

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

KING COUNTY,	)	
	)	<b>Case No. 03-3-0011</b>
Petitioner,	)	
	)	
and	)	<b>FINAL DECISION AND ORDER</b>
	)	
CITY OF RENTON,	)	
	)	
Intervenor,	)	
	)	
v.	)	
	)	
SNOHOMISH COUNTY,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
CITY OF EDMONDS,	)	
	)	
Intervenor.	)	
	)	

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**I. CASE SYNOPSIS**

Petitioner King County challenged Respondent Snohomish County’s adoption of Ordinance No. 03-006, which amended the permit review provisions of the Snohomish County Code regarding Essential Public Facilities. The City of Renton intervened on the side of King County, the City of Edmonds intervened on the side of Snohomish County, and the Puget Sound Water Quality Defense Fund participated as an amicus curiae.

The Central Puget Sound Growth Management Hearings Board concluded that Snohomish County’s Ordinance failed to comply with the Growth Management Act’s requirement that local government development regulations not preclude the siting of Essential Public Facilities. The Board also determined that the Ordinance was not in compliance with the GMA goal that development permits be processed in a timely, fair and predictable manner, and therefore

invalidated the Ordinance.

The Board has remanded the Ordinance to Snohomish County with direction that legislative action be taken to bring the Snohomish County Code into compliance with the goals and requirements of the Growth Management Act.

## **II. PROCEDURAL HISTORY**

On April 16, 2003, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a “Petition for Review and Request for Declaratory Ruling” (**PFR**) from King County (**Petitioner, King** or **King County**). Petitioner challenges the adoption by Snohomish County (**Respondent, Snohomish County** or **Snohomish**) of Ordinance No. 03-006. The basis for the challenge is alleged noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**). The matter was assigned Case No. 03-3-0011, and is hereafter referred to as *King County v. Snohomish County*. Board member Joseph W. Tovar is the Presiding Officer for this matter.

On April 22, 2003, the Board received a “Notice of Appearance” from legal counsel for Snohomish County.

On May 15, 2003, the Board received a “Motion to Intervene” (the **Motion to Intervene**) from the City of Renton (**Renton**), together with the “Declaration of Gregg Zimmerman in Support of Renton’s Motion to Intervene,” and the “Declaration of Jesse Tanner in Support of Renton’s Motion to Intervene” which had attached Exhibits A through D.

On May 16, 2003, the Board received “Snohomish County’s Index of the Record” (the **Index**). Later this same date, the Board received “Petitioner’s Statement of Issues for Pre-Hearing Conference.”

On May 19, 2003, the Board conducted the prehearing conference beginning at 10:00 a.m. in the Board’s office at 900 Fourth Avenue in Seattle. Present for the Board were Edward G. McGuire and Joseph W. Tovar, presiding officer. Representing Petitioner King County were J. Tayloe Washburn, Susan Drummond and Verna Bromley. Representing Snohomish County were Barbara J. Dykes and Courtney E. Flora. Representing potential intervenor City of Renton was Lawrence J. Warren. Also in attendance was Corinne Hensley for the Sno-King Environmental Alliance. The parties presented brief oral arguments regarding Renton’s Motion to Intervene. Snohomish opposed the Motion to Intervene, while King and the City supported it. The presiding officer indicated that he would rule on the Motion to Intervene by subsequent order. The parties then discussed with the Board the schedule and potential legal issues. At the conclusion of the prehearing conference, the presiding officer asked King County to submit a final statement of issues with specific clarification of several points.

On May 20, 2003, the Board received “Revised Petitioner’s Statement of Issues.”

On May 21, 2003, the Board issued “Prehearing Order and Order Granting Motion to Intervene” (the **PHO**). The PHO set forth the three legal issues in this case, adopted a schedule for the submittal of pleadings, and granted intervention to the City of Renton.

On May 23, 2003, the Board received the “City of Edmonds’ Motion to Intervene” (the **Edmonds Motion to Intervene**).

On May 30, 2003, the Board received a “Proposed Stipulation and Order Granting City of Edmond’s Motion to Intervene.”

On, June 2, 2003, the Board issued “Order Granting Edmonds Motion to Intervene and Order Revising Final Schedule” which granted intervention to the City of Edmonds and stated that the Hearing on the Merits would begin at 10:00 a.m. on August 21, 2003.

On June 10, 2003, the Board received “King County’s Motion to Supplement the Record or Take Official Notice” (**King County’s Motion**) and “Snohomish County’s Motion to Dismiss Legal Issue 2.C and Paragraph 11.2 of the Petition for Review for Lack of Jurisdiction (**Snohomish County’s Motion**).

On June 30, 2003, the Board received “King County’s Response to Snohomish County’s Motion to Dismiss Issue 2.C and Paragraph 11.2 of the Petition for Review” and “Snohomish County’s Response to King County’s Motion to Supplement the Record.”

On July 1, 2003, the Board received “Snohomish County’s Revised Index to the Record.”

On July 9, 2003, the Board received “King County’s Rebuttal Brief on Motion to Supplement the Record” and “Snohomish County’s Reply in Support of its Motion to Dismiss Issue 2.C and Paragraph 11.2 of the Petition for Review.”

On July 15, 2003, the Board issued “Order on Motions.”

On July 16, 2003, the Board received “Snohomish County’s Motion for Clarification and Additional Supplementation of the Record.” On this same date, the Board received from the Puget Sound Water Quality Defense Fund (**PSWQDF**) a “Motion of Puget Sound Water Quality Defense Fund for Leave to File an Amicus Curiae Brief.” On July 17, 2003, the Board received “King County’s Response to Snohomish County’s Clarification and Additional Supplementation of the Record.”

On July 18, 2003, the Board received from Snohomish “Reply to King County’s Response to Snohomish County’s Motion for Clarification and Additional Supplementation of the Record.”

