

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

CITY OF SEATTLE,)	
)	Case No. 07-3-0005
Petitioner,)	
)	<i>(Seattle I)</i>
and)	
)	
CITY OF TUKWILA and KING COUNTY)	
)	
Interveners,)	
)	
v.)	
)	
CITY OF BURIEN,)	FINAL DECISION and ORDER
)	
Respondent.)	
)	

SYNOPSIS

This dispute involved a King County County-wide Planning Policy that prohibits the overlap of city-designated Planned Annexation Areas – PAAs.

The City of Burien adopted an ordinance designating a portion of unincorporated King County, the North Highline area, as its PAA. The City of Seattle challenged this action because it had previously designated a portion of the area as its own PAA.

Significantly, Intervener King County urged the Board to abandon the “first-in-time” rationale first articulated in Renton v. Newcastle, CPSGMHB Case No. 97-3-0026, Final Decision and Order, (Feb. 12, 1998), in favor of the coordinated planning principles of cooperation and collaboration articulated in the GMA.

The Board abandoned the “first-in-time” rationale and deferred to the County’s interpretation of the challenged CPP. The Board concluded that King County had developed a process for resolving “overlapping PAA” disputes and that in light of that process, Burien’s action was not clearly erroneous and complied with the GMA.

I. BACKGROUND¹

King County, in conjunction with its cities, has developed a series of Countywide Planning Policies (**CPPs**) to guide joint planning and urban growth around cities. These CPPs are the genesis of Seattle's challenge to Burien's action. A "Planned Annexation Area" (**PAA**) is a term developed by King County and its cities to describe the urban growth areas around cities that may be considered as potential expansion areas for the various cities. The North Highline area is a largely developed urban island of unincorporated King County that is surrounded by Seattle to the north and west, Tukwila to the east, and Burien to the south. In brief, North Highline is an unincorporated urban area where the cities of Seattle, Tukwila and Burien may each wish to expand via annexation.

In November 2006, the City of Burien adopted Ordinance No. 455, amending its Comprehensive Plan to designate an area, generally known as the North Highline area a PAA for the City. This action expressed Burien's intent to pursue annexation of the area into Burien.

In January 2007, the City of Seattle filed a Petition for Review with this Board challenging Burien's action as being noncompliant with provisions of the Growth Management Act (**GMA**). In particular, Seattle alleges noncompliance with certain King County CPPs.

The Board issued a notice of hearing, conducted a prehearing conference and issued a Prehearing Order during the months of February and March, 2007. These proceedings were coordinated with the matter of *Burien v. Seattle*, CPSGMHB Case No. 07-3-0013. During this period, the Board also granted motions to intervene to the City of Tukwila and King County. Although Burien amended its Index of the Record several times, there were no motions to supplement the record or dispositive motions filed.

In April and May, the Board received prehearing briefing and exhibits from the parties. The following source notations are used throughout this Final Decision and Order:

- Petitioner City of Seattle's Prehearing Brief – **Seattle PHB**
- Intervener City of Tukwila's Prehearing Brief – **Tukwila PHB**
- Intervener King County's Prehearing Brief – **King Co. PHB**
- Respondent City of Burien's Prehearing Response Brief – **Burien Response**
- Petitioner City of Seattle's Reply Brief – **Seattle Reply**
- Intervener King County's Reply Brief – **King Co. Reply**.

On May 31, 2007, the Board conducted the Hearing on the Merits (**HOM**) in this matter. All parties were present at the HOM as well as numerous associates and observers. Since

¹ See Appendix A - Procedural History – for the complete listing of dates of filings and materials submitted in this proceeding.

the Cities of Seattle and Burien were involved in counter claims against each other (posing the same Legal Issues) regarding each City's designation of the North Highline area as their own PAA, the Cities requested that they argue once in lieu of making identical arguments in the second proceeding scheduled to immediately follow the HOM in the *Seattle v. Burien* matter. The Board agreed to incorporate the arguments from this proceeding into the *Burien v. Seattle* case, but indicated that the HOM in *Burien v. Seattle* would be convened in order to acknowledge the differences in facts between the two cases. A transcript of the *Seattle v. Burien* proceeding was ordered and received.

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF and STANDARD OF REVIEW

Upon receipt of a petition challenging a local jurisdiction's GMA actions, the legislature directed the Boards to hear and determine whether the challenged actions were in compliance with the requirements and goals of the Act. *See* RCW 36.70A.280. The legislature directed that the Boards "after full consideration of the petition, shall determine whether there is compliance with the requirements of [the GMA]." RCW 36.70A.320(3); *see also*, RCW 36.70A.300(1). *See Lewis County v. Western Washington Growth Management Hearings Board*, 139 P.3d 1096 (2006) ("The Growth Management Hearings Board is charged with adjudicating GMA compliance and invalidating noncompliant plans and development regulations").

Petitioner challenges the City of Burien's adoption of Ordinance No. 455, designating the North Highline area as a PAA for Burien. Pursuant to RCW 36.70A.320(1), this Ordinance is presumed valid upon adoption.

The burden is on Petitioner to demonstrate that the actions taken by the City of Burien is not in compliance with the goals and 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 [Burien] 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 Burien'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).

