

1 BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
2 CENTRAL PUGET SOUND REGION
3 STATE OF WASHINGTON
4

5 DON GEREND,
6

7 Petitioner,

CASE No. 19-3-0015

8 v.
9

**ORDER FINDING CONTINUED
NONCOMPLIANCE AND INVALIDITY**

10 CITY OF SAMMAMISH,
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12 Respondent.
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14 **I. INTRODUCTION AND BACKGROUND**

15 On April 20, 2020, the Board issued its Final Decision and Order (FDO) in this case.
16 In the FDO, the Board reviewed a challenge to the City of Sammamish's (City) amendments
17 to the Sammamish Municipal Code (SMC) concerning transportation concurrency and level
18 of service for road segments and corridors as adopted under Ordinance No. (Ordinance)
19 O2019-484. The Board concluded that passage of the Ordinance violated RCW 36.70A.070
20 by improper use of a development regulation, RCW 36.70A.130 by creating inconsistency
21 within the elements of the comprehensive plan, and RCW 43.21C.030 by failure to make an
22 adequate threshold determination of potential environmental impacts. The Board remanded
23 the challenged Ordinance to the City for compliance action. In addition, the Board
24 determined that the continued validity of SMC 14A.10.050(2), as adopted in Ordinance
25 O2019-484, would substantially interfere with the fulfillment of the GMA Planning Goals 10
26 and 12 and imposes invalidity on SMC14A.10.050(2). On November 13, 2020, the City filed
27 a Compliance Report, including exhibits. The City also filed the original proceeding index
28 and compliance index.
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31 On November 30, 2020, Petitioner Don Gerend filed Petitioner's Objection to a
32 Finding of Compliance, the Declaration of Dean Williams, and exhibits thereto.

1 On December 10, 2020, the City filed a Reply in Support of Compliance and the
2 Declaration of David L. Rudat. In a footnote in its Reply, the City requested that the Board
3 strike the exhibits attached to the Williams Declaration and the arguments that rely upon
4 those exhibits.

5 Pursuant to RCW 36.70A.330(1) and (2), the Board conducted a telephonic
6 compliance hearing on December 17, 2020. Board members Deb Eddy and Cheryl Pflug
7 attended the hearing. Rick Eichstaedt convened the hearing as the Presiding Officer. Peter
8 J. Eglick represented the City. Petitioner Don Gerend was represented by Dean Williams
9 and Duana Koloušková.

10 After the hearing, on December 23, 2020, the City filed an Official Notice Pursuant to
11 WAC 242-03-630(4) requesting that the Board take official notice of Sammamish Ordinance
12 O2020-524, adopted by the City of Sammamish Council on December 22, 2020. This
13 Ordinance repealed Sammamish City Code (SMC) 14A.10.050(2), which the Board found
14 invalid in its April 20, 2020 FDO.

15 Thereafter, the Board provided the Petitioner an opportunity to respond to the Official
16 Notice, which was filed by Petitioner on January 5, 2021.

17 **II. STANDARD OF REVIEW**

18 After the Board has entered a finding of noncompliance, the local jurisdiction is given
19 a period of time to adopt legislation to achieve compliance.¹ After the period for compliance
20 has expired, the Board is required to hold a hearing to determine whether the local
21 jurisdiction has achieved compliance.² For purposes of Board review of the comprehensive
22 plans and development regulations adopted by local governments in response to a
23 noncompliance finding, the presumption of validity applies and the burden is on the
24 challenger to establish that the new adoption is clearly erroneous in view of the entire record
25 before the board and in light of the goals and requirements of the GMA.³

26 The only time the burden of proof shifts to the city is when the city is subject to a
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¹ RCW 36.70A.300(3)(b).

² RCW 36.70A.330(1) and (2).

³ RCW 36.70A.320(1), (2), and (3).

