

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

STATE OF WASHINGTON)	
DEPARTMENT OF CORRECTIONS)	Case No. 00-3-0007
AND DEPARTMENT OF SOCIAL)	
AND HEALTH SERVICES,)	
)	<i>(DOC/DSHS)</i>
Petitioners,)	
)	
v.)	
)	
CITY OF TACOMA,)	FINAL DECISION and ORDER
)	
Respondent.)	
_____)	

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I. Procedural Background

A. General

On March 27, 2000, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the State of Washington Department of Corrections and Department of Social and Health Services (**Petitioners** or **DOC - DSHS**). The matter was assigned Case No. 00-3-0007, and is hereafter referred to as *State of Washington Department of Corrections and Department of Social and Health Services v. City of Tacoma*. Petitioners challenge the City of Tacoma’s (**Tacoma** or the **City**) adoption of Substitute Ordinance No. 26565 (the **Ordinance**), which amends the Tacoma Municipal Code (**TMC**) and regulates the location of work release facilities and juvenile community facilities within the City limits. The basis of the challenge is noncompliance with several provisions, primarily RCW 36.70A.200, of the Growth Management Act (**GMA** or **Act**).

On April 3, 2000, the Board issued a “Notice of Hearing;” on May 1, 2000, the Board held a prehearing conference (**PHC**); and on May 2, 2000 the Board issued a “Prehearing Order” (**PHO**) setting the schedule and Legal Issues for this case.

On May 11, 2000, pursuant to a request of the parties, the Board issued an “Order Granting 60-Day Settlement Extension.” The Order rescheduled the dates for briefing and hearing.

On July 10, 2000, the Board issued a “Notice of Change in Briefing Schedule.” The change in the schedule allowed an additional week for filing motions to supplement the record after a scheduled settlement conference.

On July 31, 2000, the Board received a “Stipulated Change in Briefing Schedule.” The same day, the Board issued a “Notice of Change in Briefing Schedule.” Again, the change was to extend the deadline for filing Motions to Supplement the Record.

B. SETTLEMENT ACTIONS

On May 2, 2000, the parties informed the Board that they wished to pursue settlement negotiations with the assistance of a board member from one of the other Growth Management Hearings Boards.

On May 4, 2000, the Board issued a “Notice of Settlement Officer” indicating that Nan Henriksen of the Western Board had agreed to serve as the Settlement Officer (**SO**) in CPSGMHB Case No. 00-3-0007 (*DOC/DSHS v. City of Tacoma*).

On May 10, the Board received a “Stipulation to 60-Day Settlement Extension.”

On May 11, 2000, the Board issued an “Order Granting 60-Day Settlement Extension.” The Order rescheduled the dates for briefing and hearing.

The SO held at least two settlement conferences involving the parties jointly and individually.

On October 25, 2000, the Board received “Agreed Stipulation Between DSHS and City of Tacoma” (**Agreement**). The Agreement resolved that portion of the case pertaining to the dispute between DSHS and the City of Tacoma; it was not intended to affect the rights of either party in the remainder of the dispute between DOC and the City. All parties to this proceeding signed the Agreement.

C. Motions to Supplement And amend index

On April 27, 1999, the Board received the City of Tacoma’s “Index of the Record.” The 15 page Index included 13 different headings for the listed items.

On May 1, 2000, the Board received Tacoma’s “Supplement to Index of the Record.”

On August 4, 2000, the Board received “DOC’s Motion to Supplement the Record.” The motion included ten items for consideration as supplementary exhibits.

On August 25, 2000, the Board was notified, by phone, that the City would not reply nor oppose

the Motion to Supplement offered by DOC. The Board did not receive any reply to DOC's motion.

On August 28, 2000, the Board issued its "Order on Motion to Supplement the Record." The Order admitted as part of the record the ten items offered by DOC.

On October 20, 2000, the Board received a "Stipulated Motion to Supplement the Record with Zoning Map."

D. Dispositive Motions

At the PHC, the parties indicated that no dispositive motions would be pursued in this case. In fact, no dispositive motions were filed in this matter.

E. Briefing and Hearing on the Merits

On September 13, 2000, the Board received "State DOC's Pre-Hearing Brief," with attached exhibits. (**DOC PHB**).

On October 12, 2000, the Board received "Prehearing Brief of Respondent City of Tacoma" (**Tacoma Response**).

On October 19, 2000, the Board received "State DOC's Pre-Hearing Reply Brief" (**DOC Reply**).

On October 26, 2000, the Board held a hearing on the merits (**HOM**) in Suite 1022 of the Financial Center, 1215 4th Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, Lois H. North and Joseph W. Tovar were present for the Board. Talis M. Abolins represented DOC, Petitioner. Kyle J. Crews represented Respondent City of Tacoma. DSHS did not appear. Robert Lewis of Robert H. Lewis & Associates, Tacoma, provided Court reporting services. Martin Blackmon from the City of Tacoma also attended. The hearing convened at 10:00 a.m. and adjourned at approximately ---12:00 p.m. Following argument on the Legal Issues, the Board asked DOC to identify those sections of the Ordinance for which it is seeking a finding of noncompliance and/or a determination of invalidity. The City was asked to comment on DOC's answer.