The GMA affirms that local jurisdictions have discretion in adapting the requirements of the GMA to local circumstances and that the Board shall grant deference to local decisions that comply with the goals and requirements of the Act. RCW 36.70A.3201. Pursuant to RCW 36.70A.3201, the Board will grant deference to the City of Burien in how it plans for growth, provided that its planning actions or policy choices are consistent with, and comply with, the goals and requirements of the GMA. The State Supreme Court's delineation of this required deference states: "We hold that deference to county planning actions that are consistent with the goals and requirements of the GMA . . . cedes only when it is shown that a county's planning action is in fact a 'clearly

erroneous' application of the GMA." *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224, 248, 110 P.3d 1132 (2005).

The *Quadrant* decision is in accord with prior rulings 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). As the Court of Appeals explained, "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*, 108 Wn. App. 429, 444, 31 P.3d 28 (2001); *affirmed Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn2d 1, 15, 57 P.3rd 1156 (2002); *Quadrant*, 154 Wn.2d 224, 240 (2005). And *see*, most recently, *Lewis County*, 139 P.3d at fn. 16: "[T]he GMA says that Board deference to county decisions extends only as far as such decisions comply with GMA goals and requirements. In other words, there are bounds."

The scope of the Board's review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to those issues presented in a timely petition for review.

III. BOARD JURISDICTION, PREFATORY NOTE and PRELIMINARY MATTERS

A. BOARD JURISDICTION

The Board finds that the City of Seattle's PFR was timely filed, pursuant to RCW 36.70A.290(2); the City of Seattle 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, which amends the Burien Comprehensive Plan, pursuant to RCW 36.70A.280(1)(a).

B. PREFATORY NOTE

The Action Challenged:

The City of Seattle challenges the City of Burien's adoption of Ordinance No. 455 designating the North Highline area as a PAA for the City of Burien. Part of the designated PAA includes the South Park area, which has already been identified as a PAA by both the Cities of Seattle and Tukwila.

King County's County-wide Planning Policies (**KCCPPs** or **CPPs**) contain an "Interim Potential Annexation Areas" map (**IPAA map**) [HOM Ex. 2] that indicates the North Highline area as a "Gap" – an urban area which is not within the designated PAA of any city. The South Park area is also depicted on the IPAA map, but is indicated as an

“Overlap or Otherwise Contested Area” – an urban area which is within the designated PAA of two or more cities. *See* HOM Ex. 2, legend.

At the time Burien adopted Ordinance No. 455 (November 6, 2006), the North Highline area, but for the South Park area, was identified by the County on the IPAA map as a “Gap” area. On the same map, the South Park area was identified as an “Overlap or Conflict” area. *Id.*

There are three Legal Issues presented for the Board to resolve. The Board addresses them in order, but combines Legal Issues 2 and 3.

C. PRELIMINARY MATTERS

Oral Rulings at the HOM:

There were numerous proposed exhibits presented with briefing that were not part of the record which needed to be considered as supplemental exhibits. No parties objected to any of the proposed exhibits. The Board identified and ruled on each of the following exhibits at the HOM.²

Seattle PHB Attachments A - D:

- A: [KCCPPs excerpts for LU-31 and LU-37] – Board takes *official notice* – **HOM Ex. 1.**
- B: [King County IPAA Map, dated August 2006] – Board takes *official notice* – **HOM Ex. 2.**
- C: [Seattle Comprehensive Plan excerpt, at 1.29, January 2005, Urban Village Figure 9] – *Admitted* – **HOM Ex. 3.**
- D: [Burien Ordinance No. 455] – **Core Document 1** (Index 414).

King County PHB Attachments A- K:

- A: [KCCPPs, in their entirety, including maps] – **Core Document 2.**
- B: 7/20/92, Motion 8733 re: formation of the County’s Growth Management Planning Council (**GMPC**)] – Board takes *official notice* – **HOM Ex. 4.**
- C: [GMPC meeting summary dated 7/28/99] – *Admitted* – **HOM Ex. 5.**
- D: 6/20/94, Ordinance No. 114466, amending KCCPPS] – Board takes *official notice* – **HOM Ex. 6.**
- E: [5/23/00, Ordinance No. 13858, amending KCCPPs, to include the Interim PAA Map] – Board takes *official notice* – **HOM Ex. 7.**

² The Presiding Officer assigned HOM Exhibit Numbers at the HOM, but indicated the numbering of exhibits would be reviewed and corrected, if necessary, in this Final Decision and Order.

- F: [Burien Ordinance No. 455, with the two attachments] – *Already in the record – See Core Document 1, supra.*
- G: [12/11/06, Ordinance No. 122313, amending Seattle’s Comprehensive Plan] – Board takes *official notice* – **HOM Ex. 8.**
- H: [Internet notice of GMPC Agenda: Item “Map Amendment”] – *Admitted* – **HOM Ex. 9.**
- I: [2/14/05, Ordinance No.15122, amending KCCPPs] – Board takes *official notice* – **HOM Ex. 10.**
- J: [9/15/04, GMPC Agenda: Item “Map Amendments”] – *Admitted* – **HOM Ex. 11.**
- K: [September 2004 King County Comprehensive Plan Policy U-203, at 2-23 and 2-24] – Board takes *official notice* – **HOM Ex. 12.**

King County Reply Brief Attachments L – O;

- L: [5/27/92. Interlocal Agreement forming GMPC, with ratification letters] – Board takes *official notice* – **HOM Ex. 13.**
- M: [4/10/07, Ordinance No. 15709, amending KCCPPs] – Board takes *official notice* – **HOM Ex. 14.**
- N: [4/24/06, Ordinance No. 15426, amending KCCPPs] – Board takes *official notice* – **HOM Ex. 15.**
- O: [5/24/04, GMPC Agenda: Item “Downtown Burien as Urban Center] – *Admitted* – **HOM Ex. 16.**

IV. LEGAL ISSUES AND DISCUSSION

A. LEGAL ISSUE 1

Petitioner’s Legal Issue 1, as stated in the PFR and PHO, provides:

1. ***Did Burien violate RCW 36.70A.100 and/or RCW 36.70A.210 by designating a Planned Annexation Area (PAA) that, contrary to KCCPP LU-31, overlaps a PAA previously designated by Seattle?***

Seattle PFR, at 2; 2/13/07 PHO, at 7.

