CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

PORT OF SEATTLE, Petitioner, v. CITY OF DES MOINES, Respondent.	))))))))))	**Case No. 97-3-0014** **FINAL DECISION AND ORDER**

I. Procedural history

On February 14, 1997, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the Port of Seattle (the **Port**) challenging the comprehensive plan (the **Plan**) of the City of Des Moines (**Des Moines** or the **City**).The Port alleged that the Plan is not in compliance with the Growth Management Act (**GMA** or the **Act**) because it purports to preclude the expansion of an essential public facility; violates the property rights goal of the Act; is internally inconsistent; and is also inconsistent with the King County Comprehensive Plan (**County Plan**), the County-wide Planning Policies (**KCCPPs**) and Multi-County Planning Policies (**MPPs**).

On May 5, 1997, the Board received the "Brief of Amicus Puget Sound Regional Council Regarding Certain Multi-County Planning Policy Issues."

On May 30, 1997, the Board issued an "Order on Motions to Supplement" and an "Order on Dispositive Motions," in which the Board ruled on the motions to supplement, but declined to rule on the dispositive motions.

On June 4, 1997, the Board received the "City of Des Moines' Motion for Reconsideration of Board's Order on Motions to Supplement" (**City's Motion for Reconsideration**).On the same date, the Board received the "City of Des Moines Motion to Supplement the Record with Rebuttal Exhibits" (**City's Motion to Supplement the Record with Rebuttal Exhibits**).

On June 5, 1997, the Board received from the Port a "Motion to Strike City of Des Moines' Motion for Reconsideration and Motion to Supplement the Record with Rebuttal

Exhibits" (**Port's Motion to Strike**).

On June 6, 1997, the Board issued an "Order Granting Port's Motions to Strike" which granted the Port's Motion to Strike the City's Motion for Reconsideration and Motion to Supplement with Rebuttal Exhibits.

On June 16, 1997, the Board received "Petitioner Port of Seattle's Prehearing Opening Memorandum" (**Port's Prehearing Memorandum**).

On June 30, 1997, the Board received the "Brief of Amicus Puget Sound Regional Council Regarding Port of Seattle's Pre-Hearing Opening Memorandum."

Also on June 30, 1997, the Board received "Respondent City of Des Moines' Prehearing Brief" (**City's Response Brief**).

On July 7, 1997, the Board received the "Reply Brief of Amicus PSRC."

On July 8, 1997, the Board received "Respondent City of Des Moines' Motion To Strike 'Reply Brief Of Amicus PSRC,'" (**City's Motion to Strike Reply Brief of PSRC**).On the same date the Board received from the PSRC a "Response To Des Moines' Motion To Strike Reply Brief Of Amicus PSRC," and later that same day the Board received "Port Of Seattle's Opposition To City Of Des Moines' Motion To Strike Reply Brief Of Amicus PSRC."

On July 9, 1997, the Board held a hearing on the merits in room 5500 of Two Union Square in Seattle, Washington.Board members Joseph W. Tovar, Presiding Officer, and Chris Smith Towne were present for the Board.[1] The Port was represented by J. Tayloe Washburn and the City was represented by John W. Hempelmann.The PSRC was represented by David A. Bricklin.Court reporting services were provided by Jean M. Ericksen, RPR, of Robert H. Lewis & Associates, Tacoma.No witnesses testified.As a preliminary matter, the presiding officer heard argument regarding the City's Motion to Strike Reply Brief of PSRC, after which he orally **denied** the motion.[2] The presiding officer orally granted leave to the City to file a post-hearing brief, by no latter than July 18, 1997, to respond to issues addressed by PSRC in its "Reply Brief of Amicus PSRC" and "Brief of Amicus PSRC Regarding Opening Memorandum."

On July 18, 1997, the Board received "Respondent City of Des Moines' Post-Hearing Brief In Response To Reply Brief Of Amicus PSRC And Brief Of Amicus PSRC Regarding Port's Pre-Hearing Opening Memorandum."

On July 28, 1997, the Board received from the Port a copy of Exhibit 163 (PSRC Resolution A-91-01), which was inadvertently omitted from the exhibits filed with the Board.

On July 29, 1997, the Board received Amicus PSRC's "Motion to Strike" portions of the City's July 18 memorandum (**PSRC Motion to Strike**).

On July 31, 1997, the Board received "Respondent City of Des Moines' Memorandum in Opposition to Amicus PSRC's Motion to Strike."

II. FINDINGS OF FACT

1.On October 25, 1990, the Puget Sound Council of Governments (**PSCOG**) passed Resolution A-90-01, adopting VISION 2020:Growth and Transportation Strategy for the Central Puget Sound Region.Ex. 133.

2.On October 24, 1991, the City passed Resolution 667, authorizing execution of the "Interlocal Agreement for the Regional Planning of the Central Puget Sound Area," including the creation of a regional planning agency, the Puget Sound Regional Council (**PSRC**).The PSRC is to "ensure implementation in the [central Puget Sound] region of the provisions of state and federal law which pertain to regional transportation planning and regional growth management."Ex. 162.

3.On October 21, 1992, the Executive Board of the PSRC adopted a PSRC Action Item affirming that the PSRC "is the governmental agency responsible for meeting the requirement in the [GMA] for multicounty planning policies."Ex. 160(a).