On October 27, 2000, the Board received "State DOC's Response to Board's Request for Additional Information" (**DOC Answer**). This submittal identified the sections of the Ordinance that DOC is seeking to have found noncompliant and/or invalid.

On November 1, 2000, the Board received "City of Tacoma's Response to Board's Request for Additional Information." In this submittal, the City focused its comments on the four areas

where DOC was seeking invalidity.

II. presumption of validity, burden of proof and standard of review

Petitioner DOC challenges Tacoma’s adoption of regulations governing work release facilities, as adopted by Substitute Ordinance No. 26565. Pursuant to RCW 36.70A.320(1), the Ordinance is presumed valid upon adoption.

The burden is on Petitioner, DOC, to demonstrate that the action taken by Tacoma is not in compliance with the requirements of the GMA. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board “shall find compliance unless it determines that the action taken by Tacoma is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” For the Board to find Tacoma’s actions clearly erroneous, the Board must be “left with the firm and definite conviction that a mistake has been made.” *Dep’t of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

III. board jurisdiction, preliminary matters and Prefatory note

A. Board Jurisdiction

The Board finds that the PFR filed by DOC and DSHS was timely filed, pursuant to RCW 36.70A.290(2); both DOC and DSHS have standing^[1] to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction^[2] over the challenged ordinance, pursuant to RCW 36.70A.280(1)(a).

B. PRELIMINARY MATTERS

At the beginning of the HOM, the Board addressed two preliminary matters. First, the Board **admitted** the “Stipulated Motion to Supplement the Record with Zoning Map” and assigned it Exhibit No. XIV-K. Second, the Board **denied** DOC’s motion to strike an argument in Tacoma’s Response that referenced a picture of a Port Orchard work release facility. The Board noted that it would accord the argument the weight it was due.

C. Prefatory Note

The City of Tacoma, DOC and DSHS are to be commended in this case for pursuing settlement discussions in an effort to resolve the difficult issues surrounding the siting of these essential public facilities. The Board especially thanks Nan Henriksen, who served as settlement officer, for her efforts in facilitating discussions among the parties.

Although both DOC and DSHS attempted to negotiate a settlement agreement with the City of Tacoma, agreement was reached only between DSHS and the City^[3]. Pursuant to this Agreement:

DSHS and the City of Tacoma *agree to entry of an order of non-compliance by the City regarding Legal Issues 1-3* as stated in the Board's Pre-hearing Order, XII. Statement of Legal Issues, only as they pertain to DSHS.

Agreement, at 2, (emphasis supplied). The Agreement also provides:

4. DSHS is not seeking a determination of invalidity as stated in Legal Issue 4.

Agreement, at 3.

Additionally, DOC agreed and stipulated that the "agreement between DSHS and the City will not be used against the City in the remaining portion of this controversy." Agreement, at 2.^[4] Consequently, the discussion below is based upon the briefing, exhibits and oral argument presented by DOC and Tacoma. The Board will address the Legal Issues in the context of Tacoma's actions as they may affect DOC work release facilities. However, the terms of the Agreement between DSHS and Tacoma pertaining to juvenile community facilities will be noted in the Conclusion for each issue and incorporated in the Order portion of this FDO.

iv. legal issues and discussion

Legal Issue No. 1

1. *Did the City of Tacoma (the City) fail to comply with the essential public facility (EPF) siting requirements of RCW 36.70A.200 when it adopted Ordinance No. 26565 (the Ordinance), amending Chapter 13.06 of the Tacoma Municipal Code, pertaining to work release centers and juvenile community facilities, because the*

Ordinance's amendments, individually and cumulatively, preclude the siting of such EPFs?^[5]

Applicable Law and Discussion

RCW 36.70A.200 provides, in relevant 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. Essential public facilities include those facilities that are typically difficult to site, such as airports, state education facilities and state or regional transportation facilities as defined in RCW 47.06.140, state and local correctional facilities, solid waste handling facilities, and in-patient facilities including substance abuse facilities, mental health facilities, and group homes.

(2) . . . *No local comprehensive plan or development regulation may preclude the siting of essential public facilities.*

(Emphasis supplied.)

The Board has interpreted “preclude” to mean: render impossible or impracticable; “impracticable” has been interpreted to mean: not practicable, incapable of being performed or accomplished by the means employed or at command. *Port of Seattle v. City of Des Moines*, CPSGMHB Case No. 97-3-0014, Final Decision and Order (August 13, 1997), at 8.^[6]

It is undisputed that work release centers or facilities are essential public facilities^[7] [correctional facilities] subject to the provisions of RCW 36.70A.200. DOC PHB, at 10, Tacoma Response, at 6.^[8]

DOC argues that Tacoma’s Ordinance precludes DOC from siting of work release facilities within Tacoma, because the Ordinance includes: 1) an exclusion of work release facilities from all areas of the City, except for the M-3 (Heavy Industry) zoning designation (encompassing the tide flats area in the Port of Tacoma);^[9] 2) a 1000’ restrictive buffer from ten sensitive areas, including residential zones;^[10] 3) a 16 bed capacity limitation;^[11] 4) internal staffing requirements;^[12] 5) resident eligibility restrictions;^[13] 6) internal security plan provisions;^[14] 7) provisions to demonstrate need;^[15] and 8) “fair share” provisions.^[16] DOC PHB, at 10-21.