Applicable Law

RCW 36.70A.100 requires the comprehensive plans of adjacent jurisdictions to be coordinated and consistent. This section of the Act provides:

The comprehensive plan of each county or city that is adopted pursuant to RCW 36.70A.040 shall be coordinated with, and consistent with, the comprehensive plans adopted pursuant to RCW 36.70A.040 of other

counties or cities with which the county or city has, in part, common borders or related regional issues.

(Emphasis supplied).

RCW 36.70A.210 requires each county, in cooperation with its cities, to adopt CPPs to provide a framework for developing and adopting comprehensive plans. This section of the Act states:

A countywide planning policy [CPP] is a written policy statement or statements used solely for establishing a county-wide framework from which county and city comprehensive plans are developed and adopted pursuant to this chapter. *This framework shall ensure that city and county comprehensive plans are consistent as required by RCW 36.70A.100.*³

RCW 36.70A.210(1), (emphasis supplied).

RCW 36.70A.210(3) directs that CPPs must address certain issues, including “Policies for joint county and city planning within urban growth areas.” [RCW 36.70A.210(3)(f)]

It is undisputed that King County and its cities have adopted, and ratified, CPPs to provide the framework for their comprehensive planning. The relevant King County CPP at issue in this case is within a section of the KCCPPs entitled, “Joint Planning and Urban Growth Areas around Cities.” The introduction to this section of the CPPs states:

The [GMA] requires each County to designate [UGAs] in consultation with cities. Within the Countywide [UGA], each city will identify land needed for its growth for the next 20 years. *Although the [GMA] does not explicitly equate [UGAs] with municipal annexation areas, the [UGAs] around cities may be considered potential expansion areas for cities.*

Core Document 2, at 28, (emphasis supplied). Thus, these potential expansion areas where municipal annexations are anticipated to occur are intended to be referenced in the KCCPPs by the terminology – “potential annexation areas” – or PAAs.

The specific KCCPP in question in Legal Issue 1 is KCCPP – LU -31, which provides:

In collaboration with adjacent counties and cities and King County, and in consultation with residential groups in affected areas, each city shall designate a potential annexation area. Each potential annexation area shall be specific to each city. *Potential annexation areas shall not overlap.*

³ The Board emphasized this relationship between CPPs and .100 in one of its first cases: *Cities of Snoqualmie and Issaquah v. King County (Snoqualmie)*, CPSGPHB Case No. 92-3-0004c, Final Decision and Order, (Mar. 1, 1993), at 8.

Within the potential annexation area the city shall adopt criteria for annexation, including conformance with [CPPs], and a schedule for providing urban services and facilities within the [PAA]. This process shall insure that unincorporated islands of King County are not created between cities and strive to eliminate existing islands between cities.

Core Document 2, KCCPP – LU-31, at 28-29, (emphasis supplied).

Discussion

Position of the Parties:

Seattle urges the Board to decide this case on the basis of Legal Issues 2 and 3, since Ordinance No. 455 was allegedly not the result of a collaborative and cooperative process. Seattle PHB, at 21. However, Seattle also argues that the South Park portion of Burien's PAA designation should be struck down since it is in direct violation of KCCPP's provision – "Potential annexation areas shall not overlap." KCCPP LU-31. The City cites to this Board's decision in *Renton v. Newcastle (Renton)*, CPSGMHB Case No. 97-3-0026, Final Decision and Order, (Feb. 12, 1998) [Relying upon a first-in-time rationale, and finding that where one city designates a PAA in a particular area that has already been designated by another city in a prior action, the second city's action is inconsistent with the "shall not overlap" CPP]. *Id.*

The City of Tukwila's intervention was limited to briefing on Legal Issue 2. *See* 3/6/07 Order on Intervention, at 3.

Intervener King County argues that neither RCW 36.70A.100, nor RCW 36.70A.210, prohibits overlapping PAAs. King Co. PHB, at 6-8. Further, the County argues that neither Burien's designation of the North Highline area as its PAA [Ordinance No. 455] nor Seattle's later designation of the North Highline area as its PAA [Ordinance No. 122313] are inconsistent with KCCPPs LU-37 or LU-31. The County explains that the PAA designated by one or more cities are not "official" until reviewed by the GMPC and ultimately included as PAAs on the IPAA map. *Id.* at 8-17.