On July 21, 2003, the Board issued “Order on Motion for Clarification and Additional Supplementation of the Record and Order Regarding PSWQDF’s Motion for Amicus.”

On July 22, 2003, the Board received “Snohomish County’s Objection to Motion for Puget Sound Water Quality Defense Fund for Amicus Status.”

On July 23, 2003, the Board issued “Order Granting Motion for Amicus.”

On July 25, 2003, the Board received from Snohomish County “Reply to King County’s Response to Snohomish County’s Motion for Clarification and Additional Supplementation of the Record.”

On July 29, 2003, the Board received the following pleadings: “City of Renton’s Prehearing Brief” (the **Renton PHB**); “Brief of Amicus Curiae Puget Sound Water Quality Defense Fund” (the **Amicus Brief**); and King County’s Pre-Hearing Memorandum” (the **King County PHB**).

On August 7, 2003, the Board received “Amended Citations to King County’s Pre-Hearing Memorandum, Based on Snohomish County’s Certified Transcripts” (**King County’s Amended Citations**.)

On August 12, 2003, the Board received “City of Edmonds’ Pre-Hearing Brief” (the **Edmonds PHB**) attached to which was the “Declaration of Stephen Clifton” (the **Clifton Declaration**.) On this same date, the Board received “Snohomish County’s Prehearing Brief” (the **Snohomish County PHB**).

On August 15, 2003, the Board received “King County’s Response Brief” (the **King Response**). Also on this date, the Board issued “Order Revising Start Time for hearing on the Merits and Schedule for Oral Argument.”

On August 18, 2003, the Board received a “Notice of Withdrawal” from Courtney Flora of the Snohomish County Prosecutor’s Office.

The Board conducted the hearing on the merits beginning at 10:00 a.m. on August 21, 2003, in the Training Room on the 24<sup>th</sup> Floor of the Bank of California Building, 900 Fourth Ave., Seattle, WA. Present for the Board were Edward G. McGuire, and Joseph W. Tovar, presiding officer. Also present was the Board’s legal extern Lynette Meachum. Barbara J. Dykes represented Snohomish County, J. Zachary Lell represented the City of Edmonds, J. Tayloe

Washburn represented King County, and Lawrence J. Warren represented the City of Renton. Also present for King County were Susan Drummond, Verna Bromley and Bill Blakney. Present for the Puget Sound Water Quality Defense Fund was Rachel Thomas. Court reporting services were provided by Brenda Steinman of Mills & Lessard, Seattle. No witnesses testified. At the conclusion of the hearing, the Board ordered a Transcript (the **Transcript**).

On September 2, 2003, the Board received from Snohomish County the “Declaration of Stacy Phan” (the **Phan Declaration**).

### **III. FINDINGS OF FACT**

1. The Snohomish County Council adopted Amended Ordinance No. 03-006 on February 19, 2003. PFR, Attachment 1.

2. The Title Caption of Ordinance No. 03-006 reads: “AMENDING SNOHOMISH COUNTY CODE TO IMPLEMENT AN ESSENTIAL PUBLIC FACILITY SITING PROCESS; ADDING CHAPTER 30.42D SCC; AMENDING CHAPTER 30.22.020.” *Id.*

3. Snohomish County Code (**SCC**) 30.42C.100 states, in part: “The hearing examiner may approve, approve with conditions, or deny a conditional use permit only when all the following criteria are met.” *Id.*

4. All Snohomish County conditional use permits are evaluated subject to four decision criteria. These are:

The hearing examiner may approve, approve with conditions, or deny a conditional use permit only when all the following criteria are met:

(a) The proposal is consistent with the comprehensive plan;

(b) The proposal complies with applicable requirements of this title;

(c) The proposal will not be materially detrimental to uses or property in the immediate vicinity; and

(d) The proposal is compatible with and incorporates specific features, conditions or revisions that ensure it responds appropriately to the existing or intended character, appearance, quality of development, and physical characteristics of the site and surrounding property.

SCC 30.42C.100.

5. SCC 30.42D.060 contains the decision criteria for “any essential public facilities

determined to be difficult to site.” This section of the SCC reads:

An application for conditional use permit approval for any essential public facility determined to be difficult to site must comply with conditional use permit requirements, any applicable requirements for the proposed use, and the following site decision criteria:

- (1) The project sponsor has demonstrated a need for the project, as supported by an analysis of the projected service population, an inventory of the existing and planned comparable facilities, and the projected demand for the type of facility proposed.
- (2) If applicable, the project would serve a significant share of the county’s population or service area, and the proposed site will reasonably serve the project’s overall service population.
- (3) The sponsor has reasonably investigated alternative sites, as evidenced by a detailed explanation of site selection methodology, as verified by the County and reviewed by associated jurisdictions and agencies.
- (4) The project is consistent with the sponsor’s own long-range plans for facilities and operations, as well as the plans of those jurisdictions and agencies that may also be participation in a facilities plan.
- (5) The sponsor’s public participation plan has provided an opportunity for public participation in the siting decision and mitigating measures that is appropriate in light of the project’s scope.
- (6) The project will not result in a disproportionate burden of essential public facilities on a particular geographic area.
- (7) The project is consistent and compatible with the county’s comprehensive plan county-wide planning policies and local land use regulations as well as consistent and compatible with other land use plans applicable to the host community.
- (8) The project site meets the facility’s minimum physical site requirements, including projected expansion needs. Site requirements may be determined by the minimum size of the facility, access, support facilities, topography, geology, and on-site mitigation needs. The sponsor shall identify future expansion needs of the proposed facility during the initial environmental review and the phasing of additional needs early in the process.
- (9) The project site, as developed with the proposed facility and under the proposed mitigation plan, is compatible with surrounding land uses.