In response, Tacoma contends that allowing work release facilities in the M-3 zone is not preclusive, since sites are available, albeit expensive sites, and the City “grand-fathered” existing work release facilities in other zoning designations and will allow their expansion. Tacoma Response, at 6-12. Regarding the 1000’ foot buffer, Tacoma contends it is “logical.” Tacoma Response, at 12. The City does not respond to argument about the provision requiring DOC to demonstrate need for a facility. Tacoma Response, at 1-18. As to the other provisions of the Ordinance that DOC challenges (internal staffing, resident eligibility, internal security and 16-bed limitation), the City concedes that, “[the provisions] run into preemptive problem(s) given the State’s authority to govern the internal workings of its own facilities and the practical aspect of the “preclusion” problem under RCW 36.70A.200(2), therefore, the City can only ask of the state to follow its own internal regulations. . . .” Tacoma Response, at 13. The “fair share” provision is discussed under Legal Issue 2, *supra*.

In reply, DOC notes that regarding Legal Issue 1, the City appears to be only defending the 1000’ buffer and the limitation of work release facilities to the M-3 designation. DOC reply, at 1-2. The Board agrees. Consequently, the Board finds the provisions of the Ordinance that Tacoma did not defend or conceded to State preemption **do not comply** with the requirements of RCW 36.70A.200. The Board now turns to the limitation to M-3 districts and the 1000’ foot buffer provisions of the Ordinance.

Limiting Work Release Facilities to the M-3 Zoning District:

DOC asserts that the City’s Ordinance precludes the siting of work release facilities in the M-3 zone for three reasons: 1) suitable land is not available; 2) the M-3 area does not provide adequate access to the resources necessary to support state work release facilities; and 3) the City has based its preclusion on unsubstantiated community fears and prejudices. DOC PHB, at 13. To support each of these contentions DOC cites to evidence in the record that it provided to the City.

DOC refers to an evaluation of available land that DOC had done for the area, and a privately initiated land availability evaluation. Both consultants noted that the siting of work release facilities in the M-3 zone would not be practicable due to the scarcity of available land. Additionally, even the “available” land is contaminated or has a high probability of contamination requiring significant clean-up expense. DOC PHB, at 13; Ex. XIV-A, enclosures 6 and 7; IX-KKK; and IX-P. On the question of access to resources^[17], DOC illustrates that the needed resources are not located in the M-3 District and that Pierce Transit provides limited bus service between downtown and the port industrial yard between 5:25 and 7:47 a.m. and 3:32 and 5:11 p.m., but no midday, evening or weekend service. DOC PHB, at 14, Ex. XIV-A. Finally, DOC relies upon State DOC v. Kennewick^[18] for the proposition that inaccurate stereotypes and

popular prejudices or generalized community displeasure cannot justify zoning restrictions. DOC PHB, at 12 and 15.

In response, the City does not counter DOC's land availability evidence, or rebut the access and community displeasure arguments.^[19] Instead, the City contends it is regulating, not precluding, the siting of work release facilities. To support this contention, the City equates work release facilities with adult movie theaters (*citing: City of Renton v. Playtime Theaters Inc.*, 475 U.S. 41, 106 S. Ct. 925 (1986) and suggests that the state should fend for itself in the real estate market, "the State must . . . pay the commercial going rate for locations of the facilities in the M-3 Zoning district or, in the alternative, use its powers of condemnation" Tacoma Response, at 10. The City then asserts that the contaminated sites or the sites already developed for industrial port purposes "are, in fact, legally available for siting correctional facilities." Tacoma Response, at 9-11. The City also emphasizes that it has "grand fathered" existing work release facilities that are already in the City. Tacoma Response, at 7, 9.

DOC replies that the economic indifference at play in the siting of adult pornographic theaters should not be controlling when siting, at public expense, an essential public facility, such as a work release facility. Further, DOC indicates that it is not seeking a subsidy or bargain prices, instead it will pay market prices if it must site a facility in Tacoma. DOC Reply, at 3-5.

