCW 64.04.190 authorizes a public agency or utility to acquire reversionary interests in public utility and transportation corridors without payment of just compensation.

[14] The Railroad was willing to stipulate that the utilities element need not address railroad issues if those issues are adequately addressed elsewhere in the Plan. BN's Prehearing Brief, at 34.