In response, Burien notes that both Seattle and Tukwila have designated the South Park area as their respective PAAs and that there has been a "lack of discernable movement towards annexation." Burien Response, at 3. This inaction, Burien contends, led Burien to believe that the area was no longer of interest to either Tukwila or Seattle; thus prompting its inclusion in Ordinance No. 455. *Id.* However, Burien voluntarily offers to remove the South Park area from its PAA designation if the Board finds the action noncompliant and remands the Ordinance to the City with such direction. *Id.*

Additionally, Burien argues that the County's interpretation of its CPPs, particularly the view that PAAs are not "official" until included on the IPAA map, is new and not supported by the KCCPPs or any language in the authorizing Ordinances. Burien further

suggests that the GMPC does not have explicit review and approval authority for PAAs. Burien Response, at 7-10. Burien also notes that several King County representatives testified before the Burien City Council regarding Ordinance No. 455, and none mentioned or acknowledged the role of the GMPC in “officially” designating PAAs. *Id.* at 10-11. Finally, Burien argues that the plain language of LU-31 prohibits overlapping PAAs, meaning that only one city can be recognized as having designated a PAA. Burien argues that, but for South Park, it has acted first to designate the North Highline area as its PAA. To support this contention, Burien relies on this Board’s decision in *Renton*, and suggests the CPPs should be read in the same manner as they were at the time of the *Renton* decision. Burien urges the Board to uphold Ordinance No. 455, as compliant with the GMA and KCCPPs. *Id.* at 11-13.

Seattle’s reply brief does not distinguish between any of the Legal Issues. Rather, in reply, Seattle urges the Board to either: 1) uphold *both* PAA Ordinances (Burien’s Ordinance No. 455 and Seattle’s Ordinance No. 122313); or 2) find *both* Ordinances noncompliant for lack of cooperation as required by the GMA and CPPs; and 3) not apply the “first-in-time” rationale announced in *Renton*; or 4) if the Board applies the *Renton* rationale, to leave Seattle’s Ordinance in place since it was adopted within 25 days of Burien’s – suggesting the actions were concurrent – and, finally, to find the South Park designation noncompliant and remand it to Burien to remove. Seattle Reply, at 1-13.

In reply, King County also urges the Board to reject the *Renton* decision’s “first-in-time” rationale and to uphold both Ordinances, allowing the GMPC to work with both Cities to complete the PAA designation process. King Co. Reply, at 1-13. The County also argues that designation of a PAA on the IPAA map by the GMPC does not alter Burien’s land use powers. *Id.* at 5-7.

Board Discussion

The Board’s Renton Decision:

It is undisputed that Burien adopted Ordinance No. 455, designating the North Highline area as its PAA, *prior* to Seattle’s similar action. It is also undisputed that both Seattle and Tukwila had *previously* designated a portion of the North Highline area – the South Park area – as their respective PAAs.

If the Board were to apply the *Renton* first-in-time rationale it would find that Burien’s claim to the North Highline PAA area, but for South Park, was first and Ordinance No. 455 should be upheld except for Burien’s inclusion of the “overlapping” South Park designation, which would be remanded to be removed. But the parties have made some provocative arguments that were not articulated as well to the Board at the time the *Renton* decision was issued. Additionally, a decade of growth management planning has passed since the *Renton* decision. Significantly, King County was not a party to the *Renton* dispute, and the Board did not have the benefit of its input. Hence, the Board reassesses the rationale of the *Renton* decision.

The Board agrees with the County that neither RCW 36.70A.100 nor RCW 36.70A.210 prohibits “overlapping” PAAs. In fact, neither of these sections of the GMA even mentions PAAs.⁴ PAA is a term of art developed by King County and its cities to describe the unincorporated areas of the County that are within the Urban Growth Area (UGA) and are eligible to be annexed by adjacent cities. The “prohibition of overlapping PAAs” is derived solely from KCCPP LU-31, not the GMA.

On two previous occasions, this Board has been called upon to address “overlapping PAAs.” In *Renton*, cited by all the parties to this proceeding, the Board sought to give meaning and effect to a KCCPP – LU-31. The Board commented that there was no ambiguity in the language of LU -31 and held, “the jurisdiction which created the overlap and conflict (in this case, Newcastle) should not benefit from its disregard of the law (LU-31). Therefore, Newcastle’s PAA will be remanded.” *Renton*, at 10. The Board also noted in that case that King County’s CPPs “contain no process for resolving disputes over PAAs.” *Id.* at 9. This is the genesis of the Board’s “first-in-time” rationale.

The other Board case involving overlapping PAAs did not directly implicate KCCPP LU-31, but was argued as a violation of the “consistency among jurisdictional plans” requirement of RCW 36.70A.100. In *Shoreline v. Woodway [Chevron USA and Snohomish County – Interveners] (Shoreline II)*, CPSGMHB Case No. 01-3-0013, Final Decision and Order, (Nov. 28, 2001) the majority of the Board found that where two plan designations by different cities, in different counties, conflict (both designating the same area as a PAA), an inconsistency arises yielding a violation of RCW 36.70A.100. The Board stated,

The most logical and equitable reading of this provision [RCW 36.70A.100] is that the burden of *removing* such an inter-jurisdictional inconsistency must rest upon the jurisdiction that *created* that inconsistency. In the present case, the facts support the conclusion that the Town of Woodway created the inconsistency and therefore must bear the burden of curing it.”

Shoreline II, FDO, at 11 (emphasis in original).

