

**State of Washington
CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD**

HAPSMITH, et al.,)

) **Consolidated**

Petitioners,) **Case No. 95-3-0075c**

)

v.) **ORDER ON PETITIONS FOR RECONSIDERATION AND
MOTION TO SUPPLEMENT**

)

CITY OF AUBURN,)

)

Respondent.)

)

_____)

I. PROCEDURAL HISTORY

On May 10, 1996, the Central Puget Sound Growth Management Hearings Board (the **Board**) entered a Final Decision and Order in the above-captioned case, *Hapsmith I*. This document constituted the Board's final decision unless, pursuant to WAC 242-02-830, a party filed a petition for reconsideration.

On May 20, 1996, the Hapsmith Company filed a "Petition for Reconsideration" (**Hapsmith's Petition**) with the Board.

On May 21, 1996, the "City of Auburn's Petition for Reconsideration of the Board's Final

Decision and Order" (**Auburn's Petition**) was filed with the Board. A "Declaration of J. Tayloe Washburn" was attached to Auburn's Petition.

On May 23, 1996, the Board issued an "Order Requiring Answers to Petitions for Reconsideration."

On May 23, 1996, "the City of Auburn's Motion to Supplement the Record" (**Auburn's Motion to Supplement**) was filed with the Board.

On May 30, 1996, the Burlington Northern Santa Fe Railway Company (**BN** or **BNSF**) filed "Petitioner BN's Response to City's Motion for Reconsideration" (**BN's Response**) with the Board. On the same date, the "City of Auburn's Answer to the Hapsmith Company's Petition for Reconsideration" (**Auburn's Answer**) was filed with the Board.

Also on May 30, 1996, BN's "Response to City's Motion to Supplement the Record" was filed with the Board.

On June 5, 1996, the "City of Auburn's Reply Memorandum to BNSF's 'Response to City's Motion to Supplement the Record'" was filed with the Board.

II. DISCUSSION

A. HAPSMITH'S PETITION

Hapsmith petitioned the Board for reconsideration of its Final Decision and Order entered in this case, claiming that the Board erred by concluding that Hapsmith lacked appearance standing to bring its appeal. The Board will deny Hapsmith's Petition. Prior to issuing the Final Decision and Order in *Hapsmith I*, the Board required petitioners to both make a claim of standing and offer proof of such standing directly in their petitions for review or through the use of documents attached to or incorporated by reference in petitions for review. A failure to make such a *prima facie* case upon filing a petition for review could result in a dismissal of the entire case.

However, in *Hapsmith I*, the majority of the Board relaxed this rule, holding that, although

petitioners continued to have a duty to specify in a petition for review the type of standing permitted by the Growth Management Act (**GMA** or the **Act**) under which they qualified, petitioners did not have to prove their allegation unless subsequently challenged by the respondent local government.

Hapsmith's Petition for Review cited to the GMA's standing provision, RCW 36.70A.280, generally. RCW 36.70A.280(2) lists all three of the methods of standing permitted by the Act. A citation to the GMA's standing statute alone does not put a local jurisdiction on notice as to how the petitioner obtained standing. **The Board holds that simply citing to RCW 36.70A.280 does not meet the requirement of specifying under which method of standing a petitioner is qualified.** Although the Hapsmith Petition for Review did not explicitly identify which of the three methods of standing under which Hapsmith qualified, it did indicate that the petitioner was aggrieved and adversely affected by Auburn's Comprehensive Plan. This statement was sufficient to trigger a claim of standing under the Administrative Procedure Act (**APA**) [Chapter 34.05 RCW] method of obtaining standing before the Board. Accordingly, under the majority's relaxed rule first enunciated in the Final Decision and Order in this case, Hapsmith met its duty of specifying which method of standing allowed it to proceed with its case.[\[FN1\]](#) Importantly, however, Hapsmith's Petition for Review failed to contain any allegation whatsoever that it had appearance standing, let alone include any proof of such a claim.

