Land Use Case Law Update – Winter 2022

Thursday, December 8, 2022

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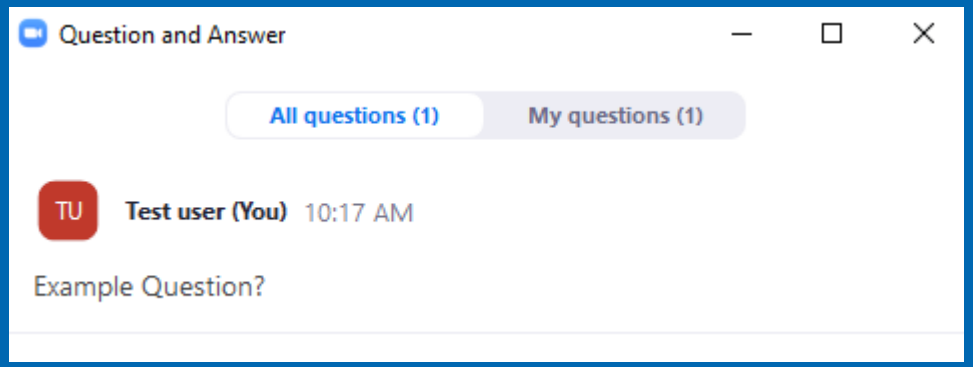

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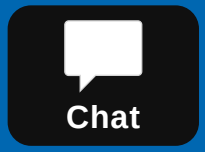
To open the Chat, press the 

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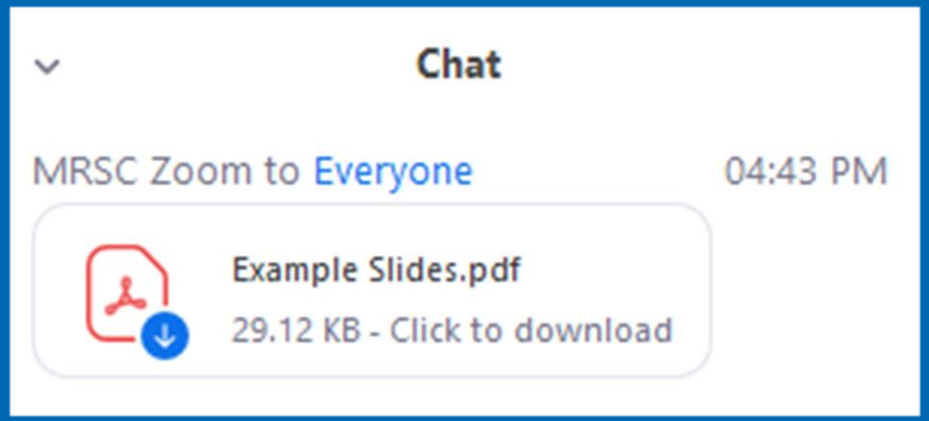

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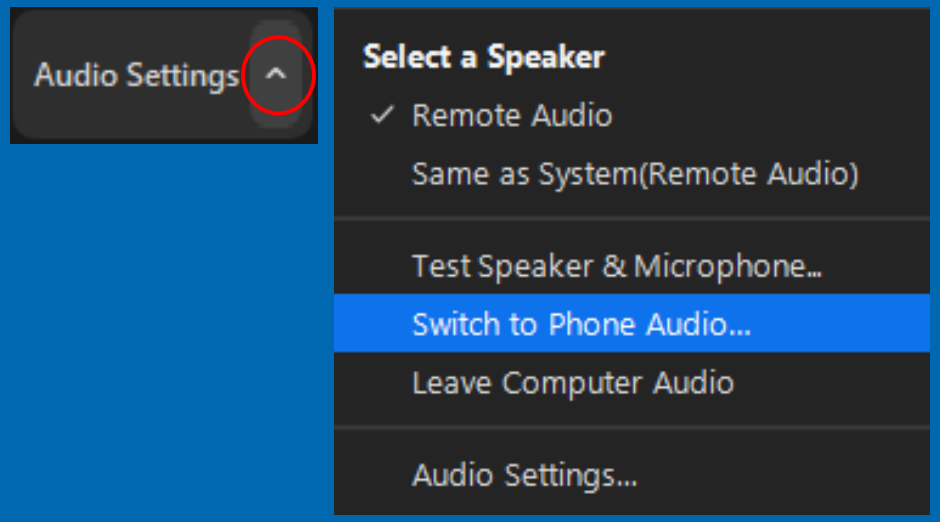

