Post-it® Fax Note 7671	Date 7/9/98 # of pages 10
To J. Taylor Washburn	From Sharon Brown
Co./Dept.	Co. Judge Alsdorf
Phone # (206) 447-4400	Phone # (206) 205-7620
Fax # (206) 447-9700	Fax # (206) 205-2669

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

THE CITY OF DES MOINES, et al., Plaintiffs/Petitioners, vs. THE PUGET SOUND REGIONAL COUNCIL, et al., Defendants/Respondents.	No. 96-2-20357-2 KNT No. 97-2-13908-2 KNT No. 97-2-22276-1 KNT No. 98-2-04911-1 KNT (CONSOLIDATED CASES)
CITY OF DES MOINES, et al., Plaintiffs/Petitioners, vs. PORT OF SEATTLE, et al., Defendants/Respondents.	MEMORANDUM RULING ON APPLICATION OF WAC Ch. 365-195
CITY OF DES MOINES, et al., Petitioners, vs. CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD, et al., Respondents.	

Judge Robert H. Alsdorf
King County Superior Court
Regional Justice Center
Kent, WA 98032
(206) 205-2620

AIRPORT COMMUNITIES COALITION, et al.,
Plaintiffs/Petitioners,
vs.
PORT OF SEATTLE, et al.,
Defendants/Respondents.

In January, 1998, this Court considered plaintiff-petitioners' claims against the Puget Sound Regional Council ("PSRC"). The plaintiff-petitioners there contended that RCW 47.80.023 gave their comprehensive plans primacy over the plans of the PSRC, and required the PSRC to conform its plans to theirs. The Court concluded that that argument was based on a misreading of the statute.

In this proceeding, the plaintiff-petitioners contend that the Procedural Criteria for Adopting Comprehensive Plans and Development Regulations as set forth in Chapter 365-195 of the Washington Administrative Code "unambiguously *require*" the Port to develop its plans for the Seattle-Tacoma International Airport ("STIA") in a way that "complies with" the neighboring cities comprehensive plans and development regulations. See, Cities' Trial Memorandum, at 31 (emphasis added).

The Court herein examines plaintiff-petitioners' assertion that the WAC effectively requires the Port's plans and actions to be governed by local comprehensive plans.

A. Do the CTED Regulations Establish Requirements of the Port?

Fundamental to plaintiff-petitioners' argument is the proposition that the regulations require certain actions of the Port. Section 030(5) of the regulations explicitly states that the

1 regulations apply only to jurisdictions covered by RCW 36.70A.040. That section of the GMA
2 is limited to cities and counties. The Port is neither.
3 Even were the Port a covered entity, the regulations would require nothing of it. Section
4
5 030 states simply that this chapter of the regulations is advisory:

6 (1) This chapter makes recommendations... The recommendations set forth are intended
7 as a listing of possible choices, but compliance with the requirements of the [Growth Management] act can be achieved without using all of the suggestions made here or
8 by adopting other approaches.
9 (2) These criteria are not meant to represent a minimum list of actions which must be taken...
10 (3) ... [C]ompliance with these criteria is not a prerequisite to a finding of compliance
11 with the act.

12 In Section 040(2), the Department recites that its purpose "is to provide assistance in interpreting
13 the act, not to add provisions and meanings beyond those intended by the legislature." Thus, the
14
15 regulations are advisory only, and do not expand or alter statutory requirements.
16 Plaintiff-petitioners nonetheless rely on Section 770(2) as establishing a requirement that
17 the Port comply with the cities' plans. Yet the language of that section cannot subject the Port to
18
19 the GMA in any way that is not already statutorily required, despite its careful phrasing. It
20 states:

21 Except where any specific enactment may state the contrary, the department interprets the
22 GMA as requiring that regional agencies and special districts comply with the comprehensive plans and development regulations developed under the act.
23
24 The opening phrase "Except where any specific enactment may state the contrary" effectively
25 concedes that the statutory language, such as RCW 36.70A.040, still controls.
26 In sum, the regulations may be examined simply for such assistance as they may provide
27
28 in interpreting the act. They establish no requirements, even for covered entities. They explicitly

Judge Robert H. Alsdorf
King County Superior Court
Regional Justice Center
Kent, WA 98032
(206) 205-2620

disa·ow meanings or standards different from those which are already present in the Growth Man.gement Act.