(10) The sponsor has proposed mitigation measures that substantially avoid, reduce, or compensate for adverse impacts on the environment, including but not limited to buffers, impervious surfaces, design elements and other operational or programmatic measures contained in the proposal.

*Id.*

#### **Iv. STANDARD OF REVIEW/BURDEN OF PROOF/deference**

##### **A. Board Review of Local Government Decisions**

Petitioner King County challenges Snohomish County’s adoption of Ordinance No. 03-006 alleging that the Ordinance does not comply with the goals and requirements of the Growth Management Act. Pursuant to RCW 36.70A.320(1), Ordinance Nos. 03-006, is presumed valid upon adoption by Snohomish County. King County bears the **burden of proof** of overcoming Snohomish County’s presumption of validity by presenting evidence and argument that demonstrates clear error.

The Board is directed by RCW 36.70A.320(3) to review the challenged action using the “**clearly erroneous**” **standard of review**. The Board “shall find compliance unless it determines that the actions taken by [a city or county] are 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 Snohomish County’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).

Pursuant to RCW 36.70A.3201, the Board will grant **deference** to Snohomish County in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. In 2000, the State Supreme Court reviewed RCW 36.70A.3201 and clarified that, “Local discretion is bounded . . . by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board (King County)*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000).

In 2001, Division II of the Court of Appeals further clarified, “Consistent with *King County*, and notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not ‘consistent with the requirements and goals of the GMA.’” *Cooper Point Association v. Thurston County*, No. 26425-1-II, 108 Wn. App. 429, 31 P.3d 28 (Wn.App. Div. II, 2001). In 2002, the Supreme Court affirmed the Court of Appeals decision in *Cooper Point*. *Thurston County v. Western Washington Growth Management Hearing Board*, Docket No. 71746-0, November 21, 2002, at 7.

## B. Judicial Review of Board Decisions

Any party aggrieved by a final decision by a growth management hearings board may appeal the decision to superior court as provided in RCW 34.05.514 or 36.01.050 within thirty days of the final order of the Board. RCW 36.70A.300(5).

RCW 36.70A.260(1) requires that board members be “qualified by experience or training in matters pertaining to land use planning.” The Board has been endowed by the legislature with

[1]

quasi-judicial functions due to its expertise in land use planning. Accordingly, under the Administrative Procedures Act, a reviewing court accords substantial weight to this agency’s interpretation of the law. The Supreme Court, in *Cooper Point*, specifically affirmed this standard of review of a Growth Management Hearings Board decision:

Although we review questions of law *de novo*, we give substantial weight to the Board’s interpretation of the statute it administers. *See Redmond*, 136 Wn.2d at 46. Indeed “[I]t is well settled that deference [to the Board] is appropriate where an administrative agency’s construction of statutes is within the agency’s field of expertise . . .

*Id.*

### v. board jurisdiction

The Board finds that King County’s PFR was timely filed, pursuant to RCW 36.70A.290(2); that King County has standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged Ordinance, pursuant to RCW 36.70A.280(1)(a).

## VI. LEGAL ISSUES

### A. PREFATORY NOTE

The full text of the three legal issues is set forth in Appendix A. The Board Order on Motions dismissed Legal Issue 2.C. The Board will organize its analysis of the legal issues into two broad categories: allegations of noncompliance with the provisions of RCW 36.70A.200 (Essential Public Facility or EPF provisions) [Section VI.B]; and allegations of noncompliance with RCW 36.70A.070(preamble) due to inconsistency with the County’s comprehensive plan itself [Section VI.C]. Legal Issues 1 and 2 are addressed in Section VI.B; Legal Issue 3 is addressed in Section VI.C.

## **B. LEGAL ISSUES ADDRESSING NONCOMPLIANCE WITH THE GMA'S ESSENTIAL PUBLIC FACILITIES PROVISIONS**

The heart of the two legal issues in this category are set forth in the “preamble” to each:

### **Legal Issue No. 1**

*Does Snohomish County’s Ordinance No. 03-006 (“EPF ordinance”) violate RCW 36.70A.200 because the ordinance goes beyond regulating the design and requiring reasonable mitigation of adverse impacts to require denial of a proposed EPF on the basis of both general CUP criteria and special EPF CUP siting criteria which are so broad and vague that Snohomish County has virtually unlimited discretion to deny the proposed siting of an EPF?*

### **Legal Issue No. 2**

*Do provisions of the EPF ordinance violate RCW 36.70A.200 by establishing extraordinarily onerous and time-consuming processes, which greatly exceed the regulatory processes applicable to similar projects that are not EPFs and which must be completed as a prerequisite to obtaining approval of the siting of a proposed EPF, because the expense and delay of such processes are likely to directly or indirectly preclude EPF siting, that is, because such extreme procedural requirements may make it impracticable to site a given EPF in Snohomish County or may induce the sponsors of regional EPFs to avoid Snohomish County and choose sites for such EPFs in jurisdictions without such burdensome processes rather than socially, economically, and environmentally optimal sites?*

### **1. Applicable Law**

RCW 36.70A.200 provides in relevant part:

(1) The comprehensive plan of each county and city that is planning under RCW 36.70A.040 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 47.60.140, state and local correctional facilities, solid waste handling facilities, and in-patient facilities including substance abuse facilities, mental health facilities, group homes, and secure community transition facilities as defined in RCW 71.09.020.

....

(5) No local comprehensive plan or development regulation may preclude the siting

of essential public facilities.

## 2. Discussion

### a. Positions of the Parties

#### King County

King County argues that the EPF ordinance renders EPF siting impracticable by requiring a conditional use permit (**CUP**)

Instead of facilitating EPF siting, the CUP requirement calls for denial, that is, preclusion of EPF siting on the basis of criteria that are arbitrary in relation to EPFs because they were designed to serve another purpose that had nothing to do with GMA's requirements for the accommodation of EPFs. Instead of being tailored to specific types of uses, all EPFs subject to the EPF Ordinance must obtain a CUP, even if comparable non-EPF uses are permitted outright.