Regarding the availability of land, the Board finds that DOC has carried its burden of proof; the Board agrees with DOC. Limiting work release facilities to the M-3 zoning designation where the availability of non-developed, non-contaminated sites is problematic effectively precludes the siting of new work release facilities from being located within the City of Tacoma. Also, the Board recognizes that work release facilities are more analogous to residential uses than adult theaters. The Board notes, ironically, that the City prohibits residential uses and theaters in the M-3 district.^[20]

Regarding Tacoma's "grand-fathering"^[21] of work release facilities, the Board notes that prior to the present Ordinance, work release facilities were allowed in various zones, but under the Ordinance they are prohibited from *all zones* except the M-3 district. But for the new prohibitions of the Ordinance, the "grand-fathering" of existing work release facilities within their present zoning districts would not be necessary. The City should be aware that RCW 36.70A.200 prohibits the City from not allowing the expansion of existing essential public facilities^[22] as well as precluding new essential public facilities.

The Board finds that the City's adoption of Ordinance No. 26565, which limits the location of new work release facilities to the City's M-3 (Heavy Industrial District) makes it impracticable for DOC to site work release facilities in the City of Tacoma. The task of siting a work release

facility in Tacoma is incapable of being performed or accomplished by DOC given the means and resources at its command. The City's action was **clearly erroneous**. The Ordinance is preclusive.

- The Board finds that Tacoma's action of adopting a limitation on the siting of work release facilities to the M-3 zoning district, with conditions, as set forth in the Ordinance [TMC 13.06.375 (B)(15) and .340] preclude the siting of work release facilities within the City of Tacoma and **do not comply** with the essential public facility requirements of RCW 36.70A.200.

- 1000' Buffer:

DOC also asserts that the 1000' buffer is preclusive. Further, DOC states, "[the buffer is] undermined by the lack of any objective analysis indicating that work release facilities are incompatible with each of the several 'sensitive uses' identified [in the Ordinance]. The only basis offered for these preclusive buffers was the kind rejected by the court of appeals in State v. Kennewick – unsubstantiated fears and generalized community displeasure." DOC PHB, at 15. The record also contains statistical information provided by DOC to the City (Ex. IX-M, IX-FF and XIV-A) regarding its work release program. In response, Tacoma argues that a 1000' buffer requirement between work release facilities and any residential zones, various daycare facilities, foster homes, crisis care clinics, group homes, schools, parks and open spaces is "logical given the potential for criminal activity by the work release inmates given the amount of recidivism of the persons in the work release program. (Exhibit VII.E)." Tacoma Response, at 12.

Perusal of the attachments in Exhibit VIII-E reveals no direct evidence on the question of - Why 1000' buffers? The only evidence the Board can discern from the Exhibit cited by Tacoma that appears to have any relevance to the Tacoma's contention, are the following comments: "The people in these homes are dangerous," and DOC testimony that "The City is "zoning out" work release." The only supporting evidence for a 1000' buffer that Tacoma cites seems to be a statement based on perception, unsubstantiated fear or community displeasure.

As DOC argues in reply, "Tacoma can point to no evidence indicating that these facilities increase criminal activity or, more importantly, that recidivism tends to occur within 1000 feet of a facility itself. ^[23]" DOC Reply at 8-9. The Board also notes that the record contains evidence provided by DOC regarding its work release program, success rates, number of offenders, escapes from work release and crimes related to escapes. Ex. IX.M, IX.FF and XIV.A. This information appears to contradict the "logic" for Tacoma's 1000' buffer requirement. Therefore, the Board finds that the 1000' buffer requirement of the Ordinance [TMC 13.06.388(C)(2)] was **clearly erroneous** and precludes the siting of essential public facilities (work release facilities) within the City of Tacoma. The Ordinance **does not comply** with the essential public facility requirements of RCW 36.70A.200.

Conclusion

Based upon Tacoma's lack of argument, concessions of preemption made by the City in its brief, and DOC's arguments, the Board concludes that the City's action of adopting the provisions of the Ordinance that include: a 16 bed capacity limitation; [24] internal staffing requirements; [25] resident eligibility restrictions; [26] internal security plan requirements; [27] and provisions to demonstrate need; [28] was **clearly erroneous**. These provisions preclude the siting of work release facilities, within the City of Tacoma and **do not comply** with the essential public facility requirements of RCW 36.70A.200.

The Board concludes that Tacoma's action of adopting a limitation on the siting of work release facilities to the M-3 zoning district, with conditions, as set forth in the Ordinance [TMC 13.06.375 (B)(15) and .340] was **clearly erroneous**. These provisions preclude the siting of work release facilities within the City of Tacoma and **do not comply** with the essential public facility requirements of RCW 36.70A.200.

The Board concludes that Tacoma's adoption of a 1000' buffer requirement in the Ordinance [TMC 13.06.388(C)(2)] was **clearly erroneous**. This provision precludes the siting of work release facilities within the City of Tacoma and **does not comply** with the essential public facility requirements of RCW 36.70A.200.

Pursuant to the Settlement Agreement between the City and DSHS, the City of Tacoma stipulates:

1. **The City of Tacoma failed to comply with the essential public facility siting requirements of RCW 36.70A.200** when it adopted Ordinance No. 26565, amending Chapter 13.06 of the Tacoma Municipal Code, **pertaining to juvenile community facilities**, because the Ordinance's amendments, individually and cumulatively, preclude the siting of such EPFs.

