

1
2
3
4
5
6
7
8
9
10
11
12
13

**State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON**

BRITT DUDEK and BRUCE BAGULEY,

Petitioners,

v.

DOUGLAS COUNTY; CITY OF EAST
WENATCHEE; PANGBORN MEMORIAL
AIRPORT; THE PORT OF CHELAN COUNTY;
and THE PORT OF DOUGLAS COUNTY,

Respondents.

Case No. 07-1-0009

ORDER ON MOTIONS

14
15
16
17
18
19
20
21
22
23
24
25
26

I. PROCEDURAL HISTORY

On July 5, 2007, BRITT DUDEK and BRUCE BAGULEY, by and through their representatives, James Klauser and Robert Rowley, filed a Petition for Review.

On August 1, 2007, the Board held a telephonic Prehearing conference. Present were John Roskelley, Presiding Officer, and Board Members, Dennis Dellwo and Joyce Mulliken. Present for the Petitioners were James Klauser and Robert Rowley. Present for the Respondents were Steve Clem, Douglas County; Devin Poulson, City of East Wenatchee; and Eric Wahlquist, Pangborn Airport, Port of Chelan County, Port of Douglas County.

On August 3, 2007, the Board issued its Prehearing Order.

On August 21, 2007, the Board received Respondent Douglas County's Motion to Dismiss Petition for Review, or in the Alternative, Issues set forth in the Petition for Review and to Supplement Record, and Memorandum Supporting Douglas County's Dispositive Motions.

1 On August 22, 2007, the Board received Petitioners' Request that Respondent
2 Douglas County Certify a complete Record, or in the Alternative, that Parties be Allowed to
3 Supplement the Certified Record with Relevant Material from Below.

4 On August 24, 2007, the Board received Douglas County's Response to Petitioners'
5 Request for Certification of a Complete Record.

6 On August 30, 2007, the Board received the City of East Wenatchee's Memorandum
7 in Support of Douglas County's Motion to Dismiss Petition.

8 On September 5, 2007, the Board received Petitioners' Response to Douglas County's
9 Motions: 1. To Supplement the Record; and 2. To Dismiss All or Some of the Issues in the
10 Petition; and B. Petitioners' Objection to City of East Wenatchee's Brief.

11 On September 6, 2007, the Board received Pangborn Memorial Airport, Port of
12 Douglas County and Port of Chelan County's Memorandum in Support of Douglas County's
13 Motion to Dismiss Petition.

14 On September 10, 2007, the Board received City of East Wenatchee's Rebuttal to
15 Petitioners' Responses to Motions.

16 On September 12, 2007, the Board received Petitioners' Reply to Douglas County's
17 Response to Petitioners' Motion that Douglas County Certify a Complete Record, or in the
18 Alternative, that Parties be Allowed to Supplement the Certified Record.

19 On September 18, 2007, the Board held a telephonic motion hearing. Present were
20 John Roskelley, Presiding Officer, and Board Member Dennis Dellwo. Present for the
21 Petitioners were James Klauser and Robert Rowley. Present for the Respondent was Steve
22 Clem, Douglas County.

23 II. DISCUSSION

24 The Respondent, Douglas County, filed two timely motions with the Eastern
25 Washington Growth Management Hearings Board (Board): 1.) Motion To Supplement
26 Record, and 2.) Motion To Dismiss Petition For Review, Or In The Alternative, Issues Set
Forth In The Petition for Review.

1 The Board held a Motion Hearing on September 18, 2007, and heard arguments on
2 both motions from the Respondent (County), represented by Steve Clem, and the
3 Petitioners, Britt Dudek and Bruce Baguley, represented by Robert Rowley and James
4 Klauser. Respondents Pangborn Memorial Airport, et al. submitted a statement in support of
5 the County's request for dismissal, but did not argue the issues or was a Party to the
6 hearing. Respondent City of East Wenatchee, was also not part of the hearing, but did
7 submit a brief arguing Issue No. 7, which is included under the discussion of that issue.

8 The Board granted the Respondent's Motion to Supplement the Record as requested,
9 including the two maps, the Public Participation Plan, and the Douglas County Regional
10 Policy Plan, and also allowed two amended maps requested by the Petitioners. All four
11 maps requested by the Parties, the Public Participation Plan, and the Regional Policy Plan
12 will be accepted as supplemental exhibits to the index and will be included as part of the
13 Record.