King County PHB, at 54.

Petitioner also argues that the CUP criteria are preclusive because they “allow Snohomish County to second-guess whether an EPF should be sited at all.” King County PHB, at 56. King states:

The Hearing Examiner is to assess whether the location of the site should be somewhere else, by determining whether the population served is ‘significant,’ (an undefined term), whether the EPF is needed, whether the EPF is compatible with its surroundings, and whether the EPF would result in a disproportionate burden of EPFs at that location. These types of criteria bring up important questions to be asking during the initial siting process. However, it is preclusive to second guess these initial siting decisions.

King County PHB, at 57.

King County contends that Ordinance No. 03-006 precludes EPF siting by imposing “onerous, time-consuming, and uncertain procedural requirements.” King County PHB, at 74. Petitioner argues:

The EPF Ordinance does not merely provide for the possibility of denial, but has built into it a process which is prone to extensive delay and this may mean critical EPFs will not be sited when they are needed.” King County PHB, at 44.

Renton

Renton acknowledges that the GMA allows Snohomish County to regulate “project design and to mitigate any probable adverse impacts” of EPFs, but agrees with King County that Ordinance No. 03-006 violates RCW 36.70A.200 because it contemplates denial of an EPF. Renton PHB, at 3. Renton contends “The discretion to deny an essential public facility provided for in SCC 30.42C.100 (Exhibit 15) cannot be reconciled with the prohibition [against EPF preclusion] found in RCW 36.70A.200(5).” *Id.*

In addition, Renton criticizes the complicated, lengthy and open-ended nature of the conditional use permit process that Snohomish has devised to review EPF proposals. Renton points out that the process imposed on EPFs “will exceed the 120-day limit that is enjoyed by almost every other conditional use permit process in the county.” Renton PHB, at 8.

Renton asserts that Snohomish County’s EPF review process does not lead to a “timely, fair or predictable result” and thus does not comply with the GMA’s permit goal. *Id.* RCW 36.70A.020(7) provides:

Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.

Puget Sound Water Quality Defense Fund

Amicus PSWQDF argues that Ordinance No. 03-006 stands the non-preclusionary direction of RCW 36.70.200 on its head by making EPF’s “difficult to site” even *more* difficult to site rather than less so. Amicus argues:

If Snohomish County decides that any of the ten special CUP criteria, or four regular CUP criteria, are not met, it must deny the EPF CUP. SCC 30.42D.070. . . Each of these bases [SCC 30.42D.070(2), (6), (9)] for denial is purely parochial, precluding the approval of “difficult to site” EPFs whenever they are perceived to be inconsistent with a wholly local interest. Such a broad mandate to deny EPF permits is wholly at odds with the GMA’s mandate not to preclude EPFs.

Amicus Brief, at 10. Emphasis in original.

Anticipating Snohomish County’s argument, Amicus cautions the Board against relying on a principle cited in an earlier Board case. Amicus states:

In *Sound Transit v. City of Tukwila*, this Board stated that it “cannot assume the City will elect to act unlawfully.” *Id.*, at 5 This principle does not justify the Board staying its hand here. As the Board observed, Tukwila’s new plan policies did not “obligate nor authorize” the City to deny any necessary permits. Snohomish County’s ordinance presents the opposite situation. The Board has no need to speculate as to whether Snohomish County will Act unlawfully in order to decide this case properly.

Amicus Brief, at 6-7, citations and footnotes omitted.

### Snohomish County

Snohomish County argues that other statutes contemplate the use of CUPs to regulate secure community transition facilities and residential care facilities, but prevent the use of permits to regulate energy facilities. It reasons, therefore, that if the GMA had intended to prohibit the use of CUPs for EPFs, the legislature would have said so. Snohomish contends that because GMA does not explicitly preclude the use of CUPs to regulate EPFs, then a CUP is a permissible tool to use. “If the Legislature intended to preempt local decision making authority in the GMA over EPFs, it certainly knew how to do so.” Snohomish County PHB, at 45.

Respondent also argues that the CUP language that mentions denial of in certain circumstances is necessary because “without an ability to deny, there would be no ability to impose reasonable mitigation.” *Id.*, at 46. It states that “Far from being a license to make discriminatory and unprincipled decisions, the conditional use permit process has been tightly bridled through case law to assure that these decisions are legitimate and based on a sound process.” *Id.*, at 48.

Snohomish County disagrees that its hearing examiner would not be bound by the language of the CUP criteria to revisit or reverse a regional siting decision. Snohomish states that, “It is true that some of the criteria will have been addressed through a regional siting decision, in the case of regional EPFs. In that case, the hearing examiner will simply make a finding that the particular criteria has been met through the regional siting process.” Snohomish County PHB, at 52.

Snohomish County disputes the Petitioner’s characterization of a CUP process as one that will result in unreasonable delays or unpredictability. Snohomish asserts that “a CUP requirement is neither onerous nor procedurally complex.” Snohomish County PHB, at 63.

### Edmonds

Edmonds supports Snohomish County’s view that a CUP is an appropriate regulatory mechanism to address the question of EPFs. Edmonds states:

Contrary to King County’s assertions, local jurisdictions may permissibly subject essential public facilities to a separate and rigorous regulatory process, including but not limited to a conditional use permit requirement. That compliance with any such local procedures ultimately delays an EPF project or renders it more expensive does not, as a matter of law, “preclude” the subject facility in derogation of GMA.

Edmonds PHB, at 28.

Edmonds contends that if the Board were to eliminate a CUP as a local government regulatory tool, it would co-opt the legitimate and necessary local check on the siting authority of regional EPF sponsors. At any rate, Edmonds asks that:

[T]he Board’s decision should provide clear guidance to planning jurisdictions regarding the scope and limits of the conditional use system – recognizing the appropriate utilization of this valuable permitting mechanism.