Auburn challenged Hapsmith's claim to standing when, on January 22, 1996, the "Respondent City of Auburn's Motion to Dismiss Petitions of the Hapsmith Company and Burlington Northern Santa Fe Railway Company" (**Auburn's Motion to Dismiss**) was filed with the Board. The City alleged that Hapsmith did not have either appearance standing or APA standing. *See* Auburn's Motion to Dismiss. Hapsmith failed to respond to the City's contention that it lacked appearance standing pursuant to RCW 36.70A.280(2). Accordingly, the Board concurred with the City that Hapsmith lacked appearance standing. Moreover, as indicated above, even though Hapsmith's Petition for Review alleged APA standing, the Board concluded that Hapsmith did not have APA standing.

As a result of its complete silence (initially in the Petition for Review and then in its response to Auburn's Motion to Dismiss), Hapsmith failed to meet its burden of proving that it had appearance standing after the City brought its standing challenge. In instances of such utter silence, a petitioner simply cannot fail to respond to a respondent's standing challenge and expect to prevail. Instead, petitioners have an obligation to prove that they have standing to bring an appeal.

Hapsmith now, for the first time,[\[FN2\]](#) attempts to claim that it has appearance standing by citing to a March 30, 1995, letter from John Keegan to Paul Krauss, Auburn's Planning Director. Exhibit A to Hapsmith's Petition for Reconsideration. Ironically, the City itself cited to this

document when it challenged Hapsmith's appearance standing and argued that this document could not satisfy the appearance standing test. Hapsmith did not respond to the City's claim that it lacked appearance standing even though Auburn brought the existence of the letter to the Board's attention. Under even the relaxed standing rule enunciated by the Board, it is too late for Hapsmith to now attempt to rely on this letter for the proposition that it has appearance standing. **The Board holds that when a petitioner's standing is challenged, that petitioner must promptly respond to the challenge by proving that the petitioner qualified under the specific method of standing alleged in the petition for review.** [\[FN3\]](#)

B. AUBURN'S PETITION

Auburn asks the Board to reconsider its holding regarding the Plan's consistency with King County County-wide Planning Policy T-16 -- specifically asking the Board to rule that T-16 applies only to existing facilities. T-16 provides:

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.

The Final Decision and Order stated:

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. *Hapsmith I*, at 36-37 (bolding in original; underlining added).

The Board concurs with the City that T-16 addresses *existing* transportation facilities and not future ones. Accordingly, the reference in the Board's holding quoted immediately above to "the potential future intermodal facility use" will be stricken.

The City also contends that the Board exceeded its authority by determining that facilities of certain railroads constitute essential public facilities as a matter of law and that by so ruling, the Board has forced the City to accept BN's proposed intermodal facility. Auburn's Petition, at 8 and 10. The Board will not alter its Final Decision and Order on these points. As BN's Response convincingly points out, the City specifically argued that the railroad's present and proposed facilities are not EPFs. BN's Response, at 1-3. In order to determine whether a comprehensive plan precludes an EPF facility, it is crucial to determine whether the facility at issue indeed does constitute an essential public facility.

The Board points out that neither its determination that railroad facilities that serve the region or state are essential public facilities, nor its ruling that the City failed to adopt a process for siting essential public facilities, forces Auburn to site BN's proposed intermodal facility specifically at the existing Auburn Yard. Each and every jurisdiction within the Central Puget Sound region must have a process for siting essential public facilities and may not adopt a comprehensive plan or development regulation that precludes the siting of such facilities. RCW 36.70A.200. The specific siting of an essential public facility, such as a railroad's intermodal facility, the conditions under which the development may be undertaken remains within the sound discretion of the permitting jurisdiction.