14 The Motion to Dismiss Petition for Review, Or In The Alternative, Issues Set Forth In
15 The Petition For Review was discussed on an issue by issue basis. The Board has
16 considered the Parties briefs, their oral argument and case law to determine whether to
17 dismiss the Petition or one or more of the issues.

18 Under Issue No. 1, which pertains to RCW 36.70A.060, conservation of natural
19 resource lands, and RCW 36.70A.177, conservation of agricultural lands, the Respondent
20 argues the Growth Management Act (GMA) recognizes the inherent social and economic
21 benefits of aviation and requires land use planning that includes the consideration of
22 airports. The Respondent cites two statutes, one from the GMA, RCW 36.70A.510, and one
23 from the Planning Enabling Act, RCW 36.70.547, to emphasize Pangborn Airport is a general
24 aviation airport requiring protection under the GMA. Maintaining the general operations at
25 Pangborn Airport complies with the GMA's Goal 3, "Encourage efficient multimodal
26 transportation systems that are based on regional priorities and coordinated with county
and city comprehensive plans". While the Petitioners rely on two statutes in the GMA, RCW
36.70A.060(1) and 36.70A.177(1), the Respondent contends the amendments to the Airport

1 Overlay District do not authorize or encourage conversion of agricultural lands and do not
2 impact agricultural practices. In fact, the Respondent argues the amendments actually
3 further conservation of agricultural lands.

4 The Petitioners contend there are past Growth Board decisions and court decisions
5 that obligate jurisdictions to protect agricultural land of long term commercial significance
6 over other GMA goals. They cite *King County v. Central Puget Sound Growth Management*
7 *Hearings Board*, 142 Wn.2d 543, 14 P.3d 133 (2000), and *Lewis County v. Western*
8 *Washington Growth Management Hearings Board*, 157 Wn.2d 488, 139 P.3d 1096 (2006),
9 as court cases that argue agricultural and other competing uses, such as airport expansion,
10 are not on equal footing. The Petitioners argue the broad expansion of the Airport Overlay
11 and the proliferation of intrusive zones now renders the impacts of Douglas County Code
12 18.65.040 and .050 significant to the farmers.

13 The Petitioners argue the State Environmental Policy Act (SEPA) review failed to
14 evaluate the impacts of the amendments on the agricultural resource area. They also
15 contend the Respondent continues to “misstate the nature of Pangborn Airport” as a
16 “general aviation airport” to justify using RCW 36.70A.510 and RCW 36.70.547.

17 This is a complicated issue and requires a more complete record, additional briefing
18 and testimony, and will not be decided by the Board at this time.

19 Issue No. 1 is not dismissed.

20 Under Issue No. 2, the Respondent contends the County has engaged in phased
21 environmental review over several years for non-project GMA planning and has used a
22 combination of planning documents as part of the integrated process. WAC 197-11-442.
23 The amendment objected to has been in the process since early 2005 and the Supplemental
24 Environmental Impact Statement (SEIS) listed the alternative to the “preferred alternative”
25 as “no action”. Alternatives to the proposal were discussed in planning documents, agency
26 comments and public comments throughout the record. Siting the airport elsewhere was
not a viable alternative. The Petitioners fail to demonstrate the amendment of the Airport

1 Overlay District creates “unresolved conflicts concerning alternative uses of available
2 resources,” as described in RCW 43.21C.030(2)(e).

3 The Petitioners contend the County failed to comply with RCW 43.21C.030(2)(e).
4 They argue the SEIS does not mention Pangborn Airport; does not mention a proposed
5 amendment to the Overlay zone; does not mention the agricultural resource area of long-
6 term commercial significance; and does not mention resource conflicts or alternatives to
7 resolve conflicts. In other words, the Petitioners believe the County should have studied
8 other alternatives besides the “preferred alternative” and “no action”.

9 This is a complicated issue and requires a more complete record, additional briefing
10 and testimony, and will not be decided by the Board at this time.

11 Issue No. 2 is not dismissed.

12 Under Issue No. 3, the Respondent argues the GMA does not provide guidance as to
13 the requirement for mapping and they cite *Woodmansee v. Ferry County*, EWGMHB, Case
14 No. 00-1-0007, FDO (August 18, 2000). They contend the language of RCW 36.70A.070
15 requires that the Comprehensive Plan, development regulations and mapping must be
16 consistent. The Respondent argues the Comprehensive Plan text and amended DCC
17 18.65.080 specifically incorporate and adopt the official zoning map.

