

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

PORT OF SEATTLE,)	Case No. 97-3-0014
Petitioner,)	ORDER FINDING
v.)	NONCOMPLIANCE AND
CITY OF DES MOINES,)	INVALIDITY, AND
Respondent.)	RECOMMENDING CONTINGENT
)	SANCTIONS
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Introduction

In the Final Decision and Order (**FDO**) in the above-captioned case, after finding that Sea-Tac International Airport (**STIA**) is an essential public facility (**EPF**), the Central Puget Sound Growth Management Hearings Board (the **Board**) held that “the expansion of an existing EPF, including necessary support activities associated with that expansion, is protected by RCW

[\[1\]](#) 36.70A.200.” FDO, at 7. The Board determined that “RCW 36.70A.200 imposes a duty requiring the City’s [Comprehensive] 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.” FDO, at 8.

The Board then determined that the regional decision regarding STIA triggered Des Moines’ duty to review its Plan for preclusive policies and amend its Plan to eliminate the preclusive effect of

[\[2\]](#) any of its policies. The Board found that the City failed to amend its Plan in recognition of the regional decision to expand STIA, thereby retaining certain Plan policies that precluded the siting of an EPF. FDO, at 7, 12. Since the City had not amended its Plan to eliminate or amend policies that precluded the expansion of STIA, the Board found that the City’s Plan did not comply with the requirements of RCW 36.70A.200. FDO, at 12. The Board also invalidated two of the noncompliant Plan policies, 1-04-05 and 5-04-04. *Id.*

In this compliance proceeding, the Board will determine whether the previously invalidated

policies, as amended, no longer substantially interfere with the fulfillment of the goals of the GMA; and whether the Plan, including the amendments, complies with RCW 36.70A.200 and RCW 36.70A.070(preamble). For any Plan policies found noncompliant with RCW 36.70A.200 and .070(preamble), the Board will determine whether they should be invalidated pursuant to RCW 36.70A.330(4).

Standard of Review for Invalidity

As to the invalidated policies, the City has the burden of demonstrating that the Plan provisions amended in response to the Board's finding of invalidity no longer substantially interfere with the fulfillment of the goals of the GMA, specifically the transportation goal of RCW 36.70A.020(3). *See* RCW 36.70A.320(4).

Invalidity

In the FDO, the Board found that Plan policies 1-04-05 and 5-04-04 substantially interfered with the fulfillment of the transportation goal of the GMA, "because they preclude the expansion of STIA, a regional transportation priority, and an essential public facility." FDO, at 13. The transportation goal provides:

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

RCW 36.70A.020(3). The Board found that:

The Plan [policies] 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. . . . The City's Plan, particularly [policies] 1-04-05 and 5-04-04, obligates the City to oppose necessary support activities, such as the [fill dirt] excavation and hauling operations [required for the expansion of STIA].

FDO, at 12. In response to the FDO, the City amended the two invalidated policies and a third policy, 1-04-04. The City contends it replaced "opposition" language in these policies with "mitigation" language. The Board's review of the amended language reveals that, although "mitigation" language was added to the policies, the "opposition" language, or direction to

[3]

oppose, is still present. The City has not persuaded the Board how these amendments transform policies 1-04-05 and 5-04-04 sufficiently so that they no longer substantially interfere with the fulfillment of the GMA transportation goal. The City has not explained how the amended Plan policies encourage efficient intermodal transportation systems that are based on regional

priorities and coordinated with county and city comprehensive plans; the City has not explained how amended Plan policies 1-04-05 and 5-04-04 can no longer be used to preclude the expansion of STIA, a regional transportation priority and an EPF.

If certain conditions are not met, the “mitigation” language in the amended Plan policies obligates the City to oppose airport-related projects and to deny certain permits. The inescapable conclusion is that opposition of airport-related projects and the denial of certain permits can result in preclusion of STIA expansion or some other EPF. There is no Plan provision excluding EPFs from these preclusive requirements. This continues to violate the clear language of RCW 36.70A.200 and substantially interferes with the fulfillment of the GMA transportation goal.

Plan policies 1-04-05 and 5-04-04, as amended, continue to be noncompliant with RCW 36.70A.200 and to substantially interfere with the fulfillment of the GMA transportation goal – expansion of STIA, a regional priority. Plan policies 1-04-05 and 5-04-04, as amended, remain invalid.