The Board has not taken and will not take a position as to *where* specifically a railroad intermodal facility may or may not be located within a city or county. However, the question of *if* an intermodal facility will be located within the City is not solely within the City's discretion. Such an eventuality also depends upon private investment decisions made by the railroad and/or public policy decision embodied in a future county-wide planning policy. It may also depend upon multi-county planning policy pursuant to RCW 36.70A.210(7). Instead, the Board has simply held that as a matter of law, regional and statewide railroad facilities are EPFs that Auburn does not have an adopted process for siting such facilities and is required to have such a process, and does not and that its comprehensive plan and local development regulations cannot preclude that siting of essential public facilities.

C. AUBURN'S MOTION TO SUPPLEMENT

Auburn asks the Board to supplement the record below with the following documents:

1. Puget Sound Regional Council's (**PSRC**) "Draft Interim Regional Capital Facility Siting Process", dated April 15, 1996.
2. May 21, 1996, letter from the City of Kent to the Board.
3. May 21, 1996, letter from City of Algona Mayor Glenn Wilson to Presiding Officer Joe Tovar.
4. May 20, 1996, letter from City of Pacific Mayor Debra Jorgensen to Presiding Officer Joe Tovar.

The Board will deny the entire motion. The PSRC document is dated well after Auburn adopted its Comprehensive Plan on September 5, 1995. Furthermore, it is a draft document rather than a formally adopted policy.

As for the letters, all three are also dated well after the City's action. Moreover, their subject matter, how other cities interpret a countywide planning policy, is not the relevant issue before the Board.

III. ORDER

Having reviewed the above-referenced documents and deliberated on the matter, the Board enters the following orders:

1. Hapsmith's Petition is **denied**.
2. Auburn's Petition is **partially granted**. The Board's Final Decision and Order at 37 is **modified** by deleting the language with a strikethrough quoted below:

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.

The remainder of Auburn's Petition is **denied**.

1. Auburn's Motion to Supplement is **denied**.

So ORDERED this 18th day of June, 1996.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

M. Peter Philley

Board Member

Joseph W. Tovar, AICP

Board Member

Chris Smith Towne

Board Member

[FN1](#)

The Board gives Hapsmith the benefit of the doubt in this regard. Although Hapsmith's Petition for Review did not cite to either the APA in general or to RCW 34.05.530 in particular, by referring to the words "aggrieved" and "adversely affected," Hapsmith implicitly was referring to the APA provision.

[FN2](#)

The Board's Prehearing Order in this case established a schedule for filing dispositive motions such as Auburn's Motion to Dismiss, and for parties to respond. Indeed, Hapsmith did respond to the City's allegation that Hapsmith lacked APA standing.

[FN3](#)

The Board need not rule whether the March 30, 1995, letter would have constituted appearance standing for Hapsmith. However, had the letter been before the Board in a timely manner, more than likely, the Board would have concluded that the letter did not constitute an appearance by Hapsmith before the City regarding adoption of the comprehensive plan. For a letter to qualify a petitioner for standing under the appearance standing method, it cannot be content neutral -- instead, it must at least raise a concern about the proposed action in question or contain a statement in support of or in opposition to that action. The March 30, 1996 letter, although not as utterly content neutral as, for example, a request for a copy of a proposed ordinance, does not take a position regarding the adoption of the proposal at issue. Instead, it inquires as to the status of future development on property south of 15th Street SW.

The Board further notes that, had Hapsmith responded to Auburn's Motion to Dismiss in a timely manner with the second argument it now makes, i.e., that Hapsmith's appearance on a 1993 Comprehensive Plan Map qualifies it for appearance standing, the Board would reject that argument. Appearance regarding a 1993 comprehensive plan amendment is not in regard to the

same matter as before the Board in this case, Auburn's 1995 Comprehensive Plan. *See* RCW 36.70A.280(2) and *Robison v. Bainbridge Island*, CPSGMHB Case No. 94-3-0025, Order on Dispositive Motion (February 16, 1995), at 10.

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