4.On March 11, 1993, the PSRC General Assembly passed Resolution A-93-02, amending VISION 2020 to include MPPs for King, Kitsap, Pierce, and Snohomish Counties.Ex. 174.

5.On May 25, 1995, the PSRC passed Resolution A-95-02, adopting the 1995 update to VISION 2020 and the Metropolitan Transportation Plan (**MTP**).Ex. 136.

6.On December 7, 1995, the City adopted the Greater Des Moines Comprehensive Plan.Ex. 160.

7.On July 11, 1996, the PSRC passed Resolution A-96-02, amending the 1995 MTP to include a third runway at Sea-Tac International Airport (**STIA**).Ex. 138.

8.On August 1, 1996, the Port passed Resolution 3212, adopting the Airport Master Plan Update for STIA, including the development of a third runway, and noise reduction measures in accordance with PSRC Resolution A-96-02.Ex. 140, at 3-4.

9.An L_{dn} is a unit of measure representing an average day-night noise level typically used for airport-related noise measurements.*See* Port's Prehearing Brief, at 40 n.21.

10.The expansion of STIA requires the use of fill dirt.The borrow site for this fill dirt is within Des Moines.Consequently, trucks hauling fill dirt from the borrow site to STIA must drive through the City.*See* Ex. 148 *and* City's Response Brief, at 16.

11.The City's development code requires trucks used to haul fill dirt through the City to obtain permits pursuant to local regulations (Chapter 12.04 DMMC).Ex. 148.

iII. rulings on motions

Since they went to the heart of the case, the Board took no action on the two dispositive motions. Because the Board now addresses the substance of the dispositive motions , the Board will not rule on these motions.

The City's Motion to Dismiss the Reply Brief of PSRC is **denied**.PSRC's motion for leave to submit additional briefing is **granted**.

PSRC's Motion to Strike is **denied**.

IV. STANDARD OF REVIEW

The City urged the Board to apply Engrossed Senate Bill (**ESB**) 6094, specifically Section 20. ESB 6094, Chapter 429, Laws of 1997.Section 20 changes the standard of review to be used by the Boards.The Board takes official notice of ESB 6094, which became effective on July 27, 1997.Section 53 expressly provides that this new law is prospective in effect, except for Section 22, which is explicitly retroactive.In other words, the 1997 amendments to the Growth Management Act became effective on July 27, 1997.

The Board obtained jurisdiction to review this dispute when the PFR was filed on February 14, 1997.Briefing, pursuant to the Board's Rules of Practice and Procedure, was received from April 21, 1997, through July 8, 1997.[3] The hearing on the merits was held on July 9, 1997.But for the issuance of this final decision and order, all events in this proceeding occurred prior to July 27, 1997 -- the effective date of ESB 6094.

If, as the City suggests, the date of issuance of the Board's decision is determinative as to the law to be applied, the Board could select the law to apply based upon its desire and ability to accelerate or delay the issuance of its decision.This is an outcome the Board cannot reach, nor can the Board conclude that it is a result the legislature intended.[4] Consequently, to give effect to the legislature's clear direction, as contained in Section 53, the Board has a duty to apply the provisions of the GMA as they existed at the time the PFR was filed.[5]

RCW 36.70A.320(1) provides that:

> Except as provided in subsection (2) of this section, comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.In any petition under this chapter, the board, after full consideration of the petition, shall determine whether there is compliance with the requirements of this chapter. In making its determination, the board shall consider the criteria adopted by the department under RCW 36.70A.190(4).The board shall find compliance unless it finds by a preponderance of the evidence that the state agency, county, or city erroneously interpreted or applied this chapter. (Emphasis supplied.)

The Port must show, by a preponderance of the evidence, that the City erroneously interpreted or applied the provisions of the GMA.

V. DISCUSSION AND CONCLUSIONS

The Board's Prehearing Order set forth five Legal Issues.While several of these legal issues raise significant issues of first impression, the Board finds that, after answering Legal Issue 2, it need not, and will not, reach the remaining issues.[6] For the reasons presented below, the Board concludes that Des Moines' comprehensive plan is not in compliance with RCW 36.70A.200, and it will therefore be remanded and invalidated in part.

Legal Issue 2

Does the City's Plan fail to comply with RCW 36.70A.200 by containing policies and strategies which purport to preclude the expansion of Seattle-Tacoma International Airport (STIA) based on the City Plan policies cited above in Legal Issue No. 1 and CP 5-04-04, 6-04-09(4), 6-04-09 (5), 8-04-01(1)(b), and 8-04-02(1)(d)?

Discussion

RCW 36.70A.200 provides:

> (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.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.
> (2) The office of financial management shall maintain a list of those essential state public facilities that are required or likely to be built within the next six years.The office of

financial management may at any time add facilities to the list.No local comprehensive plan or development regulation may preclude the siting of essential public facilities. [7]

(Emphasis added.)

There are two duties imposed on the City under RCW 36.70A.200:a duty to adopt in its Plan a process to site essential public facilities (**EPFs**), and a duty not to preclude their siting in its Plan or implementing development regulations.In this case, the question is whether Des Moines' failure to amend its Plan in recognition of the third runway at STIA, and thereby retaining certain Plan policies, precludes the siting of an EPF.But first, the Board must determine whether the expansion of an existing EPF is protected by RCW 36.70A.200.