Although not specifically citing the *Renton* rationale, the Board, in essence, resolved the *Shoreline II* case by applying the same first-in-time rationale relied upon in *Renton*. However, the case was appealed and the issue of overlapping PAAs was resolved by the Court of Appeals. After discussing the fact that King County CPPs have no application

⁴ The Board notes that RCW 36.70A.110(7) states, “An urban growth area designated in accordance with this section may include within its boundaries urban service areas or potential annexation areas designated for specific cities or towns within the county.” However, the terms “urban service areas” and “potential annexation areas” are terms used by several Puget Sound Counties to describe unincorporated areas within UGAs that may be annexed. Additionally, this subsection of .110 was not part of the GMA when the *Renton* decision was rendered.

in Snohomish County and could not be violated as a matter of law, Division I of the Court of Appeals stated,

[T]here is no logical reason to conclude that two municipalities may not identify the same area of land for potential annexation simply because one or the other has already done so. In other words, there is no reason in logic why land that could *potentially* be annexed by Shoreline could not also be *potentially* annexed by Woodway.

After reviewing the record and considering all of Shoreline’s arguments to the Board, we fail to see how Woodway’s policy thwarted Shoreline’s PAA designation, and thus we fail to see how Woodway’s policy was clearly erroneous.

Chevron U.S.A., Inc. v Central Puget Sound Growth Management Hearings Board, et al. 123 Wn. App. 161, 169, 93 P.3d 880 (2004).⁵

Although neither KCCPP LU-31 nor the first-in-time rationale of *Renton* was directly before the Court in *Chevron*, it appears that the Court strongly questioned whether a “first-in-time” rationale made sense in the context of *potential* annexation areas since either jurisdiction could *potentially* annex the area!

Here, Seattle and King County explicitly urge the Board to reverse, or retreat from, the “first-in-time” rationale of *Renton*. Their reasoning is that a “first-in-time” rule undermines cooperation and collaboration and fosters unilateral action contrary to the strong mandate in the GMA for cooperative and coordinated planning. On the other hand, Burien urges the Board to retain, and apply, *Renton* as a reasonable means of resolving PAA disputes.

Mindful of the Court of Appeals comments and having reconsidered the “first-in-time” rationale in *Renton* in the larger context of the premium the GMA places on coordinated and cooperative planning among all GMA jurisdictions and the need for an orderly and timely transition of governance for unincorporated urban areas, **the Board declares that its prior holding in *Renton* is a relic of a bygone GMA era and the Board abandons the “first-in-time” rationale in favor of supporting the overriding GMA emphasis on cooperative and coordinated planning and the transformation of governance for unincorporated urban areas.**

Seattle and King County have persuaded the Board that such a “first-in-time” rationale merely creates a rush to enactment in lieu of deliberative and cooperative action to

⁵ See also *Chevron v. CPSGMHB*, 156 Wn.2d 131 (2005) [Noting that the two plan designations by Shoreline and Woodway were determined to be compatible and was not part of the appeal to the Supreme Court.] Following the remand from the Court, on November 16, 2006, the Board issued an Order on Remand – Finding Compliance in the *Shoreline II* matter.

resolve disputes over lands within unincorporated UGAs. Consequently, the Board finds that Burien's enactment of Ordinance No. 455, designating the North Highline area [including the South Park area] as a PAA, is not clearly erroneous and complies with RCW 36.70A.100.

The Board also notes that one of the County's primary interests is in having unincorporated "islands" ultimately served and annexed by cities – the primary provider of urban governmental services within UGAs.⁶ The North Highline area is no longer an unclaimed "island" or "gap." It is now up to Seattle and Burien [Tukwila for South Park], with assistance from the County, to assess their respective abilities to provide adequate urban governmental services and facilities to these unincorporated areas. However, the Board's abandoning of *Renton* begs the question of how conflicting PAA designations by cities are to be resolved.

Resolving overlaps and conflict areas – the GMPC:

As to *how* competing PAA designations of cities are to be reconciled, in the context of the KCCPPs, the Board defers to the County's interpretation of how such PAA disputes are to be resolved and how PAAs are to be ultimately designated. Deference to the County is due here based upon the GMA [RCW 36.70A.3201] and direction from the Court of Appeals. In *King County v. CPSGMHB*, 91 Wn. App 1 (1998), at 12, Division I stated,

We therefore owe deference to the County's interpretation of its own CPPs, and not the Board's conflicting interpretation. Although the Board has expertise in the field of GMA compliance, it did not apply that expertise when it examined the CPPs and determined they were ambiguous.

Thus, the Board defers to the County's interpretation of its CPP in this matter. The County's interpretation of its CPPs provides a forum for additional cooperation, collaboration and resolution of conflicting city PAAs.

The County scheme involves the GMPC, a multi-jurisdictional body created in 1992 as the collaborative forum to address CPPs [which includes PAAs, a creature of CPP invention]. HOM Ex. 4. In 1999, the GMPC created the IPAA map showing the status of PAAs throughout the County. It was adopted by the County Council and ratified by the requisite cities. King Co. PHB, at 4; HOM Exs. 2 and 7. The IPAA map shows "gap" areas, "overlap or contested" areas and *uncontested* "interim potential annexation areas."

As noted previously, the IPAA map does not show the North Highline area as a PAA for any city – thus, the County contends there is no conflict or overlap and KCCPP LU-31 is not violated. *Id.* The County explains,

⁶ See RCW 36.70A.210(1).

GMPC has named the map ‘interim’ to allow the process to remain fluid and collaborative as jurisdictions work through the issues relating to contested areas and any other changes that may be desired. The map will remain interim until all unincorporated urban areas are included in city PAAs without gaps or overlaps. [Citations omitted.]

If a city takes legislative action designating a potential annexation area, it needs to have the [IPAA] map amended to reflect that legislative action. Until a city has come before the GMPC seeking an amendment of the Interim Potential Annexation Area Map to reflect their designation, their action is not recognized by the GMPC. Of course, the city’s proposed amendment to the map would need to be approved by the GMPC, adopted by the King County Council and ratified [by the cities].