Standard of Review for Compliance

As to the noncompliant Plan policies which were not invalidated, the Port of Seattle (**Port**) has the burden of demonstrating that those policies continue to be noncompliant with the GMA. *See* RCW 36.70A.320(2). The Board “shall find compliance unless it determines that the [City’s action] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” RCW 36.70A.320(3).

Compliance

In the FDO, the Board stated that “[t]he [policies] identified by the Port require the City to oppose activities related to the expansion of STIA” and held that “the City’s Plan does not comply with RCW 36.70A.200 and will preclude expansion of STIA.” FDO, at 12. The Board needed to scrutinize only some of the Plan policies identified by the Port to reach its holding.

The FDO examined policies 5-02-08 and 8-04-01(1)(c):

[Policy] 5-02-08 provides direction to the City in carrying out [Plan policy] 8-04-01(1)(c), which directs the City to limit weight and noise levels of commercial trucks through residential neighborhoods. This [policy] cites to three chapters of the City’s municipal code, one of which (chapter 12.04 DMMC) . . . 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 [its Plan policies], the clear effect of the direction of these Plan policies will be to prevent, not mitigate, expansion of STIA.

FDO, at 11. The City has not amended Plan policies 5-02-08 or 8-04-01(1)(c). The Board again finds that the clear effect of the direction of unamended policy 8-04-01(1)(c) will be to prevent, not mitigate, expansion of STIA. The City's decision not to amend this policy is clearly erroneous. Policy 8-04-01(1)(c) does not comply with RCW 36.70A.200.

The FDO examined policies 5-04-04, 1-04-05(1), 8-04-01(1)(b), 8-04-01(1)(c), and 8-04-02(1)(d):

[Policy] 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, [policy 5-04-04] is particularly instructive in reading [policies] 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.

FDO, at 11. Although amended, policy 5-04-04 continues to require the City to oppose airport-related projects under certain conditions. Likewise, amended policy 1-04-05 still directs the City to take appropriate measures for implementing regional decisions only under certain conditions. Policies 8-04-01(1)(b), 8-04-01(1)(c), and 8-04-02(1)(d) have not been amended by the City and the Board again finds that these three unamended policies, when read with amended policy 5-04-04, continue to prevent expansion of STIA. The City's decision not to amend these policies is clearly erroneous. Policies 8-04-01(1)(b), 8-04-01(1)(c), and 8-04-02(1)(d) do not comply with RCW 36.70A.200.

The FDO examined policies 7-02-08, 6-04-09(4), 6-04-09(5), 8-04-01(1)(b), and 8-04-02(1):

According to Plan [policy] 7-02-08, virtually all of the City is within the 65 L_{dn} noise contour. This [policy] illuminates [policies] 6-04-09(4), 6-04-09(5), 8-04-01(1)(b), and 8-04-02(1). All of these [policies] 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.' . . . The Board notes that the ambient noise levels, as found by the City in 7-02-08, already exceed the numerical limits of these [policies]; therefore, the practical effect of these [policies] is to make the maximum noise level that level existing as of April 20, 1995. . . . The obvious effect of these Plan provisions will be to prevent the excavation and fill dirt hauling support activities associated with expansion of STIA.

FDO, at 12.Policies 7-02-08, 6-04-09(4), 6-04-09(5), 8-04-01(1)(b), and 8-04-02(1) have not been amended by the City and the Board again finds that they continue to prevent expansion of STIA. The City's decision not to amend these policies is clearly erroneous. Policies 6-04-09(4), 6-04-09(5), 8-04-01(1)(b), and 8-04-02(1) do not comply with RCW 36.70A.200.

At the same time the City amended policies 1-04-05 and 5-04-04, the City amended policy 1-04-04. ^[4] If certain conditions are not met, policy 1-04-04 requires the City to deny permit approval.

^[5] As with policies 1-04-05 and 5-04-04, the inescapable conclusion is that the denial of certain permits as required by policy 1-04-04 can result in preclusion of STIA expansion or some other EPF. This is clearly erroneous and violates RCW 36.70A.200. Policy 1-04-04 does not comply with RCW 36.70A.200.

The City's Plan continues to be out of compliance with RCW 36.70A.200. Because the City is under a continuing duty, imposed by RCW 36.70A.200, not to preclude EPFs, any and all Plan policies that direct the City to use them to preclude EPFs, such as the expansion of STIA, even if not specifically identified above, are not in compliance with the GMA and the City must amend

^[6] them. The specific policies discussed in the August 13, 1997 FDO and reiterated above remain out of compliance with RCW 36.70A.200, and amended policy 1-04-04 is out of compliance with RCW 36.70A.200.