B. Do the CTED Regulations Establish Any Form of Primacy for City Plans?

There is an additional defect in plaintiff-petitioners' arguments beyond the fact that the regu.ations do not cover the Port and in any event establish no affirmative requirements of any entit.. That defect is readily apparent upon examination of Section 770(2) of the CTED regul.tions. Plaintiff-petitioners have ignored the significant limitation expressed in the last three words of that regulation. The final three words require deference only to those plans and regul.tions that have been developed "under the act", i.e., in conformity with the GMA. No defer.nce is due under the GMA to any city comprehensive plan or development regulation whic· itself does not conform to the requirements of the GMA. Comprehensive plans to which defer.nce is due cannot be those which consider only the needs or wants of their particular juris.ction.

Plaintiff-petitioners have urged this Court to be guided by the CTED regulations. Further exam.nation of the CTED regulations clarifies what the department considers necessary in order for lo.al comprehensive plans to be in conformity with the GMA. The very first section of the regul.tions suggests not just that local plans should be internally consistent, but also that they shoul.l be consistent with "county-wide planning policies and . . . the plans of other counties and cities where there are common borders or related regional issues." Section 010(4).

A jurisdiction's plan which contains a pledge not to cooperate with or implement any plans or decisions which "negatively affect" its residents or businesses would conflict with what CTED has declared to be that jurisdiction's fundamental duty to be consistent with and cooperate

Judge Robert H. Alsdorf
King County Superior Court
Regional Justice Center
Kent, WA 98032
(206) 205-2620

with neighboring jurisdictions. Moreover, a plan which pledges flat opposition to a facility that increases "adverse impacts" on the jurisdiction is contrary to the CTED declaration of what is appropriate in inter-jurisdictional consistency and cooperation. A plan which promotes its own self-interest without regard to the interests or needs of the region and of neighboring jurisdictions simply is not the type of plan that can be deemed to have been developed "under the act" or to be one to which deference is due.

The CTED regulations nowhere shift away from this emphasis on the primacy of inter-jurisdictional coordination over the protection of any one jurisdiction's self-interests. For example, Section 070(7) provides that inter-jurisdictional consistency is met by plans "which are consistent with and carry out the relevant county-wide planning policies." In effect, cities are to coordinate with that which has been declared to be of county-wide interest.

In a similar vein, Section 220 directs not only that local jurisdictions consider developing local definitions of certain key terms such as "Essential public facilities", but also that such definitions "should *in every case* be consistent with county-wide planning policies" (emphasis added). This interpretation further undercuts any argument of the cities' primacy, and suggests that the scope of protection for essential public facilities is to be viewed and determined from a broader perspective.

Section 325(2)(b) recommends that the local plan's transportation element include a discussion of how it is "consistent with the regional transportation plan" and of strategies which "promote the regional transportation plan." Section 325(2)(i)(i) then suggests that all jurisdictions should "assess the impacts of their transportation and land use decisions on adjacent jurisdictions." Subsection (C) thereof states explicitly

Judge Robert H. Alsdorf
King County Superior Court
Regional Justice Center
Kent, WA 98032
(206) 205-2620

AR 041633

> Local jurisdictions should also define their community's role in the regional transportation and land use strategy and *produce transportation and land use plans, and development regulations which promote that role.* (emphasis added)

Such regulatory provisions do not support plaintiff-petitioners' argument that the CTED regulations reflect, let alone establish, the primacy of their plans over the Port's, or any argument that a promised refusal to cooperate with any other body whose plans may negatively affect them could be considered action in conformity with the GMA.