*Id.*

#### **b. Analysis**

Certain of the parties’ arguments help inform the proper disposition of this case. However, much of what was presented and argued is simply irrelevant to the ultimate determination of GMA compliance for the challenged ordinance. For example, every party recounted the history and

[2]

relative merits of a certain wastewater treatment project, characterizing the motivations, perceptions, and behaviors underlying inter-governmental communication, coordination, and

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cooperation, or alleged lack thereof. While hypothetical scenarios may help illuminate the merits of alternative constructions of the law, it is important to state at the outset of this analysis that the **only** relevant facts before the Board are *the words contained in Ordinance No. 03-006*. See Section III, *supra*. At the end of the day, the only question properly before the Board is a very simple one – does Snohomish County’s process for reviewing EPF permits, as adopted in Ordinance No. 03-006, comply with the Goals and Requirements of the Growth Management Act?

The Board’s analysis begins with a review of relevant statutory provisions and prior holdings of the board and courts. The Board then evaluates the arguments of the parties about how the challenged Ordinance squares with the law. In so doing, the Board will affirm and clarify its view of what the Act allows or requires of local government EPF permit processes. The Board will then apply that holding to the facts of this case, setting forth its findings and conclusions.

The central statutory provision at issue with Legal Issues 1 and 2 is RCW 36.70A.200(5), which provides:

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

Emphasis added.

There is no dispute that Ordinance No. 03-006 is a development regulation subject to this statutory requirement. The disagreement between the parties focuses on whether or not the Ordinance precludes essential public facilities. In weighing the arguments on this parties on this point, the Board's first important agreement is with Renton's reasoning that compliance with RCW 36.70A.200 can best be understood in light of the GMA's goals, specifically Goal 7. RCW 36.70A.020(7) provides: "Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability."

As discussed, *infra*, the Board has previously held that RCW 36.70A.200's prohibition against EPF preclusion by a development regulation includes a prohibition not only on flat-out exclusion, but also a prohibition against the imposition of impracticable permit conditions. Here, the Board's review of RCW 36.70A.200 in light of RCW 36.70A.020(7) leads to the conclusion that the GMA also prohibits local government EPF permit processes that are determined by the Board

[4]

to be fundamentally untimely, unfair and unpredictable.

Both King and Snohomish point to prior Board case law regarding EPFs. The Board has held that jurisdictions preclude the siting of EPFs when they are rendered impossible or impracticable to site. *Children's Alliance v. Bellevue*, CPSGMHB Case No. 95-3-0011, FDO, (Jul. 25, 1995), at 12. "Impracticable" is defined as "incapable of being performed or accomplished by the means or at command." *Port of Seattle v. Des Moines*, CPSGMHB Case No. 97-3-0014, FDO, (Aug. 13, 1997), at 5 (citing *Merriam Webster's Collegiate Dictionary* 584 (10<sup>th</sup> ed. 1996)).

Impracticability has taken the form of restrictive zoning (*Children's Alliance*), comprehensive plan policies directing opposition to a regional decision (*Port of Seattle*), or the imposition of unreasonable requirements (*Hapsmith v. City of Auburn*, CPSGMHB Case No. 95-3-0075c, FDO, May 10, 1996), at 31-2. In *Sound Transit v. City of Tukwila*, the Board found that policies that did not "obligate or authorize the City to deny necessary permits" for an EPF, in that case a light rail system, did not render it impracticable. *Sound Transit v. City of Tukwila*, CPSGMHB Case No. 99-3-0003, (Sep. 15, 1999), at 5.

The question now before the Board, then, is whether Ordinance No. 03-006 creates a permit review process that is fundamentally "unfair, untimely and unpredictable" or otherwise renders EPFs "impracticable." The Board's inquiry parses the two essential components of Snohomish County's approach in Ordinance No. 03-006: the "decisional criteria" employed to consider the

CUP and the use of the “conditional use permit” mechanism” to process EPF proposals.

### Decisional Criteria

Ten decisional criteria were adopted by Ordinance No. 03-006 to apply specifically to “any essential public facilities determined to be difficult to site.” Finding of Fact 5. Significantly, these criteria do not distinguish between those EPFs that a local jurisdiction has the authority to site and those EPFs that the jurisdiction has a statutory duty to accommodate. SCC Chapter 30.42D.010(1)(a), as created by the ordinance, defines affected EPFs as “any facility owned or operated by a unit of local *or state* government...” King County Exhibit No. 46 (emphasis added).

Many of the criteria in 30.42D.070 are directly relevant to the siting decision, including (1) demonstrated need, (3) investigation of alternative sites, and (6) proportionality. Finding of Fact 5. These may be appropriate when applied to a local EPF that is within a county’s authority to site. However, it is not appropriate for a local government to create criteria that purport to revisit or “second-guess” a siting decision that has been made by a regional or state entity. The Board agrees with Petitioner that the decisional process in Ordinance No. 03-006 not only authorizes, but obligates Snohomish County to deny regionally sited EPFs when they do not meet the Ordinance’s criteria, and thus violates RCW 36.70A.200(5). *Sound Transit*, at 5.

In addition to allowing Snohomish County to second-guess a state or regional siting decision, Chapter 30.42D.070 addresses the mitigation of the EPF once it has been sited:

The sponsor has proposed mitigation measures that substantially avoid, reduce, or compensate for adverse impacts on the environment, including but not limited to buffers, impervious surfaces, design elements and other operational or programmatic measures contained in the proposal.

SCC Chapter 30.42D.070(10). King County Exhibit No. 46.

EPFs that are sited by a regional or state agency are distinct from those that are “sited by” a local jurisdiction or a private organization or individual. When a local jurisdiction is contemplating its own EPF, public or private, it is free to establish a non-preclusive siting process with any criteria it deems relevant.