Airports are specifically identified as EPFs.There is no credible argument that an existing EPF, such as STIA, is not an EPF, even though it predates the GMA.In addition, there is no credible argument that expansion of an existing EPF is not within the scope of RCW 36.70A.200.Further, there is nothing in the language of .200 to justify distinguishing between expansion of an existing EPF and a new EPF.Indeed, the present dispute is evidence that it is no less difficult to site the expansion of an existing EPF than it is to site a new EPF.Nor does the language of .200 suggest that a city's comprehensive plan is prohibited only from precluding EPFs within its jurisdiction. Likewise, .200 does not support the notion of precluding necessary support activities for the expansion of the EPF that occur within the city's jurisdiction.**The Board holds that the expansion of an existing EPF, including necessary support activities associated with that expansion, is protected by RCW 36.70A.200.**

The Port does not challenge a specific City action; instead, the Port charges that the City's failure to act violates the GMA.Specifically, the Port asserts that the City failed to amend its Plan in response to the PSRC's regional decision to expand STIA by adding a third runway.

Where a petitioner has proposed a comprehensive plan amendment to a local government and that local government declines to adopt the proposed amendment, the Board has found in favor of the local government.*See Cole v. Pierce County [**Cole**]*, CPSGMHB Case No. 96-3-0009, Final Decision and Order (1996).Cole argued, among other things, that his proposed amendment would "correct" a GMA defect in Pierce County's plan.*Id.* at 9.The Board rejected Cole's appeal, holding "**that the actions challenged in Cole's petition were not taken in response to a GMA duty to act by a certain deadline, or in response to any other duty imposed by the act . . . .**"*Id.*, at 10-11.

The present case is unlike *Cole*.Here, there is a GMA duty -- the duty not to preclude EPFs.RCW 36.70A.200(2).Although the City's Plan may not have conflicted with .200(2) when the Plan was originally adopted, the subsequent regional decision to expand an EPF, STIA, requires the City to re-evaluate its Plan to determine if it still complies with .200(2).

When Des Moines adopted its Plan in December 1995, there was no regional decision to expand STIA.However, the PSRC passed Resolution A-96-02, amending the MTP to include a third runway at STIA, on July 11, 1996.The City's duty to comply with the GMA in the context of the decision to expand an essential public facility (STIA) was triggered when the PSRC passed Resolution A-96-02.RCW 36.70A.200 imposes a duty requiring the City's Plan not to preclude essential public facilities, even when the decision regarding the essential public facility was made subsequent to the initial adoption of the Plan.

In *Children's Alliance*, the Board defined "preclude" as "render impossible or impracticable."*Children's Alliance*, at 19."Impracticable" is defined as "not practicable:incapable of being performed or accomplished by the means employed or at command."*Merriam Webster's Collegiate Dictionary* 584 (10th ed. 1996).In other words, the City's Plan need not make it impossible to build the third runway in order to violate the GMA.If the City's Plan has the effect of making the expansion incapable of being accomplished by the means at the Port's command, then the Plan is in violation of the GMA.

The Board holds that a local government plan may not, through policies or strategy directives, effectively preclude the siting or expansion of an EPF, including its necessary support activities.

The City of Des Moines Comprehensive Plan contains a number of policies that the Port alleges are not in compliance with RCW 36.70A.200.These include policies 1-04-05, 5-02-08, 5-03-02, 5-04-04, 8-03-01(2), 8-04-01(1), 8-04-01(1)(c), 8-03-04(4), 4-04-01, 6-03-23, 6-04-09(4), 6-04-09 (5), 8-03-01(3), 8-03-02(3), 8-04-01(1)(b) and 8-04-02(1).*See* Port's Prehearing Memorandum, at p. 4 and 37 - 40.

The City's Plan contains four categories of policies:Goals, Findings, Policies, and Strategies.The policies relevant here are:

> Finding 5-02-08:The siting, construction, and operation of public facilities and utilities has sometimes resulted in adverse impacts upon nearby properties and the natural environment. *The City currently accepts more than its fair share of adverse impacts associated with air transportation; to allow any increase in those impacts would require that Des Moines accept an even greater disproportionate share of those impacts.*(Emphasis added.)
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> Finding 7-02-08:Much of Des Moines is impacted by aircraft noise related to Sea-Tac International Airport (STIA).*Virtually all of the Des Moines Planning Area is within the 65 L_{dn} noise contour*, and large portions of the Planning Area are within the 70 or 75 L_{dn} noise contour (STIA Existing Noise Exposure Map, 1991). . . .(Emphasis added.)

Policy 5-03-02:*When not against the City's interests*, Des Moines should promote cooperative working relationships between Des Moines and the other municipalities, agencies and districts identified in this Comprehensive Plan.(Emphasis added.)

Policy 8-03-01:Residential Neighborhood Preservation:. . . (2) Develop plans, land use regulations and review procedures to preserve and protect designated residential communities from inconsistent and incompatible land uses which threaten to undermine their stability and their residential character.(chapter 18.02 DMMC, chapter 18.38 DMMC)

Strategy 1-04-05:Intergovernmental Cooperation/Annexation:(1) . . . *When decisions are made by state, county, regional agencies*, tribes, or special purpose districts, *and those decisions are clearly in the best interests of the state, county or region, take appropriate measures to implement those decisions* within Des Moines and the Planning Area, *unless the decisions unfairly or negatively affect the residents or businesses in the Des Moines area*.(Emphasis added.)