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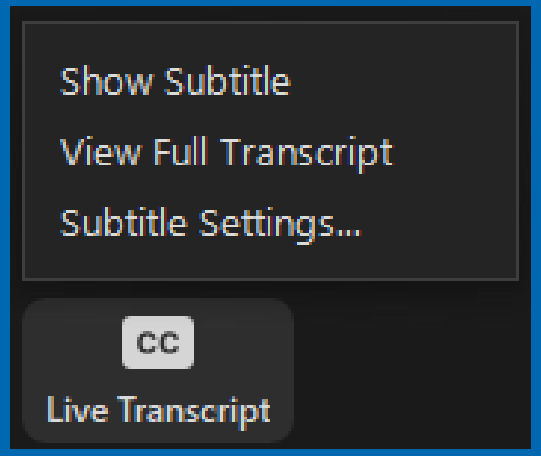

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Case Law Overview

Homeward Bound in Puyallup v. GMA Hearings Hearings Bd., *GMA compliance of homeless facility regulations*

Goertz v. City of Kirkland, *wetland takings.*

Futurewise v. Spokane Cnty*., clarification on what's required in capital facility elements.*

Viking JV, LLC v. City of Puyallup, *two-tiered examiner system A-OK.*

Homeward Bound in Puyallup v. Cent. Puget Sound Growth Mgmt. Hearings Bd., No. 55560-3-II (Wash. Ct. App. Sep. 27, 2022)

Primary Holdings: (1) GMA Hearings Boards don't have authority to designate homeless facilities as essential public facilities under GMA definition; (2) Even if the facilities did qualify as epfs, Puyallup's regulations didn't preclude them in violation of GMA; and (3) Puyallup's adoption of siting limitations are consistent with its comprehensive plan encouraging special needs housing and the like.

Homeward Bound in Puyallup v. Cent. Puget Sound Growth Mgmt. Hearings Bd., No. 55560-3-II (Wash. Ct. App. Sep. 27, 2022)

Facts:

In 2018 Puyallup adopts a new chapter in its zoning code that limits day use centers and overnight shelters for the homeless to a narrow portion of its industrial area, separated from the rest of the City by the Puyallup River. The area was distant from any services and had almost no access to transit. Additional siting options were available via approval of a development agreement.

Homeward Bound appealed the ordinance to the Central Puget Sound Growth Management Hearings Board. It argued that the ordinance was inconsistent with the City's comprehensive plan policies. It also argued that the facilities qualify as essential public facilities. As such, Homeward argued that the chapter violated a GMA statute that prohibits cities from precluding the siting of essential public facilities.

Homeward Bound in Puyallup v. Cent. Puget Sound Growth Mgmt. Hearings Bd., No. 55560-3-II (Wash. Ct. App. Sep. 27, 2022)

Facts:

The GMA Hearings Board ruled that the homeless facilities chapter did not qualify as essential public facilities under state law, but that the chapter was not consistent with pertinent comprehensive plan policies. The Board issued a compliance order remanding the chapter back to the City to amend the chapter to conform to its comprehensive plan.

Of central importance to the Court's resolution of the appeal was that the Plaintiffs never requested the City to designate the homeless facilities essential public facilities during City review.