King Co. PHB, at 5.

The County notes that both Burien and Seattle’s enactment of overlapping PAA designations occurred after the GMPC last met in 2006 and prior to its first meeting in 2007 [June 20, 2007]. *Id.* Consequently, neither City has had the opportunity to bring its PAA enactments before the GMPC for discussion related to adding either to the IPAA map prior to the commencement of this matter before the Board. *Id.* at 6.

The County asserts that the GMPC forum for collaboration, cooperation and the initiation of the CPP amendment process is not new and has been previously used. King Co. PHB, at 12; HOM Ex. 10.

The County also notes that its Plan supports its interpretation of LU-31. The County’s Comprehensive Plan U-203 provides:

The Interim Potential Annexation Areas Map adopted by the Growth Management Planning Council illustrates city-designated potential annexation areas (PAAs), contested areas (where more than one city claims a PAA), and those few areas that are unclaimed by any city. For contested areas, the county should attempt to help resolve the matter, or to enter into an interlocal agreement with each city for the purpose of bringing the question of annexation before voters. For unclaimed areas, King County should work with adjacent cities and service providers to develop a mutually agreeable strategy and time frame for annexation.

HOM Ex. 12, King County Comprehensive Plan excerpt at 2-23 and 2-24.

The fact that the County has put in place a process to further cooperation and resolution of contested areas is an additional reason for the Board to defer to the County’s

interpretation of its CPPs in this context.⁷ Consequently, the Board finds that Burien’s enactment of Ordinance No. 455, designating the North Highline area [including the South Park area] as a PAA, is not clearly erroneous and complies with RCW 36.70A.210 and KCCPP LU-31.

Conclusion

The Board finds and concludes that the City of Burien’s enactment of Ordinance No. 455, designating the North Highline area [including the South Park area] as a PAA, is **not clearly erroneous** and **complies** with RCW 36.70A.100, .210 and KCCPP LU-31.

B. LEGAL ISSUES NOS. 2 and 3

Petitioners’ Legal Issues 2 and 3, as stated in the PFR and PHO, provide:

2. *Did Burien violate RCW 36.70A.100 and/or RCW 36.70A.210 by designating a PAA that, contrary to KCCPP-37, was not the result of a cooperative development of city comprehensive plans that are consistent with one another and with the KCCPPs?*
3. *Did Burien violate RCW 36.70A.100 and/or RCW 36.70A.210 by designating a PAA that is not coordinated and consistent with Seattle’s comprehensive plan?*

Seattle PFR, at 2; 2/13/07 PHO, at 7.

Applicable Law

RCW 36.70A.100 and .210 and the context for the KCCPPs are set forth in full, *supra*.

Legal Issues 2 and 3 challenge compliance with another specific KCCPP, namely KCCPP – LU -37, which is introduced, and provides, as follows:

The [GMA] requires that city and County comprehensive plans be coordinated and consistent with one another. Consistency is required “where there are common borders or related regional issues” (RCW 36.70A.100). Joint planning is fundamental to all the framework policies.

LU-37: *All jurisdictions shall cooperate* in developing comprehensive plans which are consistent with those of adjacent jurisdictions and with the [CPPs].

Core Document 2, KCCPP LU-37, at 30; (emphasis supplied).

⁷ The Board notes that the County’s process for resolving PAA disputes, the creation of the IPAA map, and the Court of Appeals language on deference to County CPP interpretation all post-date the *Renton* decision.

Discussion

Position of the Parties:

Seattle argues that pursuant to RCW 36.70A.100, .210 and KCCPP LU- 37, the designation of PAAs in King County must result from a process of collaboration and cooperation. Seattle PHB, at 16-18. And although Burien, Seattle, and King County had discussions and negotiations about PAA designations for the North Highline area [*See* Ex. 490, King County/Burien/Seattle Memorandum of Understanding relating to resolution of North Highline annexation (**MOU**)], Seattle asserts that Burien acted unilaterally and strategically to designate the North Highland area a PAA. This unilateral action, Seattle contends, was contrary to the tenets of collaboration and cooperation as set forth in the GMA and CPPs. *Id.* at 19 – 21.

Intervener City of Tukwila adopts the reasoning set forth by Seattle and emphasizes the importance the GMA places upon cooperation and coordinated planning, arguing that the substance and manner of Burien’s action was contrary to a collaborative and cooperative process reflected in the MOU and the GMA. Tukwila PHB, at 2-7.

King County’s briefing focuses on the question of overlap, arguing as noted *supra*, that overlapping PAAs are not prohibited by the GMA. Nor is PAA overlap inconsistent with King County’s process for identifying and designating PAAs. King Co. PHB, at 6-16.