However, when the siting decision is made by a state or regional agency, the role of the host jurisdiction is much more limited. It may attempt to influence the siting decision “by means such as providing information to the regional body, commenting on the alternatives under consideration, or expressing its local preference in its comprehensive plan.” *Sound Transit*, at 6.

But once a site has been chosen regionally, local plans and regulations cannot preclude it, even if those plans predate the EPF's conception. "If a decision regarding an EPF follows the adoption of a plan, and if the plan violates the .200 duty 'not to preclude,' the jurisdiction has a duty to amend its plan." *Port of Seattle*, at 8.

### The CUP permit process

Snohomish County has chosen to use a Conditional Use Permit as the mechanism to review proposed EPFs, has directed that the County's Hearing Examiner conduct the public hearing and authorized the Hearing Examiner to take action based upon the decisional criteria discussed *supra*. Finding of Fact 3. Apart from the decisional criteria themselves, the CUP process as set forth in the SCC raises questions regarding Snohomish County's GMA compliance.

The first of these questions concerns the length of time and numbers of procedural steps involved in processing a CUP. The Board understands the concerns voiced by King County and Renton about the potentially lengthy time that it would take for an EPF CUP to run its course. Nevertheless, the Board agrees with Edmonds that cost and delay do not, *prima facie*, make an EPF permit review process unfair and untimely and thus not GMA compliant. The one year-plus delay decried by King County and Renton does not necessarily constitute noncompliance with RCW 36.70A.200 and .020 (7). Such a time frame may very well be the necessary, and thus reasonable, schedule required to evaluate certain large and complex EPF proposals.

However, the fact that there appears to be no definite end to the iterative loops of EPF hearings, appeal hearings, remands, etc. is problematic. When asked about this directly, Snohomish County could point to no provision of the Ordinance that assures that a decision must ever be

[5]

made, whether measured in days, months or years. Such an open-ended decision-making time frame might arguably be appropriate for conditionally permissible uses, however, it cannot be appropriate for those "public facilities" that RCW 36.70A.200 deems "essential" and that RCW 36.70A.020(7) and (12) indicate are to be "assured."

A second and more problematic question is the authority that Snohomish County ostensibly has reserved to itself to deny permit applications for EPFs. The Board concludes that Snohomish and Edmonds are correct that RCW 36.70A.200 does not preclude a jurisdiction's authority to regulate an EPF project once the site has been determined nor does it preclude the imposition of reasonable conditions and mitigating measures. However, they are incorrect when they assert that such processes may contemplate outright denial of all EPFs. This is a fundamental flaw in Ordinance No. 03-006. The Board agrees with Amicus and Renton that an Ordinance that purports to authorize denial of applications for all EPFs, including those proposed by state and regional sponsors, facially precludes EPFs in violation of RCW 36.70A.200.

**The Board holds that no local government plan or regulation, including permit processes and conditions, may preclude the siting, expansion or operation of an essential public facility. Local plans and regulations may not render EPFs impossible or impracticable to site, expand or operate, either by the outright exclusion of such uses, or by the imposition of process requirements or substantive conditions that render the EPF impracticable. While there is no absolute time limit for how long an EPF permit review may take, an EPF permit process lacking provisions that assure reaching an ultimate decision may be found to be so unfair, untimely and unpredictable as to substantively violate RCW 36.70A.020(7). In addition, local governments lack authority to deny a development permit for EPF's that are sponsored by state or regional entities.**

It is important to note that the Board does not take issue with the use of the CUP mechanism, *per se*. For many types of EPFs, such as those that are not sponsored by state or regional entities, a CUP may continue to be an appropriate tool. However, when a permit process, regardless of its name, purports to reserve to a local government the discretion to deny that which it may not lawfully deny, it will be found to violate RCW 36.70A.200. If, on remand, Snohomish County wishes to continue to use the CUP tool, it must first differentiate between those EPFs that have state or regional sponsors and those that do not.

### **3. Conclusions re: Legal Issues Nos. 1 and 2**

The Board concludes that, with respect to Legal Issues Nos. 1 and 2, King County has carried the burden of showing that Snohomish County's adoption of a permit process for EPFs, as set forth in Ordinance No. 03-006, **failed to be guided by RCW 36.70A.020 (7) and failed comply** with the requirements of **RCW 36.70A.200**. The Board concludes therefore that Snohomish's action was **clearly erroneous**, and will remand Ordinance No. 03-006 to Snohomish County to take appropriate legislative action to comply with the GMA as interpreted in this Order.

## **C. INCONSISTENCY WITH COMPREHENSIVE PLAN PROVISIONS**

### **Legal Issue No. 3**

***Does the EPF ordinance violate the requirements that Snohomish County's development regulations be consistent with the Snohomish County Comprehensive Plan, under RCW 36.70A.040, .100, .120, and .130(1)(b)?***

Having determined that Ordinance No. 03-006 does not comply with statutory provisions,

specifically RCW 36.70A.200 and RCW 36.70A.020 (7), it is academic to address the question of whether the Ordinance is also inconsistent with Snohomish County's comprehensive plan. Even assuming, *arguendo*, that Snohomish County's EPF Ordinance No. 03-006 is consistent with its Comprehensive Plan, that conclusion alone would not cure the Ordinance's statutory non-compliance with RCW 36.70A.200.

Although the GMA compliance of Snohomish County's comprehensive plan is not presently before the Board, it is noteworthy that the non-preclusionary mandate of RCW 36.70A.200 plainly applies to both development regulations *and* comprehensive plans. Thus, when Snohomish County considers how to amend its EPF development regulations to achieve GMA compliance, it may wish to also consider how to cure any parallel defects in its plan so as to assure compliance with RCW 36.70A.040, .120 and .130 (1)(b).