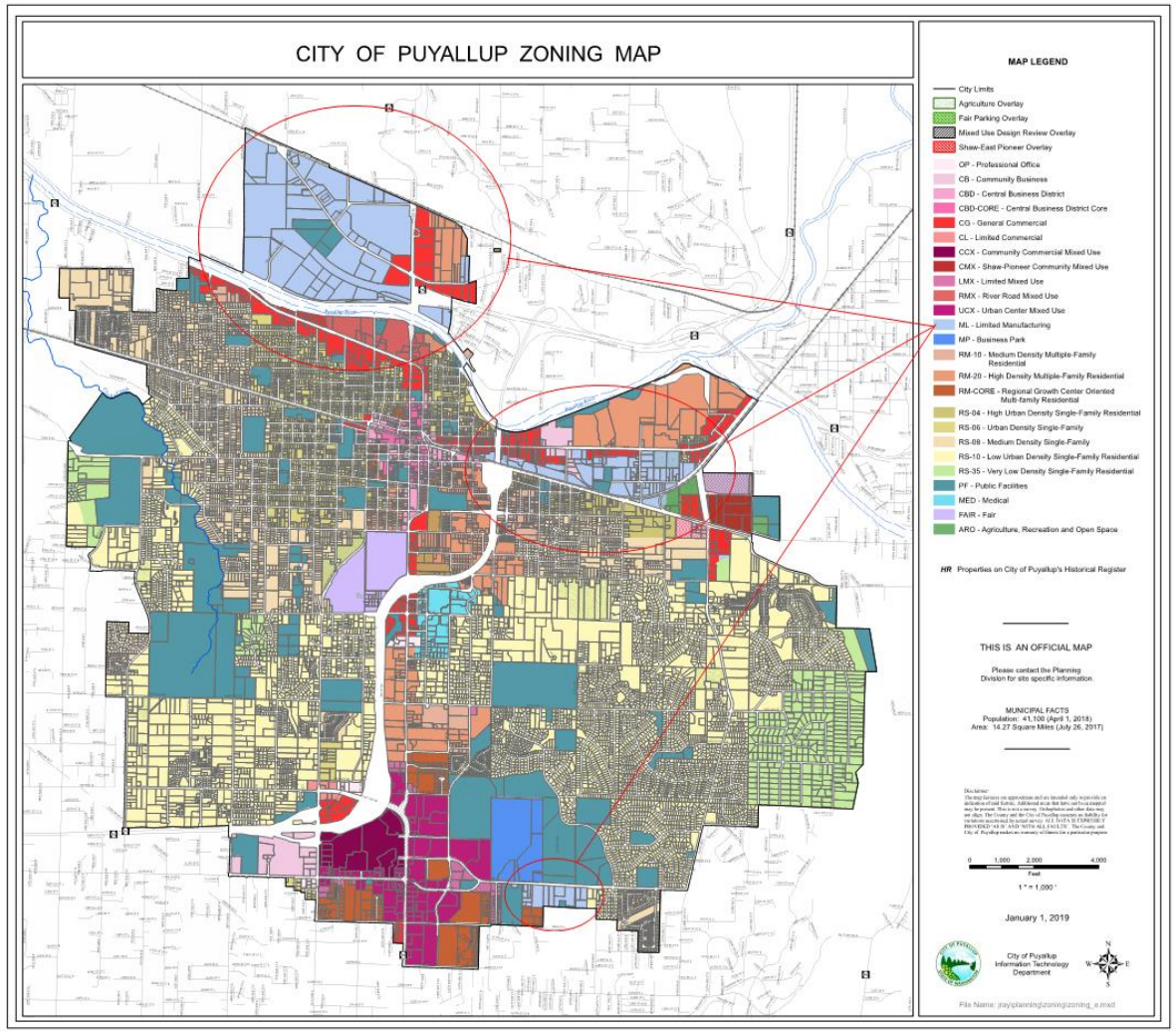
Homeward Bound in Puyallup v. Cent. Puget Sound Growth Mgmt. Hearings Bd., No. 55560-3-II (Wash. Ct. App. Sep. 27, 2022)