Because the Plan requires significant amendments to bring it into compliance with the Act, the Board will not consider compliance with the internal consistency requirements of RCW 36.70A.070 at this juncture. It is the City's duty to achieve internal consistency in amending its Plan.

Determination of Invalidity

The Board has found the following policies noncompliant:

- 1-04-04
- 1-04-05
- 5-04-04
- 6-04-09
- 8-04-01
- 8-04-02

The individual and combined effects of the above policies in the City's Plan direct Des Moines to oppose and preclude the expansion of STIA. Comprehensive plans are binding documents; thus the City is bound to implement these Plan policy provisions. The Board finds that the policies

listed above substantially interfere with the fulfillment of the transportation goal of the GMA, RCW 36.70A.020(3), because they preclude the expansion of STIA, a regional transportation priority, and an essential public facility. Therefore, **the Board enters a determination of invalidity for Plan policies 1-04-04, 1-04-05, 5-04-04, 6-04-09, 8-04-01, and 8-04-02.**

Contingent Sanctions

Pursuant to RCW 36.70A.330(3), the Board will also make a contingent recommendation to the Governor that he impose sanctions upon the City of Des Moines if it does not adopt the amendments necessary to bring its Plan into compliance pursuant to the schedule specified below.

Order

Having reviewed and considered the Final Decision and Order, and the briefs and oral arguments of the parties in this compliance proceeding, the Board issues the following Order:

Des Moines' comprehensive plan **does not comply** with the requirements of RCW 36.70A.200. Noncomplying Plan policies 1-04-05 and 5-04-04 **remain invalid**. Noncomplying Plan policies 1-04-04, 6-04-09, 8-04-01, and 8-04-02 are determined to be **invalid**.

Des Moines' comprehensive plan is **remanded** to the City with instructions to:

1. Repeal or amend the invalidated Plan policies so as to remove their substantial interference with the fulfillment of the GMA's transportation goal, RCW 36.70A.020(3), and bring them into compliance with RCW 36.70A.200.
2. Fulfill its duty to amend its Plan by repealing or amending any Plan policies that direct Des Moines to preclude the siting of essential public facilities as prohibited by RCW 36.70A.200.
3. Achieve or maintain internal Plan consistency as required by RCW 36.70A.070 (preamble).

Des Moines shall bring its Plan into compliance with RCW 36.70A.200 and RCW 36.70A.070(preamble), consistent with this Order Finding Noncompliance and Invalidity, and Recommending Contingent Sanctions, by no later than **Wednesday, September 16, 1998**.

The City is further instructed to file with the Board, and provide copies to the Port and amicus

curiae Puget Sound Regional Council, four copies of a Statement of Actions Taken to Comply, by no later than 4:00 p.m. on **Wednesday, September 23, 1998**. The briefing and hearing schedule shall be pursuant to the schedule below.

DATE	EVENT
Wed., Sept. 16, 1998, 4:00 p.m.	Deadline for City action
Wed., Sept. 23, 1998, 4:00 p.m.	Deadline for City's Statement of Actions Taken to Comply; and
	Deadline for City's Opening Brief Regarding Invalidity; and
	Deadline for City to File Index of the Record
Wed., Oct. 7, 1998, 4:00 p.m.	Deadline for Port's Response Brief Regarding Invalidity and Opening Brief Regarding Compliance
Wed., Oct. 21, 1998, 4:00 p.m.	Deadline for City's Reply Brief Regarding Invalidity and Response Brief Regarding Compliance
Tues., Oct. 27, 1998, 4:00 p.m.	Deadline for Port's Reply Brief Regarding Compliance
Thurs., Oct. 29, 1998, 10:00 a.m.	Invalidity and Compliance Hearing (location to be announced)

At the invalidity and compliance hearing, the Board will examine substantive and procedural compliance with Board Orders in this case, and with the GMA, specifically, RCW 36.70A.200 and RCW 36.70A.070(preamble).

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So ORDERED this 26th day of May, 1998.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

Joseph W. Tovar, AICP
Board Member

Chris Smith Towne
Board Member

NOTICE: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

APPENDIX

Procedural History

On August 13, 1997, the Board issued its Final Decision and Order in this case.

On December 26, 1997, the Board received the City's Statement on Compliance.

On January 8, 1998, the Board issued a Notice of Compliance Hearing and Order Establishing Briefing Schedule.