1 **B. City’s Request to Take Official Notice**

2 The City requested that this Board take official notice of Ordinance O2020-524
3 pursuant to WAC 242-03-630(4). That provision provides, in part, that this Board may take
4 official notice of “[o]rdinances, resolutions, and motions enacted by cities, counties, or other
5 municipal subdivisions of the state of Washington.”
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7 Ordinance O2020-524 appears to be offered to the Board as evidence of an action
8 taken to comply with the April 20, 2020, FDO in this matter. Generally, the Board will not
9 consider “post hearing evidence, documents, briefs, or motions.” WAC 242-03-800.

10 Moreover, the Board, when considering whether a jurisdiction has acted to bring itself into
11 compliance, generally will consider only information provided prior to the date due for
12 compliance or evidence cited and attached in the compliance briefs. WAC 242-03-920,
13 940(2).
14

15 Notwithstanding, the Board finds that Ordinance O2020-524 amounts to a legislative
16 action repealing SMC 14A.10.050(2). While Board regulations allow it to turn a blind eye to
17 the City’s late legislative action, it is not in the interest of any party or in the interest of
18 judicial efficiency to create a fiction that SMC 14A.10.050(2) has not been legislatively
19 repealed and to require further compliance hearing on that particular matter. **Therefore, the**
20 **Board takes official notice of Ordinance O2020-524.**

21 **C. The Remanded Issues**

22 The FDO invalidated SMC 14A.10.050(2) because the addition of corridor level of
23 service (LOS) (the Volume to Capacity portion of challenged Ordinance) violated SEPA and
24 GMA.⁷ The Board concluded passage of the Ordinance violated RCW 36.70A.070 by
25 improper use of a development regulation, RCW 36.70A.130 by creating inconsistency
26 within the elements of the comprehensive plan, and, RCW 43.21C.030 by failure to make an
27 adequate threshold determination of potential environmental impacts and remands the
28 challenged Ordinance to the City for compliance action.⁸
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⁷ FDO at 42.

⁸ FDO at 15, 22, 26.

1 **D. The City’s Compliance Actions**

2 In its Compliance Report, the City informed the Board that it took action to come into
3 compliance with the FDO by: (1) “accepting the FDO” and dismissing its superior court
4 challenge to the FDO and (2) instructed its Code Revisor to add a “notice” to the SMC.⁹
5 Specifically, the notice stated:

6 **NOTE:** SMC 14A.10.050(2) was invalidated by the Washington State Growth
7 Management Hearings Board on April 20, 2020 in its Final Decision and Order
8 in *Gerend v. City of Sammamish*, GMHB Case. No. 19-3-0015; accordingly,
9 SMC 14A.10.050(2) is repealed by operation of law.

10 During the compliance hearing, counsel for the City admitted that the notice did not
11 occur by legislative action of the City Council. As discussed above, the City Council
12 adopted Ordinance O2020-524 on December 22, 2020, which repealed Sammamish City
13 Code SMC 14A.10.050(2).
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15 In Petitioner’s Objections to a Finding of Compliance, Petitioner alleged that the
16 City’s actions were not limited solely to the actions the City described in its Compliance
17 Report, which were allegedly taken to come into compliance with the FDO, but included a
18 moratorium on concurrency certificates.¹⁰ Ordinance O2020-508, adopted on July 28, 2020,
19 established a six-month moratorium on the acceptance of concurrency certificates,
20 excepting public agencies defined in SMC 21A.15.915. That Ordinance states, in part:
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22 WHEREAS, on April 20, 2002, the Board issued a Final Decision and Order
23 (“FDO”) in *Gerend*, declaring that SMC 14A.10.050(2) as adopted in Ordinance
24 No. O2019-484 is invalid and “remanded to the City for action to bring it into
25 compliance” by October 30, 2020.

26 Ordinance O2020-508 further states that the “non-exhaustive underlying facts
27 necessary to support this emergency declaration are included in the “WHEREAS”
28 clauses, above, all of which are adopted by reference as findings of fact as if fully set forth
29 herein.”
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31 ⁹ Compliance Report at 2.