## **VII. INVALIDITY**

### **1. Applicable Law**

RCW 36.70A.302 provides in relevant part:

- (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.

RCW 36.70A.020(12) provides:

Public facilities and services. 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.

RCW 36.70A.020(7) provides:

Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.

## 2. Discussion

King County maintains that, not only is the EPF Ordinance in non-compliance with the GMA and the County's Plan, but argues that the Board should enter a finding of invalidity. King County PHB, at 32-34. King County also argues that invalidity is a remedy that the Board may impose and that it need not be stated as an issue in the PFR. Transcript, at 38.

Snohomish County contends that its Ordinance is not in noncompliance with the Act and its Plan, and argues that, in any event, the Board should not find invalidity. Snohomish argues that King County is barred from requesting invalidity because it was not raised as an issue in the PFR. Transcript, at 76-77.

## 3. Analysis

The Board agrees with King County that invalidity is a remedy rather than a legal issue. There is nothing in the GMA that obligates a Petitioner to frame the question of invalidity as a legal issue. Moreover, the Board has authority to consider invalidity *sua sponte* regardless of whether or not a party raises it during the proceeding. RCW 36.70A.302(1) and WAC 242-02-831(2).

The Board has found, *supra*, that Snohomish County's adoption of Ordinance No. 03-006 does not comply with the essential public facilities requirements of the Act, specifically, RCW 36.70A.200. The noncompliant Ordinance is remanded to Snohomish County in this Order. Since the Board's finding of noncompliance relates to the inadequacy of the challenged permit process, the Board's consideration of invalidity will focus on Goal 7, which provides:

Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability.

RCW 36.70A.020 (7). Emphasis added.

In the Board's discussion and analysis of Legal Issues 1 and 2, the Board determined that the County's permit process for Essential Public Facilities, as adopted in the challenged ordinance, facially purports to authorize denial of EPF permits and does not result in a process that is timely, fair or predictable. Based upon the findings of fact and the Board's finding of noncompliance with RCW 36.70A.200, the Board concludes that Snohomish County Ordinance No. 03-006 substantially interferes with the fulfillment of Goals 7 and 12. The Board hereby enters a **determination of invalidity** for Snohomish County Ordinance No. 03-006.

## 3. Conclusions re: Invalidity

The Board has found Snohomish's adoption of Ordinance No. 03-006 is **noncompliant** with RCW 36.70A.200. The Board finds and concludes that the continued validity of Ordinance No. 03-006 would substantially interfere with the fulfillment of goals (7) and (12). Therefore, **the Board enters a determination of invalidity** for Ordinance No. 03-006.

### **VIII. ORDER**

Having reviewed and considered the above-referenced documents, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

1. Snohomish County's adoption of Ordinance No. 03-006 **does not comply** with the requirements of RCW 36.70A.200) and **was not guided by** RCW 36.70A.020(7) and (12); the County's action was **clearly erroneous**. Furthermore, because the continued validity of Ordinance No. 03-006 would substantially interfere with the fulfillment of RCW 36.70A.020 (7) and (12), the Board enters a **determination of invalidity** for Ordinance No. 03-006.
2. The Board establishes **4:00 p.m. on Wednesday, January 14, 2004** as the deadline for Snohomish County to take appropriate legislative action to bring the EPF provisions of its development regulations into compliance with the goals and requirements of the Growth Management Act as interpreted in this order.
3. By **Monday, January 26, 2004, at 4:00 p.m.**, Snohomish County shall submit to the Board, with a copy to the other parties, an original and four copies of its Statement of Actions Taken to Comply (the **SATC**). Attached to the SATC shall be a copy of any legislative action taken in response to this Order.
4. By **Monday, February 2, 2004, at 4:00 p.m.**, Petitioner King County and Intervenors City of Renton and City of Edmonds shall submit to the Board, with a copy to Snohomish County, an original and four copies of any Response to the SATC.
5. By **Monday, February 9, 2004, at 4:00 p.m.**, Snohomish County shall submit to the Board, with a copy to the other parties, an original and four copies of any Reply to the Responses to the SATC.
6. The Board schedules a **Compliance Hearing** in this matter for **10:00 a.m. on Thursday, February 12, 2004**. The Compliance Hearing will be held in the conference room adjacent to the Board's office at Suite 2470, Bank of California Building, 900 Fourth Avenue, in Seattle.

So ORDERED this 13<sup>th</sup> day of October 2003.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Edward G. McGuire, AICP  
Board Member

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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.

**Appendix A**

Following are the Legal Issues as they were set forth in the PHO. Legal Issue 2.C was dismissed by the Board in its July 15, 2003 Order on Motions.

**Legal Issue No. 1**

***Does Snohomish County's Ordinance No. 03-006 ("EPF ordinance") violate RCW 36.70A.200 because the ordinance goes beyond regulating the design and requiring reasonable mitigation of adverse impacts to require denial of a proposed EPF on the basis of both general CUP criteria and special EPF CUP siting criteria which are so broad and vague that Snohomish County has virtually unlimited discretion to deny the proposed siting of an EPF?***

***A. Does the EPF ordinance violate RCW 36.70A.200 because it authorizes denial of the siting of a proposed EPF rather than being limited to the regulation of project design and reasonable mitigation of adverse impacts?***

***B. Does the EPF ordinance violate RCW 36.70A.200 by authorizing the denial of the siting of a proposed EPF on the basis of criteria that are so broad and vague that Snohomish County has virtually unlimited discretion to deny the proposed siting of an EPF?***

***C. Does the EPF ordinance violate RCW 36.70A.200 by authorizing denial of uses that are***

*otherwise permitted as a matter of right by imposing on EPFs general CUP criteria and special EPF CUP siting criteria that would not apply if such proposed uses were essentially the same but were not EPFs?*