Subsection 325(2)(i)(ii) bolsters the conclusion that under these regulations local actions, plans and regulations such as those drafted by Des Moines would be deemed to be in violation of the GMA. That subsection states:

> All transportation projects which have an impact on the regional transportation system must be consistent with the regional transportation plan as defined by RCW 47.80.030.

Sections 510 and 520 of the regulations likewise provide that local levels of service are to conform to the regional transportation plan, and that each local comprehensive plan should demonstrate that county-wide planning policies have been followed in its development.

Finally, Section 750(2) removes any possible argument of local primacy over transportation projects by reciting that RTPO's

> were expressly given responsibilities for ensuring the consistency of transportation planning throughout a region containing multiple local governmental jurisdictions.

If plaintiff-petitioners are correct that the CTED regulations provide persuasive authority concerning the application of the GMA to the current conflict between the ACC cities and the Port, it is clear that this authority is to be read against their claim of primacy. The regulations as a whole cannot reasonably be read to support their position that the Port should defer to their comprehensive plan or plans, except in the very limited situation where it is proven that their

Judge Robert H. Alsdorf
King County Superior Court
Regional Justice Center
Kent, WA 98032
(206) 205-2620

AR 041634

1 own plans have been developed in conformity with the GMA. On this, plaintiff-petitioners bear
2 the burden of proof. *See* Section 050 of the CTED regulations. A planning jurisdiction must
3 demonstrate that it has complied with the act, particularly by developing plans in a cooperative
4 fashion and in reasonable conformity to county-wide and RTPO planning. Id. Even were
5 deference due, it would not be due to local plans which ignore and combat regional cooperation.
6
7 C. Do the CTED Regulations Support Plaintiff-Petitioners' Arguments as to EPF's?
8
9 Plaintiff-petitioners have urged this Court to reject the Central Puget Sound Growth
10 Management Hearings Board's interpretation and application of the term "essential public
11 facilities" under RCW 36.70A.200. However, the CTED regulations on which they purport to
12 rely undercut their theory.
13
14 For example, plaintiffs have urged this Court to rely on the language of Section
15 340(2)(b)(iv) of the CTED regulations. That section states that when EPF's are to be provided
16 by special districts, the plans of that special district must be consistent with the local
17 comprehensive plans. If these regulations were not merely advisory, and if there were no other
18 CTED regulation than this one subsection, the cities' argument of primacy might be more
19 persuasive. However, taken in the context of all of the regulations read as a whole, plaintiff-
20 petitioners' argument fails.
21
22 Their cited subsection, 340(2)(b)(iv), must be read as part of the very section in which it
23 appears. That section starts by stating, at 340(2)(a)(i), that in identifying EPFs, the "broadest
24 view" should be taken of what constitutes an essential public facility, and that it should include
25 "the full range of services" provided both by government and by private entities. Moreover,
26
27
28
29

Judge Robert H. Alsdorf
King County Superior Court
Regional Justice Center
Kent, WA 98032
(206) 205-2620

immediately after the subsection cited by plaintiff-petitioners, subsection 340(2)(c) states that no comprehensive plan may "directly or indirectly" preclude the siting of essential public facilities.

With regard to the scope of the definition of "essential public facilities" the department suggested in Section 070(4) that planning jurisdictions should be guided by *but not limited to* the examples set forth in the statute. As a further reflection of this broad reading, the department even added that it is

> not necessary that facilities be publicly owned. If the services involved meet a locally accepted definition of public service, the supporting facilities for the services may be included on the list, regardless of ownership.

This broad departmental interpretation of the phrase "essential public facility" is fully consonant with the Hearings Board's broad interpretation of the meaning and scope of the EPF provision under RCW 36.70A.200.