Strategy 5-04-04:. . . Adopt development regulations as needed that provide a process for the identification and possible siting of essential public facilities.Cooperatively work with surrounding municipalities and King County during the siting and development of facilities of regional significance.*Oppose new facilities associated with Sea-Tac International Airport that increase adverse impacts to the City of Des Moines*.(Emphasis added.)

Strategy 6-04-09:In order to protect and preserve park and recreation areas Des Moines should:. . . (4) *Oppose proposed land use and transportation facilities that would subject park and recreation areas of local significance* (except golf courses, ball fields, outdoor spectator sports areas, amusement areas, riding stables, nature trails and wildlife refuges) *to exterior noise exposure levels which exceed 55* L_{dn} *or the* L_{dn} *level existing as of the effective date of this Element, whichever is greater.A reduction in the exterior noise level (greater than 55 dBA) that existed as of April 20, 1995 shall become the new maximum exterior noise level*.(chapter 18.38 DMMC).(Emphasis added.)

Strategy 6-04-09:In order to protect and preserve park and recreation areas Des Moines should:. . . (5) *Oppose proposed land use and transportation facilities that would subject locally significant golf courses, ball fields, outdoor spectator sports areas, amusement areas, riding stables, nature trails, and wildlife refuges to exterior noise exposure levels which exceed an* L_{dn} *of 60 dBA, or the* L_{dn} *level existing as of the effective date of this Element, whichever is greater.A reduction in the exterior noise level (greater than 60 dBA) that existed as of April 20, 1995 shall become the new maximum exterior noise level.* (chapter 18.38 DMMC).(Emphasis added.)

> Strategy 8-04-01:Residential Neighborhood Protection:(1) Protect and preserve residential neighborhoods by:. . . (b) *Opposing land use changes and infrastructure improvements that would subject residential neighborhoods to environmental noise exposure levels which exceed an L_{dn} of 55 dBA, or existing levels as of April 20, 1995, whichever is greater.*
>
> (chapter 18.38 DMMC). (Emphasis added.)
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> Strategy 8-04-01:Residential Neighborhood Protection:(1) Protect and preserve residential neighborhoods by:. . . (c) *Adopting weight limits and maximum noise levels for commercial trucks on surface streets in residential neighborhoods to ensure that non-routine commercial traffic does not damage residential roads, or subject the neighborhood to unusual congestion and noisy street traffic.*(chapter 7.16 DMMC, chapter 10.28 DMMC, chapter 12.04 DMMC).(Emphasis added.)
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> Strategy 8-04-02:Historic Preservation:(1) Protect and preserve historic properties and archeological sites by:. . . (d) *Opposing land use and transportation proposals that would subject historic and archeological sites of local significance to environmental noise exposure levels of L_{dn} of 65 dBA, or existing levels as of April 20, 1995, whichever is higher.A reduction in the environmental noise level (greater than 65 L_{dn}) that existed as of April 20, 1995 should become the new maximum environmental level.*(Emphasis added.)

According to Plan Finding 5-02-08, the City has "accepted more than its fair share of adverse impacts" associated with STIA.Any increase in these adverse impacts would require the City to "accept an even greater disproportionate share."This Finding or "fact" assists the Board in interpreting Plan Strategies 1-04-05(1), 5-04-04, and 8-04-01(1)(c).

Strategy 1-04-05(1) directs the City to implement regional decisions "clearly in the best interests of the state, county, or region . . . **unless** the decisions unfairly or negatively affect" the City. There is no question that the expansion of STIA could have some adverse impacts on the City. Nonetheless, these impacts could be minimized or mitigated.Since Finding 5-02-08 makes it clear that expansion of STIA will unfairly or negatively affect the City, Strategy 1-04-05(1) can only be read to mean that the City will not take measures to implement the regional decision to expand STIA.

Further, Strategy 5-04-04 states the City's intent to oppose new facilities at STIA "that increase adverse impacts on the City."Reading this Strategy together with Finding 5-02-08 leads to the conclusion that any action causing adverse impact on the City, however slight, will result in the City's opposition.It is significant that nothing in the challenged policies cited above talks about mitigation; the language used is "oppose."In its brief, the City stated "[T]he City's opposition to the third runway is conditioned on unmitigated impacts."City's Response Brief, at 46.However, the City cites to no Plan policy to support its argument, nor could the Board find support for this

assertion in the City's Plan.The Plan expresses the City's clear intent to exercise its municipal authority to prevent expansion of STIA, not to mitigate its impacts.[8]

Finally, Finding 5-02-08 provides direction to the City in carrying out Strategy 8-04-01(1)(c), which directs the City to limit weight and noise levels of commercial trucks through residential neighborhoods.This Strategy cites to three chapters of the City's municipal code, one of which (chapter 12.04 DMMC) the City asserts requires trucks hauling fill for STIA expansion to obtain City permits.Ex. 148.Since the GMA requires the City to exercise the permit discretion of chapter 12.04 DMMC consistent with the Strategies and Findings of its Plan, the clear effect of the direction of these Plan policies will be to prevent, not mitigate, expansion of STIA.