Agreement, at 2, (emphasis supplied).

Legal Issue No. 2

2. *Did the City fail to comply with the consistency requirements for a fair, coordinated and interjurisdictional EPF siting process, as provided for in RCW 36.70A.210(3), Pierce County County-wide Planning Policies (CPPs) on Siting of Public Capital Facilities of a County-wide or State-wide Nature and Tacoma's Comprehensive Plan policies on Intergovernmental Coordination and Siting,*

when it enacted the Ordinance, because it authorizes the Land Use Administrator to reject proposed work release facilities or juvenile community facilities based upon an unguided and subjective assessment of whether the proposed location furthers an equitable distribution of EPFs within the region and state?^[29]

Applicable Law and Discussion

DOC contends that the City may not preclude state work release facilities based upon its own assessment of whether the City has already accepted its “fair share” of such facilities. DOC cites to WAC 365-195-340(2)(b)(iii) and prior Board cases^[30] to support its contention. DOC PHB, at 18-19. In response, the City concedes, “Although an extremely important issue to the City, the “fair share” or equitable distribution of the State’s correctional facilities cannot at this time, prior to future legislative changes, be made a touchstone of any EPF siting regulation enacted by the City.” Tacoma Response, at 13-14, (emphasis supplied). The City also notes that “work release facilities do not exist in surrounding communities of Lakewood, University Place, Milton, Puyallup, Sumner, Steilacoom and Fircrest, making the term “fair share” an obvious bone of contention to the City and a phrase that rings hollow . . . (citations omitted).” Tacoma Response, at 14. In reply, DOC notes, “Tacoma concedes that its “fair share” provisions must not be used to restrict the siting of essential public facilities. DOC Reply, at 2.

In *Hapsmith v. City of Auburn*, CPSGMHB Case No. 95-3-0075c, Final Decision and Order (May 10, 1996), at 40, the Board stated: “[A] city cannot . . . reject the siting of an essential public facility on the grounds that other jurisdictions have not taken an equitable share of such facilities.” The Board still adheres to this statement.

The Board acknowledges Tacoma’s assertion that work release facilities do not exist in surrounding communities, but notes that the record indicates: 1) surrounding communities allow for the siting of such facilities (Ex. IX-CC); and 2) relevant evidence contained in the record indicates that the majority of residents pending release give Tacoma as their address or are from Tacoma (Ex. X-A, XIV-A, at 16). Nonetheless, the Board concurs with both DOC and the City in that Tacoma may not rely upon its own interpretation of “fair share” as the basis for EPF siting regulations.

However, the Board disagrees with Tacoma’s assessment that future changes to EPF siting based upon “fair share” may only be accomplished by the Legislature. RCW 36.70A.210(3)(c) provides that County-wide Planning Policies must address, “Policies for siting public capital facilities of a county-wide or state-wide nature” Consequently, Tacoma, Pierce County and other Pierce County cities, working with state agencies such as DOC, could conceivably establish a process or procedure for the equitable distribution of EPFs within the County and among the

cities within the County, absent involvement of the Legislature. Nonetheless, Tacoma’s present “fair share” provisions are **clearly erroneous** and must fail. The Board finds that the Ordinance [TMC 13.06.388(A) and 13.06.388(D)(2)], **do not comply** with the requirements of the Act (RCW 36.70A.210(3)).

Conclusion

The Board concludes that Tacoma’s adoption of a “fair share or equitable distribution” provisions of the Ordinance [TMC 13.06.388(A) and 13.06.388(D)(2)] was **clearly erroneous**. The Ordinance **does not comply** with the requirements of RCW 36.70A.210(3).

Pursuant to the Settlement Agreement between the City and DSHS, the City of Tacoma stipulates:

2. **The City failed to comply with the consistency requirements for a fair, coordinated and interjurisdictional EPF siting process, as provided for in RCW 36.70A.210(3),** Pierce County [CPPs for facilities of a] County-wide or State-wide Nature and Tacoma’s Comprehensive Plan Policies on Intergovernmental Coordination and Siting, when it enacted Ordinance No. 26565, because it authorizes the Land Use Administrator to reject proposed **juvenile community facilities** based upon an independent, unguided and subjective assessment of whether the proposed location furthers and equitable distribution of EPFs within the region and state.

Agreement, at 3, (emphasis supplied).

Legal Issue No. 3

3. *Did the City fail to comply with the notice and public participation requirements of RCW 36.70A.035, .106, .130 and .140 when it adopted the Ordinance, because the City failed to provide adequate notice and opportunity for review and comment prior to its adoption?*^[31]

Applicable Law and Discussion

In the May 2, 2000, PHO for this case, both DSHS and DOC stipulated:

4. Both DOC and DSHS participated in opportunities for review and comment on Substitute Ordinance No. 26565. Each agency was identified by the City of Tacoma as an interested and affected party for purposes of the GMA. The City of Tacoma recognized that each agency was a reviewer and/or advisory committee member with a known interest in the proposed amendments.