18 The Petitioners contend the maps submitted by the County originally did not depict
19 an Airport Overlay zone mapping amendment. They argue the old and new maps are
20 deficient and do not reference mapping the airport overlay boundaries. The Petitioners
21 contend the maps are unclear and cover most of Greater East Wenatchee and even into
22 Chelan County.

23 The Board agrees with the Respondent. The maps clearly depict an airport overlay
24 zone and are consistent with the Comprehensive Plan. The Petitioners fail to show where
25 the County is out of compliance with RCW 36.70A.070.

26 Issue No. 3 is dismissed.

1 Under Issue No. 4, the Respondent contends the County engaged in an extensive
2 process of public meetings and hearings, and received a substantial amount of agency and
3 public comments. The Index of Record demonstrates compliance.

4 The Petitioners argue the Board of County Commissioners (BOCC) modified the
5 Planning Commission's recommendations at their meeting without fulfilling its public
6 participation, notice, and fact-finding obligations. They cite Douglas County Code 14.10.050
7 under B., which states, in part under B. 6., "The board of county commissioners must hold
8 a public hearing to consider any changes to the recommendation of the planning
9 commission." The Petitioners argue only by involving the Planning Commission in the review
10 of the changes proposed by the BOCC is the public's right of participation preserved. In
11 addition, comments received in the public hearing process were based on the Planning
12 Commission's recommendations, not on the final document changed by the BOCC.

13 This is a complicated issue and requires a more complete record, additional briefing
14 and testimony, and will not be decided by the Board at this time.

15 Issue No. 4 is not dismissed.

16 Under Issue No. 5, the Respondent argues RCW 36.70A.106 was followed. CTED
17 received the proposed amendments to the Airport Overlay and provided comments to
18 Douglas County.

19 The Petitioners contend the County failed to follow RCW 36.70A.106 and notify CTED
20 of the BOCC changes to the Planning Commission's recommendations. Because the BOCC
21 ignored the procedural requirements of its own development regulations, no RCW
22 36.70A.106 CTED notice and review occurred after the changes to the recommendation.

23 This is a complicated issue and requires a more complete record, additional briefing
24 and testimony, and will not be decided by the Board at this time.

25 Issue No. 5 is not dismissed.

26 Under Issue No. 6, the Respondent contends the County began its process of
updating the Comprehensive Plan in late 2004, pursuant to RCW 36.70A.130. The
amendments to the Airport Overlay District were proposed as part of that update. The

1 proposed amendments needed further work. Two years later, the BOCC adopted Resolution
2 No. 07-9B. The amendments to the Airport Overlay zone were a continuation of the 2004-
3 2005 process. Douglas County has interpreted the language in RCW 36.70A.130(2)(a) as a
4 process and docketing limitation. CTED reviewed and favorably commented on the
5 proposed amendments.

6 The Petitioners argue the BOCC resolution adopting the amendments were effective
7 immediately, not at the end of 2007, as proposed by the Respondents. They also contend
8 the County's argument is "semantic", suggesting that "considered annually" is a broad term
9 applicable to the entire Planning and Public Participation process that may extend over
10 multiple years as a distinct consideration always relating back to the year a proposal was
11 first conceived. They contend this violates the restrictions of both RCW 36.70A.130 and DCC
12 14.32.040. In addition, they believe the County fails to follow RCW 36.70A.130(2)(b), which
13 states "all proposals shall be considered by the governing body concurrently so the
cumulative effect of the various proposals can be ascertained."

14 This is a complicated issue and requires a more complete record, additional briefing
15 and testimony, and will not be decided by the Board at this time.

16 Issue No. 6 is not dismissed.

17 Under Issue No. 7, the Respondent contends the County has participated in joint
18 planning with other jurisdictions, including the City of East Wenatchee. Essential Public
19 Facilities are addressed in the Regional Policy Plan. The Greater East Wenatchee Area
20 Comprehensive Plan provides for joint planning under its Joint Planning chapter and Goals
21 and Policies, as does the Douglas County Code under DCC 14.32.070. The GMA requires
22 coordination and consistency between the jurisdictions comprehensive plans. RCW
23 36.70A.100. The County believes this has been done by the County and City of East
Wenatchee.

24 The City of East Wenatchee contends the Petitioners failed to cite any statutes or
25 case law in support of their argument. They argue the real issue is whether the
26 amendments adopted by the County comply with the GMA. Either way, the City's

1 participation is irrelevant. In addition, RCW 35A.63.030 gives cities and counties the right to
2 participate in joint planning meetings. The City contends the legislature contemplated joint
3 planning meetings when it required counties to adopt county-wide planning policies in
4 cooperation with cities within their borders. Finally, the City argues the Petitioners'
5 argument is "nothing more than speculation", which does not support a conclusion, or even
6 an inference, that the amendments ultimately adopted do not comply with the GMA. City of
7 East Wenatchee brief at 4.