Strategy 5-04-04 directs the City to "[o]ppose new facilities associated with Sea-Tac International Airport that increase adverse impacts to the City of Des Moines."Since expansion of STIA will have adverse impacts to the City, this Strategy is particularly instructive in reading Strategies 1-04-05(1), 8-04-01(1)(b), 8-04-01(1)(c), and 8-04-02(1)(d).Reading these Plan provisions as a whole, the City will oppose expansion of STIA because it "unfairly or negatively affect[s]" the City (1-04-05(1)), and because it would increase environmental noise exposure levels (8-04-01(1)(b) and (c), and 8-04-02(1)(d)).These Plan provisions do not allow necessary support activities, such as fill dirt hauling, that are necessary for expansion of STIA.

The City's Plan also includes a Finding that indirectly affects expansion of STIA.According to Plan Finding 7-02-08, virtually all of the City is within the 65 L_{dn} noise contour.This Finding illuminates Strategies 6-04-09(4), 6-04-09(5), 8-04-01(1)(b), and 8-04-02(1).All of these Strategies direct the City to oppose land use changes and transportation facilities or infrastructure improvements that will result in noise of 55, 60, or 65 L_{dn}, or "existing levels as of April 20, 1995."[9] Most of these Strategies provide that, if the environmental noise level declines, the new, lower level will become the maximum allowable.The Board notes that the ambient noise levels, as found by the City in 7-02-08, already exceed the numerical limits of these Strategies; therefore, the practical effect of these Strategies is to make the maximum noise level that level existing as of April 20, 1995.Although the City may certainly impose reasonable mitigating conditions on EPFs, or necessary support activities if the EPF itself is not within the City's jurisdiction, these particular Plan provisions direct the City to prohibit <u>any</u> increase in environmental noise.The obvious effect of these Plan provisions will be to prevent the excavation and fill dirt hauling support activities associated with expansion of STIA.

The GMA made comprehensive plans binding documents.*See* RCW 36.70A.040; see also, *Snoqualmie v. King County*, CPSGPHB Case No. 92-3-0004, Final Decision and Order (March 1, 1993), at 15.The City is bound to implement the policy provisions it includes in its Plan.The Plan Findings, Policies, and Strategies identified by the Port require the City to oppose activities

related to the expansion of STIA.Although the City's jurisdiction is limited to its city limits, clearly the Plan directs the City to oppose those necessary support activities for the expansion of STIA within its limits.*See* City's Response Brief, at 16.The expansion of STIA requires a large volume of fill dirt.The borrow site for the project is within Des Moines and trucks hauling this fill dirt must travel within the City limits.The City's Plan, particularly Strategies 1-04-05 and 5-04-04, obligates the City to oppose necessary support activities, such as the excavation and hauling operations.**The Board holds that the City's Plan does not comply with RCW 36.70A.200 and will preclude expansion of STIA.**

Conclusion No. 2

The City's Plan does not comply with RCW 36.70A.200 because it precludes the expansion of STIA, an essential public facility.

invalidity

The Board specifically finds that Plan policies 1-04-05 and 5-04-04, by precluding the siting of an essential public facility, substantially interferes with the fulfillment of RCW 36.70A.020(3), which provides:

> (3) Transportation.Encourage efficient multimodal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.RCW 36.70A.020(3).

These Plan policies substantially interfere with the fulfillment of RCW 36.70A.020(3) because they preclude the expansion of STIA, a regional transportation priority, and an essential public facility.

Vi. ORDER

Having reviewed and considered the above-referenced documents, having considered the arguments of the parties, and having deliberated on the matter, the Board finds that the Des Moines Comprehensive Plan is **not in compliance** with RCW 36.70A.200.Because policies 1-04-05 and 5-04-04 purport to preclude the expansion of an essential public facility, namely, Seattle Tacoma International Airport, and such preclusion would substantially interfere with the fulfillment of RCW 36.70A.020(3), these policies are **invalid**.
The Plan is remanded to the City and it is instructed to bring the Plan into compliance with RCW 36.70A.200 by no later than **Monday, December 15, 1997**, in order to achieve compliance with this Order and the GMA.In amending the plan to address the invalidated policies, the City will, pursuant to the Act, be required to maintain internal plan consistency.Thus, other related policies may need to be amended.

The City is further instructed to file with the Board, and provide a copy to both the Port and Amicus PSRC, a Statement of Actions Taken to Comply, by no later than **4:30 p.m. on Monday, December 29, 1997.**The Board will then promptly schedule a compliance hearing.

So ORDERED this 13th day of August, 1997.
CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____
Edward G. McGuire, AICP
Board Member

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Joseph W. Tovar, AICP
Board Member
(Board Member Tovar filed a concurring opinion)

_____
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.

Board Member Tovar's Concurring Opinion

I concur with the majority in disposing of this case in resolving Legal Issue 2 - finding that the City's Plan fails to comply with RCW 36.70A.200.However, unlike my colleagues, I would also have reached Legal Issue 3 - the allegation that Des Moines' Plan fails to comply with RCW 36.70A.210 because the challenged City policies are inconsistent with countywide planning policies and multicounty planning policies.Notwithstanding principles of judicial economy, I believe that the controversy at the core of Legal Issue 3 is a matter of significant public interest that can and should be reached.In my judgment, the same policies that the Board finds violate RCW 36.70A.200 also fail to comply with RCW 36.70A.210 because they are inconsistent, to varying degrees, with the King County Comprehensive Plan and the King County County-wide Planning Policies, as well as the multicounty planning policies for the Central Puget Sound Region.