A reading that RCW 36.70A.200 covers the siting of additional airport capacity, whether it is ultimately sited at Everett, Moses Lake, or Boeing field, or at STIA as a third runway, is a fair reading and fully in compliance with the CTED advisory regulations. The fact that the siting of additional airport capacity may, depending upon its ultimate location, be described alternatively either as the siting of a new facility or as the expansion of an existing facility, reflects a distinction without a difference. In both cases, a particular function – additional airport capacity – is being sited. Such a reading closely tracks the CTED mandate of a broad reading of EPF's. The Board's ruling therefore did not erroneously interpret the law.

The Board's reading that the EPF provision covers not just the physical structure of the facility itself but also all necessary services for the construction or operation of the facility closely tracks the language of the CTED regulations, at Section 070(4), where coverage is

Judge Robert H. Alsdorf
King County Superior Court
Regional Justice Center
Kent, WA 98032
(206) 205-2620

AR 041636

1 sugg sted by the department even for privately owned facilities providing a public *service*, and
2 Section 340(2)(c), which holds that no plan is to "directly or indirectly" preclude the siting of
3 EPF's.
4
5 Finally, nothing in the Act or in logic supports a reading that a facility that existed prior
6 to the adoption of the GMA is not subject to the EPF provisions of the GMA. Plaintiff-
7 petitioners argue that applying one or more provisions of the GMA to pre-existing entities is an
8 invalid retroactive application of the law. If that argument were carried to its logical extreme,
9
10 then pre-existing entities would be exempt from any such laws. Among other consequences of
11 such a reading would be that such facilities could expand without restraint. An absurd reading of
12 the statute is not to be made.
13
14 D. <u>Does HB 1487 Assist the Court in Interpreting RCW 36.70A.200?</u>
15 On the day of trial, plaintiff-petitioners presented to the Court the text of HB 1487, a bill
16 which was passed in March, 1998, seven months after the Hearings Board issued its decision.
17
18 Plaintiff-petitioners argue that this new bill supports their claim that the Hearings Board's
19 decision was in error.
20
21 The bill does not criticize or reject a broad definition of the scope of EPF coverage, such
22 as that employed by the Board. The bill on its face does not even apply to airports. Inasmuch as
23 the legislative history indicates that the language of the bill was drafted in such a way as to be
24 airport neutral and thereby to skirt the political controversies in which STIA has been long
25 embroiled, neither the rule of "<u>expression unius est exclusio alterius</u>" nor the argument that the
26 EPF definition has now been legislatively clarified to include airport improvements is available
27
28 to either side in these four lawsuits.
29

Judge Robert H. Alsdorf
King County Superior Court
Regional Justice Center
Kent, WA 98032
(206) 205-2620

AR 041637

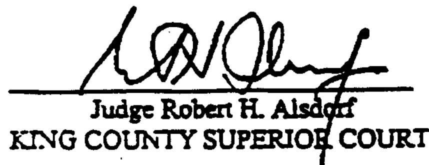
HB 1487 does not assist in the interpretation of RCW 36.70A.200. It is disregarded by this Court in its affirmance of the Hearings Board's decision below.

CONCLUSION

The Court is to sustain the administrative decisions made below unless they have been shown to be arbitrary and capricious, or unlawful, or unsupported by substantial evidence, or based upon an erroneous conclusion of law.

The plaintiff-petitioners have failed to prove that WAC Ch. 365-195 renders the Port's resolutions unlawful or that the administrative reviews conducted below erroneously interpreted the law. In this trial, as in the January 1998 proceeding, plaintiff-petitioners based their position on a misreading of the statute and of the regulations as a whole. For the reasons set forth below, and in the Findings and Conclusions separately filed this day, their claims are dismissed in each of the four cases here under review.

IT IS SO ORDERED, this 9th day of July, 1998.



Judge Robert H. Alsdorf
KING COUNTY SUPERIOR COURT

Judge Robert H. Alsdorf
King County Superior Court
Regional Justice Center
Kent, WA 98032
(206) 205-2620

AR 041638