8 The Petitioners contend the County inappropriately gave the East Wenatchee City
9 Council or the East Wenatchee Planning Commission more "accord" or equal status with the
10 County's Board and Planning Commission. Petitioners' brief at 16.

11 The Board agrees with the two Respondents. The GMA requires coordination
12 between jurisdictions. RCW 36.70A.100. The Airport Overlay zone lies in the County and
13 over the City of East Wenatchee. The County's and City of East Wenatchee's joint planning
14 was a process to ensure coordination and consistency of their respective plans and
15 development regulations. The Central Board emphasized interjurisdictional planning when it
16 wrote in *Hapsmith I*:

17 The Act requires interjurisdictional planning for public facilities that are of a
18 county or statewide nature, through the development of CPPs. *Hapsmith, et*
19 *al. v. City of Auburn*, CPSGMHB Case No. 95-3-0075c, FDO (May 10, 1996).

20 The Petitioners failed to provide documentation, case law, past Growth Board cases
21 or any evidence that show the County was out of compliance by working with other
22 jurisdictions and joint planning.

23 Issue No. 7 is dismissed.

24 Under Issue No. 8, the Respondent argues RCW 36.70.547 is not "inapplicable" to
25 GMA planning. They contend the GMA requires local governments to protect airport use and
26 expansion.

The Petitioners argue Pangborn Airport is designated by the National Plan of
Integrated Airport Systems as a "primary and commercial airport", rather than a "reliever"

1 or "general aviation" airport. Thus, RCW 36.70.547 and RCW 36.70A.510 do not apply to it.
2 Petitioners' brief at 9.

3 This is a complicated issue and requires a more complete record, additional briefing
4 and testimony, and will not be decided by the Board at this time.

5 Issue No. 8 is not dismissed.

6 Under Issue No. 9, the Respondent argues Pangborn Airport pre-exists the GMA and
7 its original siting was not subject to the GMA. However, it is clear that Pangborn is an
8 Essential Public Facility under the GMA and Douglass County Code. It has also been
9 characterized as an EPF in Douglas County's Comprehensive Plan and development
10 regulations. The amendment objected to is a non-project action and is not an expansion of
11 the EPF. The airport adopted an FAA approved, updated Airport Master Plan that includes
12 future lengthening of a runway. Site specific development approval by other agencies is not
13 a proper basis or pre-condition for GMA planning or development regulations. The
14 Respondent contends RCW 36.70.547 is not an "inapplicable state statute," as the
15 Petitioners would like the Board to believe. This statute has been incorporated by the GMA
16 at RCW 36.70A.510, and requires protection of Pangborn Airport. Respondents brief at 26.

17 The Petitioners disagree with the Respondent's argument that the amendment is a
18 "non-project" action and the amendment not an expansion of an EPF. Petitioners' brief at
19 16. They argue the maps show a clear and dramatic expansion of airport overlay uses into
20 the Agricultural Resource Area. The Petitioners contend this expansion of use is not
21 essential and possibly a "power and property rights grab?" Petitioners' brief at 17. The
22 Petitioners contend the County failed to do an adequate RCW 43.21C.030 alternative study
23 to determine if the expansion was necessary given the agricultural land underneath the
24 Overlay zone.

25 This is a complicated issue and requires a more complete record, additional briefing
26 and testimony, and will not be decided by the Board at this time.

Issue No. 9 is not dismissed.

1 Under Issue No. 10, the Respondent contends the County amended the existing
2 Airport Overlay District in response to Pangborn adopting an updated Airport Master Plan
3 and to the GMA requirements at RCW 36.70A.510 and RCW 36.70.547; the BOCC, based
4 upon the record before it and exercising the authority and discretion it has as the County
5 legislative authority, the BOCC rejected some of the Planning Commission's
6 recommendations; that rejection of planning commission recommendations by a legislative
7 authority falls within such processes and does not violate the GMA; and the amendment to
8 the Airport Overlay District meets the requirements of the GMA to protect Pangborn.