Many allegations were made by the Port regarding the inconsistencies between the City policies and various policies from these regional documents.Des Moines variously argued that there was no inconsistency between city and regional policies (City Response Brief, at 21-42), that various regional policy documents were unlawfully enacted and thus have no effect (City Response Brief, at 9-12), and that, in any case, there is no directive relationship between regional policies and a city plan (City Response Brief, at 49-57).

At the hearing on the merits, the City summarized its position by stating that, rather than a "coercive" hierarchy,the GMA "enshrine[s] the political ethic and the legal history of our region in saying that in this part of the country we do operate through collaboration, cooperation and

consensus building."Transcript of Hearing on the Merits, July 9, 1997, at 77.Des Moines insists that there is no hierarchy of policy authorized or required by the GMA and that there is no support for the proposition that a city plan must yield to a county-wide planning policy, let alone a multicounty planning policy.City's Response Brief, at 49-56.To the extent that the Port relies on Board holdings to this effect in past cases, such as *Snoqualmie*, *Edmonds* and *Aagaard*,[10] the City argues that these readings of the Act have been "called into question" by *Postema v. Snohomish County [**Postema**]* 83 Wn. App. 574 (September 9, 1996), *review denied*, 131 Wn.2d 1019 (April 4, 1997).City Response Brief, at 56-57.

The City's arguments describe a universe in which each city is, in effect, sovereign because each city has the authority to accept only those regional policy decisions that it deems to be "fair" and "not against the interests" of that city.In such a city-centered universe, a city plan is not obligated to yield to a regional[11] decision adopted pursuant to RCW 36.70A.210, regardless of whether or not such a regional policy decision is unambiguous, explicitly directive, and lawfully adopted. While such a city-centered universe may or may not have ever existed in the past, or may exist in a county with only a single incorporated city[12], it certainly does not exist now in the Central Puget Sound Region.The great number of local governments[13] and population density[14] of this metropolitan region, particularly in view of the tremendous population and employment growth currently underway, make the notion of absolute city "sovereignty" archaic.If commonly held and acted upon by the four counties and seventy-eight cities in this region, such a notion would perpetuate the type of "uncoordinated and unplanned growth" that the GMA identified as a "threat to the environment [and] sustainable economic development" of this state.RCW 36.70A.010.

The legislature is presumed to be aware of the *Snoqualmie*, *Edmonds*, and *Aagaard* decisions. While the legislature has amended the GMA many times and has had the opportunity to provide legislative correction to the interpretations that this Board has given to RCW 36.70A.210 in these cases, it is significant that the legislature has never done so.In fact, the legislature has made no substantive revisions to RCW 36.70A.210 since it created that section in 1991.[15] Therefore, I can only conclude that the legislature agrees with the Board's interpretations of the Act in the above cited cases - that RCW 36.70A.100 requires coordination and consistency between and among county and city plans, that CPPs adopted pursuant to RCW 36.70A.210 provides the mechanism to achieve that coordination and consistency, and that in order to do so, CPPs must have a substantive and directive effect on the comprehensive plans of cities.[16]

Even in the most recent session, the legislature relied upon the substantive and directive authority of CPPs to carry out the important task of monitoring land use within the urban growth areas for the purposes of determining what, if any, actions are necessary to assure that adequate land

supply remains available to accommodate expected population growth.While Des Moines called the Board's attention to a portion of Sec. 25 of ESB 6094 in support of its "collaborate and coordinate - but don't coerce" theory (City's Response Brief, at 15-16), a closer inspection of the entirety of this section leads to the opposite conclusion.It is true that this section directs cities and counties to work together in a cooperative fashion.However, this simply mirrors the language of RCW 36.70A.210 by stating that a "county shall adopt, in consultation with its cities, county-wide planning policies to establish a review and evaluation program."ESB 6094, Sec. 25 (1).The emphasized language unmistakably says that, while the county has a GMA duty to consult with the cities, it still has the sole authority to adopt these new CPPs.

While recognizing that "consultation" is essential, the legislature requires more than simply process and dialogue without ultimate closure.The final subparagraph of Section 25 states that, after a cooperative consultative process including the cities, the county "if necessary, [shall] adopt amendments to county-wide planning policies to increase consistency."Section 25 (4).ESB 6094.The directiveness of these action verbs (shall adopt ... increase consistency) reveals legislative intent that cities and counties are to do more than simply engage in an idle process. Rather, this statutory language provides direction to local governments to achieve results. Inevitably, at some point in these iterative and interactive dialogues, a decision needs to be rendered by the county and, when necessary, the county needs to take action "to increase consistency."Section 25 of ESB 6094 describes a process that recognizes the county's role as a regional government responsible for the long-term viability of the UGA.For a county to discharge this duty requires the CPPs to constitute more than the voluntary and advisory process that Des Moines suggests in its arguments.This conclusion is consistent with prior Board holdings regarding the duty of city comprehensive plans to be consistent with CPPs.Unless and until either the legislature or the courts explicitly address the matter of the relationship between lawfully adopted, unambiguous CPPs and city plans and provide explicit direction to the contrary, the Board's holdings to date on this subject retain their vitality. [17]