Specifically, related to KCCPP LU-37, the County argues that this CPP merely reflects the GMA mandates to cooperate in planning, and imposes no more than is already required by the GMA. *Id.* at 16. The County elaborates on how its PAA process is intended to work, asserts that the County’s adoption of the IPAA map is actually the mechanism for designating PAAs, and urges the Board to either dismiss both PFRs or uphold both actions of Burien and Seattle. *Id.*

Burien acknowledges that the County, Seattle, and Burien efforts to reach a mutually agreeable PAA boundary failed. In light of that failure, Burien chose to express its interest in the area, and simply acted to designate the area as a PAA prior to Seattle. Burien Response, at 1-2. Burien also contends that LU-37 does not include the term “collaborate” and does not require absolute agreement regarding PAAs. *Id.* at 3-4. Burien also contends that if Seattle were to annex the entire North Highline area, Burien would suffer a financial deficit, something Seattle acknowledged but declined to address in negotiations. *Id.* Consequently, Burien asserts it acted in the best interests of its citizens in adopting Ordinance No. 455. *Id.* Burien also argues that it worked to achieve agreement with Seattle – it cooperated – but failed to reach agreement, but that failure to reach absolute agreement does not constitute a lack of cooperation. *Id.* at 6. Regarding the MOU, Burien contends this Board has no jurisdiction to interpret the MOU, but nonetheless, all parties agreed that it had been terminated before Burien acted. (*Citing* Ex. 417- November 17, 2006 letter from King County Executive Ron Sims). Burien incorporates all arguments offered for Legal Issue 2 into Legal Issue 3. *Id.* at 7.

As noted *supra*, Seattle’s reply brief does not distinguish any of the Legal Issues; instead it outlines different options for the Board in resolving this dispute. The options are noted *supra*.

Likewise, King County’s reply brief does not distinguish the Legal Issues. It urges the Board to reject application of the *Renton* case, and uphold both Ordinances allowing both Seattle and Burien to complete the process before the GMPC. King Co. Reply, at 1-12

Board Discussion:

The Board notes that the present action was brought after numerous efforts, many initiated by Burien, failed to yield a mutual agreement on how the North Highline area should be addressed by the competing interests. A MOU was entered into and terminated without resolution or closure of the PAA issue. However, as discussed in Legal Issue 1, the Board is not persuaded that the joint planning and cooperation called for in RCW 36.70A.100, .210 and carried forward in KCCPP LU-37 has been exhausted. The County, Burien, Seattle and Tukwila, as well as the residents of the North Highline community, have a difficult and time-consuming task before them. Perhaps the present action before this Board has helped clarify the interests of the parties and given them a new resolve to continue. Nonetheless, continuing effort should be made to find the “best fit” and the “best timing” for all concerned, so that the question of annexation can be placed before the voters of the North Highline area - for it is they who will ultimately decide the annexation question.

Consequently, the Board finds and concludes that Burien’s adoption of Ordinance No. 455, designating the North Highline area [including the South Park area] as a PAA, is not clearly erroneous and complies with RCW 36.70A.100, .210 and KCCPP LU-37.

Conclusion

The Board finds and concludes that the City of Burien’s adoption of Ordinance No. 455, designating the North Highline area [including the South Park area] as a PAA, is **not clearly erroneous** and **complies** with RCW 36.70A.100, .210 and KCCPP LU-37.

V. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

- The City of Burien’s adoption of Ordinance No. 455, designating the North Highline area [including the South Park area] as a PAA, is **not clearly erroneous** and **complies** with the consistency and cooperation requirements of RCW 36.70A.100, .210 and KCCPPs LU-31 and LU-37.

- The City of Seattle's petition challenging the City of Burien's action is **dismissed**.
- The matter of *City of Seattle v. City of Burien*, CPSGMHB Case No. 07-3-0005 is **closed**.

So ORDERED this 9th day of July, 2007.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

David O. Earling
Board Member

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
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 242-02-832.⁸

⁸ Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate Court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)

APPENDIX A

Procedural Background

A. General

On January 8, 2007, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the City of Seattle (**Petitioner** or **Seattle**). The matter was assigned Case No. 07-3-0005, and is hereafter referred to as *Seattle I v. Burien*. Board member Edward G. McGuire is the Presiding Officer (**PO**) for this matter. Petitioner challenges the City of Burien's (**Respondent**, the **City**, or **Burien**) adoption of Ordinance No. 455 which amends the Burien Comprehensive Plan to designate all of the unincorporated North Highline area between the cities of Seattle and Burien as a Potential Annexation Area (**PAA**). The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**).

On January 11, 2007, the Board received a "Notice of Appearance" indicating that Michael R. Kenyon is representing Respondent City of Burien. The same day, the Board issued a "Notice of Hearing" (**NOH**) in the above-captioned case. The Order set a date for a prehearing conference (**PHC**) and established a tentative schedule for the case. The following day, the Board issued an "Amended Notice of Hearing" changing two dates from those in the original NOH.

On January 26, 2007, pursuant to a request of the parties, the Board issued an "Order Amending Schedule" to change the PHC date to February 12, 2007 at 2:00 p.m.

On February 12, 2007, the Board received a "Notice of Withdrawal and Substitution of Counsel" indicating that Michael R. Kenyon was withdrawing as counsel to the City of Burien and Andrew S. Lane is now counsel to the City.

On February 12, 2007, the Board conducted the PHC in this matter. The next day, February 13, 2007, the Board issued its "Prehearing Order" (**PHO**), establishing the final schedule and setting the three Legal Issues to be resolved by the Board.

On February 23, 2007, the Board received "City of Tukwila's Motion for Intervention" and "Declaration of Michael P. Monroe in Support of Motion to Intervene."

On February 28, 2007, the Board received "Respondent City of Burien's Response to City of Tukwila's Motion to Intervene." Burien did not object to Tukwila's intervention, but objected to the scope of the issues, or rephrasing of the issues, that Tukwila sought to intervene on.

On March 6, 2007, the Board issued its "Order on Intervention" **granting** Intervener status to the City of Tukwila, but limiting the City's intervention to Legal Issue 2.