PHO, at 6. Further, in the Settlement Agreement, DSHS acknowledges that, except for the adoption of portions of Section 11 of Substitute Ordinance No. 26565, “the City in general did comply with notice and opportunity for review and comment in its adoption process.” Agreement, footnote 1, at 3.

DOC only challenges the City’s compliance with the Act’s notice and public participation requirements as they relate to the minimum staffing ratios (TMC 13.06.388(C)(5)) and inmate eligibility criteria (TMC 13.06.388(C)(4)) for work release facilities. These changes were introduced and made on January 25, 2000, the day the Ordinance was adopted by the City. DOC challenges these [Ordinance 26565, Section 11, amending TMC 13.06.388(C)(4) and (5)] “eleventh hour additions.” DOC PHB, at 22. Not only does Tacoma concede that these amendments are “preempted by the State’s authority,” but the City also agrees that “*But for those changes, public notice and participation was correctly made by the City . . . those changes will now be removed by the City.*” Tacoma Response, at 15, (emphasis supplied).

The Board again concurs with DOC and the City. Tacoma’s adoption of the resident eligibility and internal staffing provisions for work release facilities was **clearly erroneous** and must fail. The Board concludes Tacoma’s adoption of the Ordinance [TMC 13.06.388(C)(4) and 13.06.388(C)(5)], **does not comply** with the notice and public participation requirements of the Act (RCW 36.70A.035, .106, .130 and .140).

Conclusion

The Board concludes that Tacoma’s adoption of the internal staffing and resident eligibility provisions in the Ordinance [TMC 13.06.388(C)(4) and 13.06.388(C)(5)] was **clearly erroneous**. The Ordinance **does not comply** with the notice and public participation requirements of RCW 36.70A.035, .106, .130 and .140.

Pursuant to the Settlement Agreement between the City and DSHS, the City of Tacoma stipulates:

- 3. The City failed to comply with the notice and public participation requirements of RCW 36.70A.035, .106, .130, and .140** when it adopted [Section 11 of] Ordinance No. 26565 for review and comment prior to its adoption.

Agreement, at 3.

Legal Issue No. 4

- 4. *If the City has failed to comply with the requirements of RCW***

36.70A.200, .210, .035, .106, .130 or .140, does such noncompliance substantially interfere with Goals 1, 2, 11 or 12 (RCW 36.70A.020(1), (2), (11) and (12)) thereby supporting a determination of invalidity? [\[32\]](#)

Applicable Law and Discussion

DSHS does not seek a determination of invalidity. Agreement, at 3. However, DOC asks the Board to enter a determination of invalidity for Tacoma's Ordinance No. 26565, specifically provisions contained in Sections 8, 10 and 11. PFR, at 13-14, DOC PHB, at 23-24, DOC Reply, at 9-10, DOC Answer, at 2.

RCW 36.70A.302 provides:

- (1) A board may determine that part or all of a comprehensive plan or development regulations are invalid if the board:
 - (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70a.300;
 - (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
 - (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.
- (2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.

The Board has found that many of the provisions of the Ordinance **do not comply** with provisions of the GMA and the Board will **remand** the matter to the City so compliance can be achieved. However, to enter a determination of invalidity, the Board must find that the Ordinance substantially interferes with the fulfillment of the goals of the Act.

DOC suggests the Ordinance substantially interferes with Goals 1, 2, 11, and 12 [Urban growth, Reduce sprawl, Citizen participation and coordination and Public facilities and services goals, respectively] of the GMA. DOC PHB, at 23. While DOC offers virtually no argument regarding goals 1, 2 and 11, DOC does argue, "The mandatory and continuing duty not to preclude essential

state facilities is *implicit* in the “public facilities goal of RCW 36.70A.020(12). ^[33]” DOC PHB, at 23, (emphasis supplied).

In response, the City asks:

“There are parts of the ordinance, for example, the definition of work release center [and] juvenile community facility that are valid on their faces and have not been argued to be in contradiction of the GMA. It is noted that the ordinance (section 12) does have a severability clause. *The City would ask that the Board issue an order of noncompliance to allow the City to go back to the drawing board and modify this ordinance as expeditiously as possible to come into compliance with the Act It is stipulated that some amendments are necessary in the ordinance to bring it into full compliance with the GMA, and the City continues, as this is written, to make those changes.*”

Tacoma Response, at 17-18, (emphasis supplied).

DOC does not relent, in its reply DOC states,

Despite the one-sided nature of the record, the ordinance became more and more preclusive and, even with the strategic concessions offered at this late hour, presents substantial interference with the GMA’s goals. [DOC goes on to quote testimony of the sponsor of the Ordinance regarding the advantages of dilatory legal proceedings] At this point, it appears that an order of noncompliance would merely create the opportunity for a series of dilatory compliance hearings, with repeated efforts to define an ordinance that is preclusive as is legally possible. . . . Under these circumstances, an order of invalidity will provide the necessary incentive for timely and appropriate corrections of the substantial interference with the GMA’s goals.