In conclusion, I agree with the City that "collaboration, cooperation and consensus building" are good things and that they are part of the "history" of our region.However, these principles are not "enshrined" in the GMA.The City has no explicit GMA duty to "collaborate" or "build consensus;" however, it does have an explicit GMA duty to achieve "coordination and consistency" with the plans of others as to regional issues. RCW 36.70A.100.The fatal flaw in Des Moines' reading of the Act is that it fails to acknowledge and meet this most fundamental and important GMA duty- *consistency with regional policies that address regional issues.*

The regional policies adopted pursuant to RCW 36.70A.210 provide the GMA's mechanism to achieve this consistency.Absent an effective mechanism to adopt and enforce regional policies, whether those be the location or capacity of UGAs, allocation of a fair share of various types of housing, siting of essential public facilities, or location of regional transportation improvements, the Central Puget Sound region would continue to suffer from balkanized decision-making and unmet regional needs.In short, this region would be captive to the inefficient and uncoordinated

land use decision-making of Des Moines' imagined past - a regime that it mistakenly believes the GMA now enshrines.After a review of the record and the argument in this case, I am left with the firm conviction that the City has erroneously interpreted the Act.Des Moines has failed to acknowledge its duty under RCW 36.70A.100 and RCW 36.70A.210 to achieve consistency with regional policy documents, and its Plan breaches that duty.

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[1]
Board member Edward G. McGuire reviewed the briefs and exhibits in this matter and read the transcript of the hearing on the merits.

[2]
At the request of the City,Board member Towne absented herself from the hearing room during argument regarding the City's motion and returned when Presiding Officer Tovar announced his ruling on the motion.*See*WAC 242-02-522(5).

[3]
In addition to the prehearing briefs, the City and PSRC filed post-hearing briefs.*See* Procedural History.

[4]
The Board takes notice of the legislature's clear intent to reemphasize the importance of the Boards' deference to local policy choices and decisions when those choices and decisions comply with the GMA.

[5]
Any actions taken by a local government after July 27, 1997, including actions taken to comply with a Board remand order, will be subject to the provisions of ESB 6094.The Board's compliance review of the remand action in this case will, likewise, be subject to ESB 6094.

[6]
The other legal issues listed in the Prehearing Order were as follows:

> ***1.Does the City's Plan fail to comply with RCW 36.70A.100 because Plan policies (CP) 1-04-05, 5-02-08, 5-03-02, 5-04-04, 8-03-01(2), 8-04-01(1), 8-04-01(1)(c), 8-03-04(4), 4-04-01, 6-03-23, 6-04-09(4), 6-04-09(5), 8-03-01(3), 8-03-02(3), 8-04-01(1)(b) and 8-04-02(1) are inconsistent with King County Comprehensive Plan policies T-101, T-107, F-218, T-540 and T-542?***
>
> ***3.Does the City's Plan fail to comply with RCW 36.70A.210:***
>
> > ***3.1Is the City's Plan (including all of the CPs listed in these legal issues) inconsistent with King County Countywide Planning Policies FW-19, S-1.11, and FW-32?***
> >
> > ***3.2Is the City's Plan (including all CPs listed in these legal issues) inconsistent with Multi-county Planning policies (MPPs) adopted by the PSRC and embodied in the VISION 2020 Regional Growth Strategy and Regional Transportation Plan (RTP), including the following MPPs contained in VISION 2020's 1995 Update adopted on May 25, 1995:RF-3, RC-2.11 and RT-8.31, and the RTP as implemented and amended by PSRC Resolution No. A-96-02?***
>
> ***4.Does the City's Plan fail to comply with RCW 36.70A.070 because it is internally inconsistent, including inconsistencies between CP 1-03-07, (including all CPs listed in these legal issues) and CP 1-04-05(1);***

also, is there an inconsistency between CP 3-02-04, and CP 5-04-04 (as well as all of the CPs listed in these legal issues)?

5.Does the City's Plan fail to comply with RCW 36.70A.020(6) because it contains policies, including CP 6-02-04, CP 8-03-03 and 8-04-03(1)(c), that deprive the Port of Seattle of its property rights without consideration of whether such policies protect property owners from arbitrary and discriminatory actions?

[7]

In *Children's Alliance v. City of Bellevue [**Children's Alliance**]*, the Board noted that it would regard the last sentence of RCW 36.70A.200(2) as a third subsection of .200.CPSGMHB Case No. 95-3-0011, Final Decision and Order (July 25, 1995), at 17.

[8]

In a earlier EPF case dealing with a transportation facility, the Board observed that RCW 36.70A.200 does not prevent a local government from identifying in its plan appropriate and reasonable provisions for mitigation.In *Hapsmith v. City of Auburn [**Hapsmith**]*, CPSGMHB Case No. 95-3-0075c, Final Decision and Order (May 10, 1996), the Board stated:

> 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 localizedconsequences 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 mitigation.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.*Hapsmith*, at 33.

[9]

The record does not reveal the existing noise levels on April 20, 1995.