On January 23, 1998, the Board received the City's Precompliance Hearing Brief.

On January 27, 1998, the Board issued an Amended Notice of Compliance Hearing.

On February 13, 1998, the Board received the City's Supplemental Precompliance Hearing Brief.

On February 27, 1998, the Board received Port of Seattle's Motion to Supplement Compliance Record with Index of Port of Seattle's Exhibits Proposed for Supplementation at the Compliance Hearing.

Also on February 27, the Board received Port of Seattle's Compliance Prehearing Response Brief.

On March 9, 1998, the Board received City of Des Moines' Compliance Hearing Reply Brief, with Opposition to Port's Motion to Supplement Compliance Record.

On March 13, 1998, the Board received Port of Seattle's Reply Memorandum on Its Motion to Supplement Compliance Record.

Also on March 13, the Board received Port of Seattle's Compliance Prehearing Reply Brief.

On March 16, 1998, the Board received a letter from the City's counsel.

On March 17, 1998, the Board received Port of Seattle's Response to City of Des Moines' Motion to Strike.

Also on March 17, the Board held a compliance hearing in this case. Board members Edward G. McGuire, Chris Smith Towne, and Joseph W. Tovar, Presiding Officer, were present for the Board. The Port was represented by J. Tayloe Washburn and Des Moines was represented by John W. Hempelmann. Amicus curiae Puget Sound Regional Council (**PSRC**) was represented by Jennifer Dold. At the compliance hearing, the presiding officer ruled orally on portions of the Port's Motion to Supplement. Also at the compliance hearing, the City made an oral motion *in limine*, requesting the Board to clarify the scope of argument for the compliance hearing. The Board continued the compliance hearing until April 14, 1998.

On March 26, 1998, the Board issued its Notice of Hearing on Des Moines' Motion to Clarify.

On March 31, 1998, the Board received a letter from the City's counsel re: Notice of Hearing on Motions.

On April 2, 1998, the Board received City of Des Moines' Sur-Reply to Port of Seattle's Reply Memo on its Motion to Supplement Compliance Record, and Sur-Reply of City of Des Moines' to Port of Seattle's Compliance Prehearing Brief.

On April 10, 1998, the Board received City's Brief re: Hearing on "Des Moines' Motion to Clarify."

Also on April 10, the Board received Petitioner Port of Seattle's Response to Motion to Clarify.

On April 14, 1998, the Board held a hearing on the City's motion. Board members Edward G. McGuire and Joseph W. Tovar, Presiding Officer, were present for the Board. The Port was represented by J. Tayloe Washburn and Des Moines was represented by John W. Hempelmann. The PSRC was represented by Jennifer Dold.

On April 20, 1998, the Board issued its Order on Des Moines' Motion Regarding Scope [Motion to Clarify], and Order on Motion to Supplement Compliance Record.

On April 27, 1998, the Board received City of Des Moines' Additional Briefing Re: Invalidity and Motion for Leave to File Reply Brief Re: Invalidity.

On April 27, the Board also received Port of Seattle's Pre-Compliance Hearing Memorandum Re:

Invalidity.

On May 8, 1998, the Board received City of Des Moines' Pre-Compliance Hearing Memorandum Regarding Issues.

On May 12, 1998, the Board received Port of Seattle's Pre-Compliance Hearing Reply Memorandum Re:Noncompliance.

On May 14, 1998, the Board held its continuation of the compliance hearing. Board members present were Edward G. McGuire, Chris Smith Town, and Joseph W. Tovar, Presiding Officer. The Port was represented by J. Tayloe Washburn and Des Moines was represented by John W. Hempelmann. PSRC was represented by Jennifer Dold.

Findings of Fact

1. The Board incorporates by reference all of the Findings of Fact contained in the FDO.
2. On December 11, 1997, Des Moines adopted Ordinance No. 1204, amending Plan policies 1-04-05, 5-04-04, and 1-04-04. *See* Letter of December 26, 1997 from City's counsel to the Board re: Statement of Actions to Comply with the Board's August 13, 1997 Final Decision and Order and Order of Invalidity in *Port of Seattle v. City of Des Moines*, CPSGMHB No. 97-3-0014.
3. The City did not amend Plan policies 6-04-09(4) and (5), 8-04-01(1)(b) and (c), and 8-04-02(1) in response to the FDO.