9 The Petitioners argue Issue No. 10 in the same context as Issue Nos. 4 and 5. The
10 BOCC failed to hold another public hearing as required by the Douglass County Code after
11 changing the recommendation by the Douglass County Planning Commission. In addition,
12 the "findings of fact" mirrored those of the Planning Commissions. Those findings do not
13 support the action taken by the BOCC after the changes to the recommendation were
14 made.

15 This is a complicated issue and requires a more complete record, additional briefing
16 and testimony, and will not be decided by the Board at this time.

17 Issue No. 10 is not dismissed.

18 Under Issue No. 11, the Respondent contends this is a similar argument to Issue No.
19 1. They argue that the GMA does not afford "untouchable" status upon the agricultural
20 lands adjacent to the airport. Respondent brief at 28. Encouraging conservation of
21 agricultural lands is only one of the thirteen goals. RCW 36.70A.020. Local governments do
22 not violate the GMA when balancing those goals during the planning process. The
23 Respondent contends the Petitioners have a substantial burden to demonstrate evidence in
24 the record that the Airport Overlay converts the use of agricultural lands to other uses
25 and/or impermissibly impacts those lands. The protections afforded to Pangborn actually
26 encourage conservation of agricultural land surrounding the airport and lesson the potential
for incompatible future impacts to that land.

1 The Petitioners argue statutory law requires counties to adopt development
2 regulations which shall assure the "use of lands adjacent to agricultural...resource lands
3 shall not interfere with the continued use in the accustomed manner and in accordance with
4 best management practices, of these designated lands for the production of food,
5 agricultural products..." RCW 36.70A.060(1). The Petitioners contend the County has not
6 produced a record to demonstrate that it has complied with these GMA mandates. The
7 Petitioners argue the new Airport Overlay zone and the proliferation of intrusive zones now
8 render the impacts significant to farmers. In addition, the SEPA review failed to evaluate the
9 impacts of the new amendments. The SEIS only mentioned Agricultural Resource Area in
the context of cluster housing.

10 This is a complicated issue and requires a more complete record, additional briefing
11 and testimony, and will not be decided by the Board at this time.

12 Issue No. 11 is not dismissed.

13 Under Issue No. 12, the Respondent contends the County's amendment is consistent
14 with the GMA and mandated under RCW 36.70A.510 and RCW 36.70.547. As to sub-issues
15 (2) and (3), the Respondent cites RCW 36.70A.280(1). The Growth Boards have held they
16 have no jurisdiction to hear constitutional issues involving the GMA or the actions by local
17 government. According to the Respondent, the Board has no authority to make findings
18 that the County's decision violates federal and constitutional "takings" and "substantive due
process" requirements, and/or violates due process prohibitions.

19 The Petitioners argue the Board must interpret, construe and apply state and local
20 legislation. Entitlement to SEPA review, for example, in the state of Washington is a
21 personal right, not just a public obligation. The Petitioners contend to proceed with
22 "constitutional blinders" on will result in statutory interpretation, construction and
23 implementation that run a high risk of unnecessarily creating conflict that can easily be
24 avoided if the Board is aware of these possible results of "ill-considered statutory
25 interpretation. Petitioners' brief at 18.
26

1 The Board agrees in part with the Respondent. Whether the amendment to the
2 Airport Overlay District was consistent with the GMA and RCW 36.70.547 will be determined
3 during final briefing and argument under Issue No. 1. As to sub-issues (2) and (3), this
4 Board has in the past held that it does not have jurisdiction to hear constitutional issues,
5 such as "takings", "substantive due process", and due process prohibitions, and will
6 continue to do so.

7 Issue No. 12 is dismissed.

8 III. ORDER

9 Based upon review of the Motions submitted by Douglas County, the Motion hearing,
10 the briefs and exhibits submitted by the Parties, and having deliberated on the matter, the
11 Board Orders:

- 12 1. The Motion to Supplement Record is granted.
- 13 2. The Motion to Dismiss Petition for Review, or in the Alternative, Issues
14 Set Forth in the Petition for Review is granted in part as set forth in 3
15 and 4 below.
- 16 3. Issue Nos. 3, 7, and 12 are dismissed.
- 17 4. Issue Nos. 1, 2, 4, 5, 6, 8, 9, 10, and 11 are not dismissed and will be
18 considered at the Hearing on the Merits with further briefing by the
19 Parties to this action.

20 **SO ORDERED** this 26th day of September 2007.

21 EASTERN WASHINGTON GROWTH MANAGEMENT
22 HEARINGS BOARD

23 _____
24 John Roskelley, Board Member

25 _____
26 Dennis Dellwo, Board Member

Joyce Mulliken, Board Member