[10]

In its first CPP case, the Board examined the purpose, nature and effect of CPPs.In *Snoqualmie v. King County [**Snoqualmie**]*, CPSGMHB Case No. 92-3-0004, Final Decision and Order (March 1, 1993), the Board concluded:

> The requirement that plans be coordinated suggests the need to jointly decide upon procedural matters such as schedules, formats, common data bases and methods for communication.However, RCW 36.70A.100 requires not just coordination but also consistency.To achieve the consistency requirement of the GMA requires more than simply a coordination of the mechanics of process, but rather a substantive and directive relationship between the policies in the CPPs and the policies in the comprehensive plans of cities and counties.Therefore, the Board concludes that the *effect* of the CPPs is both procedural and substantive.
> Further, the Board observes that the CPPs provide substantive direction not to development regulations, but rather to the comprehensive plans of cities and counties.Thus, the consistency required by RCW 36.70A.100 and RCW 36.70A.210 is an *external* consistency between comprehensive plans.The CPPs do NOT speak directly to the implementing land use regulations of cities and counties.Thus, the Board concludes that the requirement for consistency in RCW 36.70A.100 and .210 does not require an alteration to the land use powers of cities.*Snoqualmie*, at 15-16.Emphasis added.

The Board clarified the new GMA-created reality in a 1993 case, *City of Edmonds and City of Lynnwood v. Snohomish County [**Edmonds**]*, CPSGMHB Case No. 93-3-0005, Final Decision and Order (October 9, 1993):

> To conclude that each of those local governments retains the full range of its pre-GMA land use prerogatives would perpetuate balkanized self-interest and thwart the Legislature's clear direction to take decisive regional action to limit sprawl, site needed facilities, meet pressing human needs, protect the environment and sustain economic development.*See* RCW 36.70A.010 and RCW 36.70A.020.
>
> The broadened perspective that permeates the Act means that local governments, particularly cities, must include a regional perspective in the making of their plans, indeed, in the definition of their responsibilities to plan for the future.The "land use powers of cities" cannot be construed in such a way as to allow a city to deny its regional context or shirk its regional responsibilities.*Edmonds*, at 27-28.Emphasis added.

In 1995, the Board summarized the relationship among the goals of the GMA, policies in regional policy documents, and city plans.In *Aagaard, et al., v. City of Bothell [**Aagaard**]*, CPSGMHB Case No. 94-3-0011, Final Decision and Order (July 21, 1995), the Board stated:

> Thus, the decision-making regime under GMA is a cascading hierarchy of substantive and directive policy, flowing first from the planning goals to the policy documents of counties and cities (such as CPPs, IUGAs and comprehensive plans), then between certain policy documents (such as from CPPs to IUGAs and from CPPs and IUGAs to comprehensive plans), and finally from comprehensive plans to development regulations, capital budget decisions and other activities of cities and counties.*Aagaard*, at 6.Emphasis added.

[11]

"Regional" in the context of the GMA means either a county or two or more contiguous counties.RCW 36.70A.210(1) and (7).

[12]

In the State of Washington, there are a number of counties planning under the GMA that have only one city: Ferry, Garfield, Jefferson, Mason and San Juan.None of these counties is in the Central Puget Sound Region. Washington State Data Book, 1995.

[13]

There are at present four counties and 78 cities in the Central Puget Sound region.Washington State Department of Community, Trade and Economic Development, *"Growth Management - It's Beginning to Take Shape,"* Olympia, WA.January 1997, at 9.This does not include the cities of Maple Valley and Covington, where incorporation has been approved by the voters, but the effective date of the incorporation has not yet arrived.

[14]

The population density of the Central Puget Sound region is 12 times that of the balance of the state.In a 1995 case, the Board took official notice of the *July 6, 1995, Correction Release of the Washington State Office of Financial Management's April 1, 1995, Populations of Cities, Towns and Counties used for the Allocation of State Revenues*.According to these counts, the four counties of the Central Puget Sound Region then contained 3,020,000 people (approximately 56 percent of the state's population) in 6,287 square miles (approximately 9.4 percent of the total area of the state) for a regional population density of 480 people per square mile.The balance of the population (2,409,900 people) on the remaining land area of the state (60,295 square miles) then equaled a population density of 40 people per square mile.*Bremerton v. Kitsap County*, CPSGMHB Case No. 95-3-0039, Final Decision and Order, October 9, 1995, at 29, fn. 12.

[15]

RCW 36.70A.210 was created in 1991.ReSHB 1025 § 2.This section has never been substantively amended by the legislature.Deadlines for adoption of CPPs were changed by amendments in 1993 and the name of the growth planning hearings board was changed to the growth management hearings board in 1994.[1994 c 249 § 28; 1993 sp.s. c 6 § 4; 1991 sp.s. c 32 § 2.]

[16]

The Board has recognized that the more abstract CPPs are, the more room will be left for interpretation.*See Snoqualmie*, at 13.In addition, there are limitations on the substantive effect of CPPs.*Snoqualmie*, at 18-19.*See also*, *Edmonds*, at 29-31.

[17]

As to the City's arguments regarding the *Postema* decision, I note that the court addressed only one issue - whether RCW 36.70A.210 creates a regional government that violates the principle of one person, one vote."83 Wn. App., at 580.To decide this issue, the court looked at the scope of powers of "an informal intergovernmental planning group" which was tasked by Snohomish County to draft CPPs.*Id.*, at 578.The court recognized that the group's draft policies were not binding and that RCW 36.70A.210 did not vest this group with governmental powers.*Id.*, at 582-583.The court expressly declined to decide whether RCW 36.70A.210 creates a hierarchy of authority giving CPPs the power to "trump" city policies, because there was no actual controversy on that issue in *Postema*.Id., at 584.