32 ¹⁰ The Petitioner also pointed to a Determination of Significance (DS) and statements made during City Council meetings regarding the “Town Center Work Program” and regarding a “no-growth” position in negotiation with King County regarding growth targets for a future King County Countywide Planning Policies. Petitioner’s Objections to a Finding of Compliance at 2-3.

1 **E. Board Analysis**

2 **i. Repeal of SMC 14A.10.050(2)**

3 As provided above, the Board has taken official notice of Ordinance O2020-524 and,
4 therefore, the City has taken sufficient legislative action, except as described below, to
5 repeal the challenged ordinance and address the violation identified in the FDO.

6 The Board notes that the City Manager’s initial action, simply asking the Code
7 Reviser to place a footnote in the SMC, was not enough to constitute an official action of the
8 City’s legislative authority. It is ordinarily necessary for a county or city to adopt new
9 legislation in response to the Board’s finding of noncompliance. This is because the Board
10 bases its findings of noncompliance on legislative enactments. RCW 36.70A.280 and
11 36.70A.290. *See also Lake Cavanaugh Association v. Skagit County*, WWGMHB No. 04-2-
12 0011 (Order Finding Compliance, January 23, 2006) (In determining compliance, the Board
13 cannot look beyond the language of the comprehensive plan to determine if the county is
14 actually enforcing its provisions) and *Swinomish v. Skagit County*, WWGMHB No. 02-2-
15 0012c (Order Finding Continuing Noncompliance, May 1, 2006) (the Board cannot find
16 compliance based on administrative actions taken without legislative modification of the
17 noncompliant ordinance or resolution originally challenged). A note in the SMC is not
18 sufficient.
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21 **ii. Moratorium**

22 The Petitioner asks the Board to look beyond the City’s statement of compliance and
23 determine that it has jurisdiction to review the moratorium enacted by Ordinance O2020-508
24 as an action taken to comply¹¹ and that the moratorium substantially interferes with the
25 goals of the GMA.¹² The Petitioner argues that the language of Ordinance O2020-508
26 indicates that it was enacted as an interim measure to address compliance with the Board’s
27 FDO.
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29 The City replies that the moratorium is not properly before the Board and that the
30 Petitioner should have filed a new and timely petition for review with the Board. This
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¹¹ Pursuant to WAC 242-03-630(4), the Board takes official notice of Ordinance O2020-508.

¹² Petitioner’s Objections to A Finding of Compliance at 1.

1 appears to raise a matter of first impression for the Board – does the Board have authority
2 to review, as part of a compliance hearing, a legislative action not identified by a jurisdiction
3 in its statement of actions taken to comply?

4 The Board’s Rule of Practice and Procedure limit review in compliance to issues
5 within the nature, scope, and statutory basis of the conclusions of noncompliance in the
6 FDO. WAC 242-03-930(2) provides, “[a] person who has participated in the proceedings of
7 a city, county, or state agency to enact legislation or take other action in response to the
8 board's order and who seeks to raise new issues unrelated to compliance with the board's
9 prior order, must file a new petition for review. New issues are issues not within the nature,
10 scope and statutory basis of conclusions of noncompliance in the board's prior order finding
11 noncompliance.” WAC 242-03-940(5) states, “[i]ssues not within the nature, scope, and
12 statutory basis of the conclusions of noncompliance in the prior order will not be addressed
13 in the compliance hearing but require the filing of a new petition for review.”
14

15 The limit to review is expanded when the Board has issued a finding of invalidity.
16 The GMA provides the Board with specific authority to review interim controls on
17 development (moratorium) during a compliance hearing:
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19 If a determination of invalidity has been made and the county or city has enacted
20 an ordinance or resolution amending the invalidated part or parts of the plan or
21 regulation **or establishing interim controls on development affected by the**
22 **order of invalidity**, after a compliance hearing, the board shall modify or
23 rescind the determination of invalidity if it determines under the standard in
24 subsection (1) of this section that the plan or regulation, as amended or made
25 subject to such interim controls, will no longer substantially interfere with the
fulfillment of the goals of this chapter.