On March 9, 2007, the Board received King County's "Motion to Intervene." The County did not wish to intervene on behalf of either the City of Seattle or the City of Burien. Rather, the County sought intervention as "a regional government and as the provider of local services to the remaining urban unincorporated areas in order to protect the efficacy of the process by which the North Highline area and other unincorporated areas of the County become official PAAs." Neither the City of Seattle nor the City of Burien objected to King County's intervention.

On March 12, 2007, the Board issued its "Order on Intervention" **granting** Intervener status to King County.

On April 26, 2007, the Board received "Notice of Withdrawal and Substitution of Counsel" indicating that Michael P. Monroe was withdrawing as counsel to the City of Tukwila and George A. Kresovich is now counsel to the City.

B. Motions to Supplement the Record and Amend the Index

On February 12, 2007, the Board received the City of Burien's "Respondent's Index to the Record" (**Burien Index**). Burien's Index listed 419 documents.

On March 7, 2007, the Board received the City of Burien's "Respondent's Amended Index to Record" (**Amended Index**). The Amended Index listed 488 items.

On April 17, 2007, the Board received the City of Burien's "Respondent's Second Amended Index to Record" (**2nd Amended Index**). The 2nd Amended Index listed 510 items.

There were no motions to supplement the record filed in this matter.

C. Dispositive Motions

There were no dispositive motions filed in this matter.

D. Briefing and Hearing on the Merits

On April 19, 2007, the Board received: 1) "City of Seattle's Opening Brief" (**Seattle PHB**), with an Exhibit List noting 28 attached tabbed Exhibits [24 referenced by Index Number and four noted as Exs. A, B, C, and D]; 2) "Opening Brief of Intervener City of Tukwila" (**Tukwila PHB**), with no Exhibit List, but 3 attached untabbed Exhibits [Each referenced by Index Number]; and 3) "King County's Prehearing Brief" (**King Co. PHB**), with an Exhibit List noting 11 attached tabbed Exhibits [None of the Exhibits are referenced to Index Numbers or the record, but are tabbed as Exs. A – K].

On May 8, 2007, the Board received "Respondent City of Burien's Response Brief" (**Burien Response**), with an Exhibit List noting 12 attached tabbed Exhibits [12 referenced by Index Number].

On May 16, 2007, the Board received: 1) “City of Seattle’s Reply Brief” (**Seattle Reply**), with no attached Exhibits; and 2) “King County Reply Brief” (**King Co. Reply**), with an Exhibit List noting four attached tabbed Exhibits [none of the Exhibits are referenced to Index Numbers or the record, but are tabbed Exs. L – O].

All briefing was timely filed.

On May 31, 2007, the Board held a hearing on the merits (**HOM**) at the Board’s offices at 800 5th Avenue, Olympic Room, 20th floor, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, and Margaret Pageler were present for the Board. Julie Taylor, Board Law Clerk, was also present. Petitioner City of Seattle was represented by Roger D. Wynn. Respondent City of Burien was represented by Andrew S. Lane. Intervener City of Tukwila was represented by George Kresovich and Intervener King County was represented by Kristen Wynne and Darren Carnell. Court reporting services were provided by Rebecca L. Mayse of Byers and Anderson, Inc. The following people also attended the HOM: Scott Greenberg and Ron Seale [Burien]; Elissa Benson [King County]; Richard Conlin, Sharon Nelson, Christie Valley, David Foster and Chris Dale [Seattle]; and Martha Toffer, Mark Ufkes and Peggy Logss [White Center residents].

The hearing convened at 9:30 a.m. The parties asked to offer their arguments in both the *Seattle v. Burien* [07-3-0005] and *Burien v. Seattle* [07-3-0013] matters at the same time, since the Legal Issues were essentially the same. The Board agreed, but noted that while the parties and Legal Issues were the same, the fact patterns in each case were different. Therefore, the second HOM would convene at the conclusion of the first HOM to establish the record for that matter. It was agreed by all that the arguments in the first matter would be incorporated into the second matter and the transcripts would cross reference the two cases. The Board indicated both decisions would be rendered at the same time. The HOM in the matter of *Seattle v. Burien* adjourned at approximately 11:20 a.m. A transcript was ordered.

After a brief recess, the Board reconvened the parties for the HOM in the matter of *Burien v. Seattle*, CPSGMHB Case No. 07-3-0013. In addition to the Board and law clerk, the parties present for the second proceeding were: Andrew S. Lane for Burien, Roger Wynne for Seattle, Kristen Wynne and Daren Carnell for King County. Court reporting services were provided by Rebecca L. Mayse of Byers and Anderson, Inc. The second HOM adjourned at approximately 12:00 p.m. Again, the Board informed the parties that both decisions would be rendered at the same time. A transcript was ordered.

On June 4, 2007, the Board received a complete copy of King County proposed exhibit K – King County Comprehensive Plan Policy U-203.

On June 6, 2007, the Board received, as requested by the Board, a signed copy of Seattle Ordinance No. 122313.

The Board received copies of the transcripts on June 11, 2007. The transcript for the HOM in the matter of *City of Seattle v. City of Burien*, CPSGMHB Case No. 07-3-0005 is referenced as **Seattle HOM Transcript**. The transcript for the HOM in the matter of the *City of Burien v. City of Seattle*, COSGMHB Case No. 07-3-0013 is referenced as the **Burien HOM Transcript**