DOC Reply, at 10.

To accept DOC’s argument that RCW 36.70A.020(12) *implicitly* encompasses the non-preclusionary requirements of RCW 36.70A.200, the Board would have to see evidence that Tacoma had identified work release facilities as services necessary to support development and that the City has established minimum service levels for such facilities. This case has not been made, nor has DOC made a case for substantial interference with any of the other goals cited. However, the Board is concerned that the City ensures coordination between communities and jurisdictions, including DOC, to reconcile conflicts. Nonetheless, DOC’s request for a determination of invalidity regarding Ordinance No. 26565 is **denied**.

The Board will accept Tacoma's plea for an **Order of Noncompliance** and time to correct and/or replace the Ordinance to bring it into compliance with the Act. To allay DOC's concerns over delay in rectifying deficiencies in the Ordinance, the Board will establish the date of the compliance hearing and briefing schedule in this Order. At the compliance hearing and thereafter, the Board may revisit the question of invalidity and/or recommend sanctions if continuing noncompliance is found. *See* RCW 36.70A.330.

At the HOM the City indicated that in late July it began working on an ordinance revising the TMC as it pertains to juvenile community facilities. The revisions are anticipated to comply with the Act and the terms of the Agreement with DSHS. Tacoma expected adoption of such revisions by the end of October. Tacoma also indicated that a similar period of time (90-100 days) would likely be necessary to address similar revisions to the TMC pertaining to work release facilities. The Board has considered these comments in establishing the compliance period and setting compliance dates.

Conclusion

DOC's request for a determination of invalidity regarding provisions of Ordinance No. 26565 is **denied**.

V. ORDER

Based upon review of the PFR, the briefs and exhibits submitted by the parties, the GMA, prior decisions by the Boards and the Courts, having considered the arguments of the parties, and having deliberated on the matter the Board ORDERS:

The City of Tacoma's adoption of Substitute Ordinance No. 26565 **was clearly erroneous** and **does not comply** with the requirements of RCW 36.70A.035, .106, .130, .140, .200 and .210, as set forth in this Final Decision and Order (**FDO**) and the Settlement Agreement.

The Board therefore **remands** the **entire Ordinance** to the City with the following directions:

1. In order to comply with the provisions of RCW 36.70A.200, .210(3), .035, .106, .130 and .140. as set forth in the October 25, 2000, "Agreed Stipulation Between DSHS and City of Tacoma," and as reflected in this FDO, as they apply to ***juvenile community facilities***, the Board directs the City of Tacoma as follows:

- By no later than **4:00 p.m. Monday – December 11, 2000**, the City shall take appropriate legislative action to comply with the requirements of the GMA, as agreed to in the Settlement Agreement, and as mirrored in this FDO, regarding juvenile community facilities.
- By no later than **4:00 p.m. Monday – December 18, 2000**, the City shall file with the Board an original and four copies of a Statement of Actions to Comply (SATC) with the GMA, as set forth in the Agreement and this FDO. The City shall simultaneously serve a copy of the SATC on Petitioner DSHS.
- DSHS may comment on the SATC by no later than **4:00 p.m. Monday - January 8, 2001**. The Board will then schedule a compliance hearing.

2. In order to comply with the provisions of RCW 36.70A.200, .210(3), .035, .106, .130 and .140. as set forth and interpreted in this FDO, as they apply to *work release facilities*, the Board directs the City of Tacoma as follows:

- By no later than **4:00 p.m. on Monday, February 26, 2001**, the City shall take appropriate legislative action to comply with the requirements of the GMA, as set forth in this FDO, regarding work release facilities.
- By no later than **4:00 p.m. on Monday, March 5, 2001**, the City shall file with the Board an original and four copies of a Statement of Actions Taken to Comply with this Final Decision and Order (the SATC) and shall simultaneously serve a copy on Petitioner DOC.
- By no later than **4:00 p.m. on Monday, March 19, 2001**, Petitioner DOC *may* file with the Board an original and four copies of a Memorandum in Response to the SATC, and shall simultaneously serve a copy on the City.
- By no later than **4:00 p.m. on Friday, March 23, 2001**, the City *may* file with the Board an original and four copies of a Reply Memorandum, and shall simultaneously serve a copy on Petitioner DOC.
- By no later than **4:00 p.m. on Tuesday, March 27, 2001**, Petitioner DOC *may* file with the Board an original and four copies of a Rebuttal Memorandum, and shall simultaneously serve a copy on the City.

Pursuant to RCW 36.70A.330(1), the Board gives Notice of Compliance Hearing in this matter to be held at **10 a.m. on Thursday, March 29th, 2001** in Room 1022 of the Financial Center, 1215 Fourth Avenue, Seattle.

So ORDERED this 20th day of November 2000.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

Lois H. North
Board Member

Joseph W. Tovar, AICP
Board Member

Note: 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.