*D. Does the EPF ordinance violate RCW 36.70A.200 because it authorizes denial of the siting of an EPF even where the EPF is prescribed in a regional plan in which the host jurisdiction had full opportunity to participate and which the host jurisdiction did not oppose or appeal, even where the proposed site was determined through alternative site and environmental review processes in which the county had full and fair opportunities to participate, and even where the proposed site was selected by the sponsor jurisdiction in accordance with siting criteria that were adopted by ordinance and were not appealed by the county?*

### Legal Issue No. 2

*Do provisions of the EPF ordinance violate RCW 36.70A.200 by establishing extraordinarily onerous and time-consuming processes, which greatly exceed the regulatory processes applicable to similar projects that are not EPFs and which must be completed as a prerequisite to obtaining approval of the siting of a proposed EPF, because the expense and delay of such processes are likely to directly or indirectly preclude EPF siting, that is, because such extreme procedural requirements may make it impracticable to site a given EPF in Snohomish County or may induce the sponsors of regional EPFs to avoid Snohomish County and choose sites for such EPFs in jurisdictions without such burdensome processes rather than socially, economically, and environmentally optimal sites?*

*A. Do these extraordinary procedural requirements for regulatory approval of EPF siting violate RCW 36.70A.200 where the proposed EPF use and development is otherwise permitted as a matter of right by development regulations or where such special EPF procedural requirements substantially exceed those applicable to similar project proposals that are not EPFs?*

*B. Do such extraordinary procedural requirements for regulatory approval of EPF siting violate RCW 36.70A.200 where they are applied to EPFs that are prescribed by a regional plan in which the host jurisdiction had full and fair opportunity to participate and which the host jurisdiction did not oppose or appeal, where they are applied to proposed EPF sites that were determined after comprehensive regional alternative site and environmental review processes, and where they are applied to proposed EPF sites that were selected in accordance with site selection criteria adopted by ordinance of the sponsor jurisdiction and that were not opposed or appealed by the host jurisdiction?*

**C. Does the EPF ordinance violate RCW 36.70A.470(1) requiring that project review “shall be conducted pursuant to the provisions of chapter 36.70B RCW because the ordinance establishes procedures for the regulation of EPF projects in violation of the provisions of RCW Ch. 36.70B?**

**Legal Issue No. 3**

***Does the EPF ordinance violate the requirements that Snohomish County's development regulations be consistent with the Snohomish County Comprehensive Plan, under RCW 36.70A.040, .100, .120, and .130(1)(b)?***

**A. Does the EPF ordinance violate the cited GMA consistency requirements by failing to provide an exception from the EPF ordinance for EPFs that are "already sited by a local comprehensive plan" or “for which discretionary land use action” is not required, in accordance with Snohomish County's Comprehensive Plan (Appendix B - EPF siting process)?**

**B. Does the EPF ordinance violate the cited GMA consistency requirements by failing to "facilitate the siting of essential public facilities sponsored by public or private entities and whose location within unincorporated areas may be appropriate” and to provide for approval of EPFs in a "timely and efficient manner" in accordance with the Snohomish County's Comprehensive Plan (Appendix B- EPF siting process, and other Comprehensive Plan Policies such as GPP Goal CF 11)?**

**C. Does the EPF ordinance violate the cited GMA consistency requirements by failing to ensure, ease, and coordinate the siting of needed regional capital facilities in accordance with the Snohomish County Comprehensive Plan, including its Capital Facilities Plan? (See Snohomish County Comprehensive Plan: GPP CF 11 (facilitate EPF siting); GPP Policy LU 2. C.3 (ensure development of adequate infrastructure within UGA); GPP Goal UT 3 (develop an efficient system of wastewater collection and treatment facilities to support urban growth consistent with the comprehensive plan); GPP Objective IC 1.E (promote interjurisdictional planning and implementation of capital facilities); GPP Goal UT 3.A (work with special districts to produce coordinated wastewater systems plans); GPP Goal UT 1 (enhance efficiency and quality of utility provider service through coordinated land use planning); GPP Objective UT 1.B (achieve and maintain consistency between utility system expansion plans and planned land use patterns); and GPP UT Policy 1.B.2 (maintain consistency between utility plans and comprehensive plan); and Snohomish County Capital Facilities Plan, which identifies a need for regional wastewater treatment facilities and requires local regulations to ensure their construction before new development is allowed to connect to systems that are at or over capacity (pg. 46); and is designed to achieve coordination and consistency among the**

*plans of other public agencies planning for capital improvements within the planning area (pg. 2)).*

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[1]

The Board members possess the expertise required by RCW 36.70A.260(1). Vitae for Central Puget Sound Board members are posted on the Board's website at [www.gmhb.wa.gov/central/index.html](http://www.gmhb.wa.gov/central/index.html).

[2]

Although every party agreed that the so-called "Brightwater" wastewater treatment facility proposal is not before this Board nor could it be (because the Board lacks jurisdiction to review projects), every party nevertheless briefed and argued about "Brightwater" at length.

[3]

Even less on-point than assertions regarding "Brightwater" were King County's complaint regarding remarks made by individual members of the Snohomish County Council and Snohomish's complaint that King County's regulations are no less burdensome than the challenged ordinance. Neither the remarks of individual council members, however intemperate, nor the EPF regulations of other local governments are germane to the resolution of this case.

[4]

While Goal 7 seeks to "ensure predictability" for all "state and local government permits," it is noteworthy that another GMA goal seeks to "ensure" the availability of public facilities necessary for growth. 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." Emphasis added. Although Goal 12 has most frequently been reviewed in the context of the Act's concurrency and adequacy provisions, it also lends strong support to the Board's reading of RCW 36.70A.200 and RCW 36.70A.020(7) that "public facilities" that are "essential" are to be "ensured."

[5]

Transcript, at 78-80.