26 RCW 36.70A.302(7)(a).

27 The Court of Appeals’ decision in *Miotke v. Spokane County*, 181 Wn. App. 369, 325
28 P.3d 434 (2014), explained the Board’s authority and duty to look beyond the face of the
29 legislative action identified in the compliance statement, particularly when considering
30 invalidity. There, the Court considered the Board’s obligation to look at the effects of a
31 Spokane County Resolution that repealed an expansion of its urban growth area and the
32 effect of separate actions - vesting of urban development:

1 [A] close reading of RCW 36.70A.320(4) does not support the County's
2 interpretation that the Board merely had to find that Resolution 7–0077 was
3 itself in compliance with the GMA. The plain language of RCW 36.70A.320(4)
4 states that the question is not whether the action to remedy the invalidity itself
5 complies with the GMA, but whether the remedial action in response to the
6 invalidity finding “will no longer substantially interfere” with the GMA. **This
7 language implies that the Board's analysis should not be confined
8 strictly to the remedial action** but that the Board should review the extent to
9 which development that vested under the flawed UGA expansion interferes
10 with GMA goals and should condition its finding of compliance on measures
11 that will remedy that interference. [Emphasis added.]

10 During compliance, the Board is charged with review of “interim controls on
11 development affected by the order of invalidity” to determine whether the actions of a
12 jurisdiction “will no longer substantially interfere” with the GMA.¹³ Nothing in the GMA or the
13 Board’s procedures limits the review of an interim control simply to those identified by a
14 jurisdiction in its statement of actions taken to comply.

15 That leaves the questions of whether Ordinance O2020-508 is an interim control on
16 development affected by the FDO. The Board believes that it is. On its face, the Ordinance
17 was adopted, at least in part, to address the Board’s FDO:

18 WHEREAS, on April 20, 2002, the Board issued a Final Decision and Order
19 (“FDO”) in *Gerend*, declaring that SMC 14A.10.050(2) as adopted in Ordinance
20 No. O2019-484 is invalid and “remanded to the City for action to bring it into
21 compliance” by October 30, 2020.
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23 Having found that the Board has authority to review Ordinance O2020-508, the
24 Board must determine whether Ordinance O2020-508 will result in continued
25 noncompliance with the GMA. The repeal of SMC 14A.10.050(2) resolves the issues of
26 SEPA compliance and the requirement that a level of service be included in a City’s
27 comprehensive plan addressed in the FDO. However, Ordinance O2020-508 exacerbates
28 the issue of thwarting implementation of portions of the comprehensive plan discussed in
29 the FDO, particularly CF 1.1 (“Plan capital facilities that have the capacity and are located to
30 serve existing development and future growth planned in the Land Use Element”). This
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¹³ RCW 36.70A.302(7)(2).

1 results in a violation of RCW 36.70A.130(1)(d) because it is inconsistent with the
2 Comprehensive Plan, Land Use and Transportation Elements. RCW 36.70A.130(1)(d)
3 requires, “[a]ny amendment of or revision to development regulations shall be consistent
4 with and implement the comprehensive plan.”¹⁴

5 The City’s compliance actions, taken together, thwart implementation of the Capitol
6 Facilities Element Policy CF 1.1 because Ordinance O2020-508 will preclude realization of
7 the comprehensive plan policy by interfering with the City’s ability to locate services to serve
8 existing development and future growth planned in the Land Use Element. The City cannot
9 demonstrate compliance in one area where the actions taken to comply create a clear
10 noncompliance in another. Ordinance O2020-508 violates RCW 36.70A.130(1)(d) because
11 it either precludes or is in conflict with CF 1.1.