[1] The parties mutually agreed and stipulated that all the parties have proper standing in this matter. *See*: PHO, at 6. Pursuant to RCW 36.70A.310 the governor granted the request of DOC and DSHS to appeal Tacoma's Ordinance to the CPSGMHB. Letter of 3/23/00, attached to PFR.

[2] The parties mutually agreed and stipulated that the Board has proper jurisdiction over this matter. *See*: PHO, at 6.

[3] *See* "Agreed Stipulation Between DSHS and City of Tacoma," October 25, 2000, signed by all parties.

[4] The Board notes that DOC did not reference any of the stipulations or terms of the Agreement in any part of its briefing or oral argument.

[5] This Legal Issue is intended to include specific issues 4.1, 4.2, 4.4 through 4.13 from the PFR. The Board notes that specific issues 4.8 and 4.9 only apply to juvenile community facilities and specific issue 4.11 only applies to work release facilities. The Board also notes that the City did not stipulate to Board jurisdiction regarding specific issues 4.12 and 4.13 from the PFR. However, Tacoma did not subsequently challenge the jurisdiction of the Board on these issues.

[6] *See also*, Des Moines v. Puget Sound Council, 98 Wn. App. 23, 988 P.2d 27 (1999), at 34.

[7] Likewise, juvenile community facilities are undisputed essential public facilities.

[8] See also, State DOC v. Kennewick, 86 Wn. App. 521, at 533-34, 937 P.2d 1119, (1997).

[9] Ordinance No. 26565, Section 10 [TMC 13.06.375(B)(15)] and Exhibit XIV-K.

[10] Ordinance No. 26565, Section 11 [TMC 13.06.388(C)(2)]

[11] Ordinance No. 26565, Sections 8, 10 and 11 [TMC 13.06.340(2)(b), TMC 13.06.375(B)(15) and TMC 13.06.388(C)(1)]

[12] Ordinance No. 26565, Section 11 [TMC 13.06.388(C)(4)]

[13] Ordinance No. 26565, Section 11 [TMC 13.06.388(C)(5)]

[14] Ordinance No. 26565, Section 11 [TMC 13.06.388(D)(3)]

[15] Ordinance No. 26565, Section 11 [TMC 13.06.388(D)(1)]

[16] Ordinance No. 26565, Section 11 [TMC 13.06.388(A) and TMC 13.06.388(D)(2)]

[17] DOC identifies these needed resources as: employment, transit, courts, substance abuse, anger management and mental health community resources. Ex. XIV-A, at 16.

[18] 86 Wn. App. 521, 937 P.2d 1119 (1997)

[19] The City does assert that the Kennewick case is fact specific to denial of a conditional use permit, and not applicable to the present case. However, the Board is not persuaded by this factual distinction.

[20] “All residential uses, except for juvenile community facilities and work release facilities, are prohibited in the M-3 Heavy Industrial Districts, except for caretakers or watchmen. Group care homes, day care centers, nursery schools, and theaters are prohibited from the M-3 Heavy Industrial Districts.” Ex. IV-K, Ord. 26565, Section 8, at 45, (emphasis supplied).

[21] “Grand-fathering,” generally means that uses that are now prohibited in a district are allowed to continue, and according to Tacoma, expand. Tacoma Response, at 7 and 9.

[22] See, *Port of Seattle v. City of Des Moines*, CPSGMHB Case No. 97-3-0014c, Final Decision and Order, (Aug. 13, 1997), at 7. “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.”

[23] DOC notes in a footnote: “If logic is the guide, it is likely that recidivism by work release residents takes place away from the facility, by resident who fail to return from their workplace, or who otherwise seek to avoid the supervision provided by the facility.” DOC Reply, at 9.

[24] Ordinance No. 26565, Sections 8, 10 and 11 [TMC 13.06.340(2)(b), TMC 13.06.375(B)(15) and TMC 13.06.388(C)(1)]

[25] Ordinance No. 26565, Section 11 [TMC 13.06.388(C)(4)]

[26] Ordinance No. 26565, Section 11 [TMC 13.06.388(C)(5)]

[27] Ordinance No. 26565, Section 11 [TMC 13.06.388(D)(3)]

[28] Ordinance No. 26565, Section 11 [TMC 13.06.388(D)(1)]

[29] This Legal Issue is intended to include specific issue 4.14 from the PFR. The Presiding Officer reworded this Legal Issue in an attempt to capture the thrust of the proposed revision of the May 2, 2000 DOC/DSHS letter,

without introducing alleged RCW violations that were not within the scope of the March 27, 2000 PFR.

[30] *See: Port of Seattle v. City of Des Moines*, CPSGMHB Case No. 97-3-0014, Final Decision and Order (August 13, 1997); and *Hapsmith v. City of Auburn*, CPSGMHB Case No. 95-3-0075c, Final Decision and Order (May 10, 1996).

[31] This Legal Issue is intended to include specific issues 4.15 and 4.16 from the PFR.

[32] This Legal Issue is intended to include specific issue 4.3 from the PFR.

[33] RCW 36.70A.020(12) provides:

Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.