Conclusions of Law

1. If certain conditions are not met, amended Plan policies 1-04-05 and 5-04-04 obligate Des Moines to deny certain permits related to the expansion of STIA. This obligation to deny certain permits can preclude the expansion of STIA in violation of the explicit requirements of RCW 36.70A.200. Plan policies 1-04-05 and 5-04-04 continue to be noncompliant with RCW 36.70A.200 and to substantially interfere with the fulfillment of the GMA transportation goal, RCW 36.70A.020(3). Plan policies 1-04-05 and 5-04-04 are still invalid.
2. If certain conditions are not met, amended Plan policy 1-04-04 obligates Des Moines to deny certain permits related to the expansion of STIA. This obligation to deny certain permits can preclude the expansion of STIA in violation of the requirements of RCW 36.70A.200. Plan policy 1-04-04 does not comply with RCW 36.70A.200. Like policies 1-04-05 and 5-04-04, policy 1-04-04 substantially interferes with the fulfillment of the GMA transportation goal. Plan policy 1-04-04 is invalid.

3. Plan policies 6-04-09(4) and (5), 8-04-01(1)(b) and (c), and 8-04-02(1) obligate the City to oppose expansion of STIA, including necessary support activities. These policies do not comply with RCW 36.70A.200. These Plan policies also substantially interfere with the fulfillment of the GMA transportation goal, RCW 36.70A.020(3), and are invalid.

[1]

Consequently, references in this Order to “EPFs” or “expansion of STIA” include necessary support activities for expansion of existing EPFs.

[2]

The City’s Plan contains four categories of policies: Goals, Findings, Policies, and Strategies. *See* FDO, at 8. All of these categories are referred to as “policies” in this Order.

[3]

Amended policy 1-04-05 provides in part:

(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~~ **so long as such decisions include conditions that are sufficient to mitigate the probable significant adverse environmental impacts on the City of Des Moines and such mitigation is capable of being accomplished.**

(2) Work cooperatively with King County, tribes and other cities within King County to carry out the following county-wide growth management goals, ~~unless the decisions unfairly or negatively affect the residents or businesses in the Des Moines area~~ **decisions related to such implementation have a probable significant adverse environmental impact on the residents or businesses in the Des Moines area and such impacts cannot be mitigated in a significant manner.**

(Deleted language shown as strike-through; new language underlined; emphasis in bold.)

Amended policy 5-04-04 provides in part:

. . . Cooperatively work with surrounding municipalities and King County during the siting and development of facilities of regional significance. ~~Oppose new facilities associated with [STIA] that increase adverse impacts to the City of Des Moines.~~ **Ensure that new facilities associated with [STIA], including necessary support facilities and connected-actions or projects, include conditions that are reasonable and capable of being accomplished and that are designed to mitigate the probable significant adverse environmental impacts on the City of Des Moines. Based upon SEPA and City of Des Moines SEPA policies, oppose airport-related projects and proposals where the City finds that there are no reasonable measures capable of being accomplished to mitigate the probable significant adverse environmental impacts on the City of Des Moines as identified in relevant environmental documents.**

(Deleted language shown as strike-through; new language underlined; emphasis in bold.)

Amended policy 1-04-04 provides in part:

(5) Ensure that approvals, permits, or other authorizations required by the City of Des Moines are consistent with SEPA and City of Des Moines environmental policies and regulations. Include conditions for projects and/or connected-actions where such conditions are necessary to mitigate probable significant adverse environmental impacts identified in environmental documents prepared pursuant to SEPA or the City’s SEPA code, chapter 16.04 DMMC. **Based on City of Des Moines SEPA policies, deny approval of any permit, approval, project or connected-action when the City finds that a) approving the proposal would result in probable significant adverse environmental impacts that are identified in an environmental impact statement; and b) there are no reasonable mitigation measures capable of being accomplished that are sufficient to mitigate the identified impact(s).**

(Emphasis in bold and underlined.)

[4]

The City stated: “Passed in conjunction with the City’s 1997 Comprehensive Plan amendment process, Ordinance No. 1204, in addition to amending the two policies found invalid by the Board, amended a third policy – Policy 1-04-04 – to fully integrate the City’s SEPA policies into its development standards.” Letter of December 26, 1997 from City’s counsel to the Board re: Statement of Actions to Comply with the Board’s August 13, 1997 Final Decision and Order and Order of Invalidity in *Port of Seattle v. City of Des Moines*, CPSGMHB No. 97-3-0014, at 2.

[5]

Supra, note 3.

[6]

The Port identified additional policies in its PFR and briefing that merit review by the City and amendment, if necessary, to assure compliance is achieved.