12 The Board further agrees with the Petitioner that the moratorium, particularly in light
13 of the repeal of SMC 14A.10.050(2), substantially interferes with Goals 1, 4, and 5 of the
14 GMA. The Petitioner has met his burden to demonstrate that Ordinance O2020-508 is
15 “clearly erroneous in view of the entire record before the board and in light of the goals and
16 requirements of [the GMA].”¹⁵ Ordinance O2020-508 interferes with Goal 1 by forestalling
17 any growth that requires a concurrency certificate. Ordinance O2020-508 interferes with
18 Goal 4 by prohibiting the creation of new housing that requires a concurrency certificate,
19 including affordable housing. The Ordinance interferes with Goal 5 by precluding economic
20 development that requires a concurrency certificate.

21 While the Board recognizes that a moratorium can be an effective tool to assist in
22 achieving compliance, its continuation beyond the date of the City’s action repealing SMC
23 14A.10.050(2) amounts to interference with the goals of the GMA and is unnecessary to
24 achieve compliance with the FDO.¹⁶

25 The Board also recognizes that the moratorium enacted by Ordinance O2020-508

30 _____
31 ¹⁴ A moratorium is a development regulation under RCW 36.70A.030(8) because it is a “control placed on
32 development.”

¹⁵ WAC 365-196-040.

¹⁶ The scope of this Order is limited solely to Ordinance O2020-508. The Board cannot opine on whether it
would have the authority to review any future moratorium as a compliance action or whether a future
moratorium would be inconsistent with the Goals of the GMA.

1 will expire days after the issuance of this Order and that this may have the effect of placing
2 the City in compliance. Accordingly, the Board shall order an expedited compliance
3 schedule provided below.

4 **iii. Other Actions of the City**

5 The Petitioner also asserted that other actions of the City, not discussed in the City's
6 Compliance Report, should be considered by this Board, particularly a DS and statements
7 made during City Council meetings regarding the "Town Center Work Program" and
8 regarding a "no-growth" position in negotiation with King County regarding growth targets for
9 future King County Countywide Planning Policies. Because these actions are not interim
10 measures or within the nature, scope, and statutory basis of the conclusions of
11 noncompliance in the FDO, the Board rules that these are not relevant to any finding of
12 noncompliance.
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15 **IV. ORDER**

16 Based upon review of the April 20, 2020, Final Decision and Order, the City's
17 Compliance Report, the briefs and exhibits submitted by the parties, the Growth
18 Management Act, prior Board orders and case law, having considered the arguments of the
19 parties offered in the briefing and at the compliance hearing, and having deliberated on the
20 matter, the Board orders:
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- 23 • The City's request to strike the Petitioner's "citation and use" of exhibits attached
24 to the Williams Declaration is **DENIED**.
 - 25 • The City's request to take official notice of Ordinance O2020-524 is **GRANTED**.
 - 26 • The City is in continuing noncompliance with RCW 36.70A.130(1)(d).
 - 27 • Ordinance O2020-508 substantially interferes with Goals 1, 4, and 5 of the GMA
28 and, therefore, the City is found to be in continued noncompliance with the GMA
29 and Ordinance O2020-508 is invalid.
 - 30 • Case No. 19-3-0015 is remanded to the City for further action, consistent with this
31 order. The calendar for compliance is as follows:
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Item	Date Due
Compliance Due	February 16, 2021
Compliance Report/Statement of Actions Taken to Comply and Index to Compliance Record	March 2, 2021
Objections to a Finding of Compliance	March 16, 2021
Response to Objections	March 23, 2021
Compliance Hearing Meeting ID: 862 6606 6470 Passcode: 170023 or call (253) 215-8782	March 31, 2021 10:00 a.m.

SO ORDERED this 22nd day of January 2021.

Rick Eichstaedt, Board Member

Deb Eddy, Board Member

Cheryl Pflug, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.¹⁷

¹⁷ Should you choose to do so, a motion for reconsideration must be filed with the Board and served on all parties within ten days of mailing of the final order. WAC 242-03-830(1), WAC 242-03-840. A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.