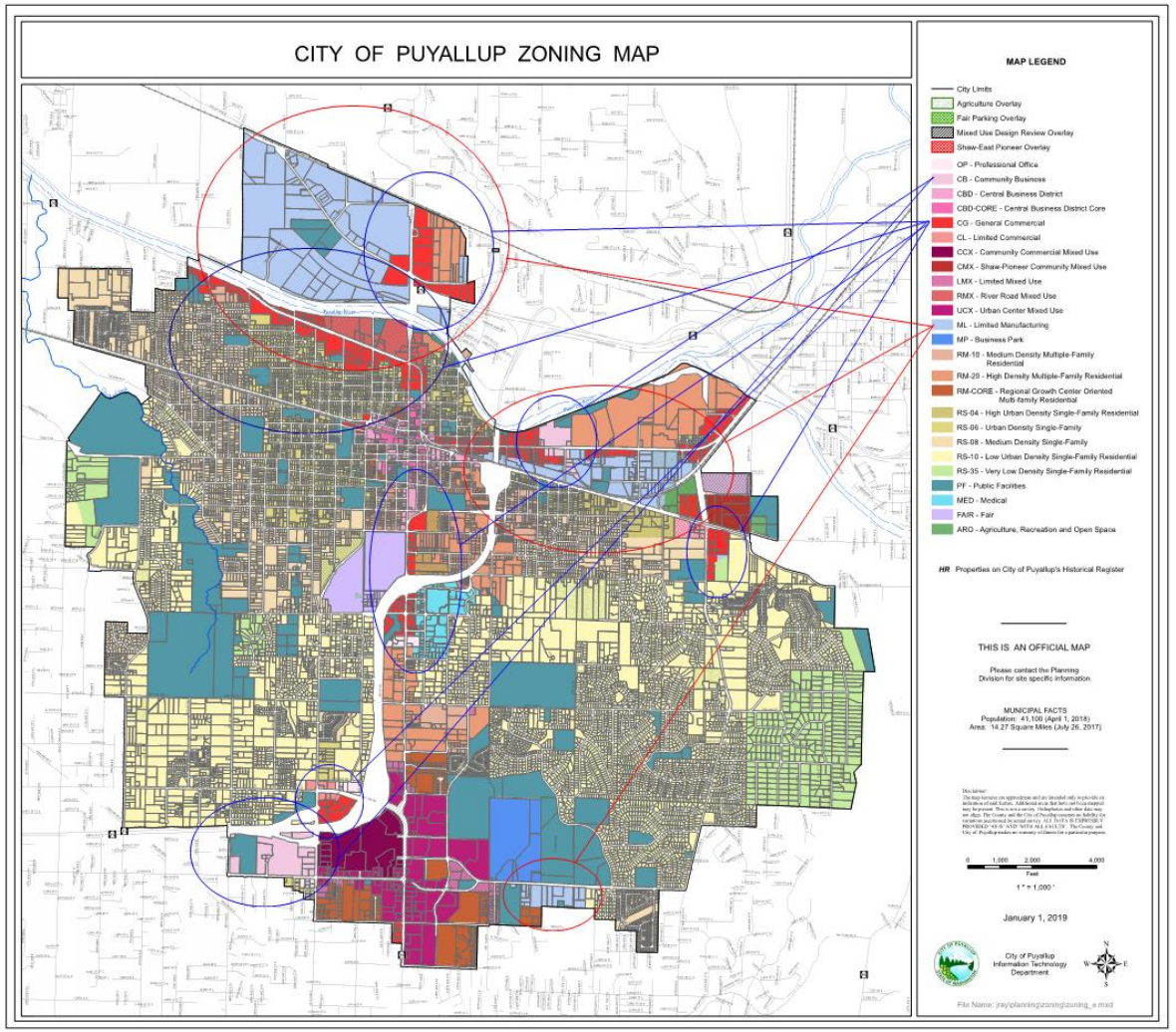
Facts:

In response to the remand, the City expanded the zoning districts where day use centers and overnight shelters could be sited to include areas with improved transit access. The final version of PMO 3195 added siting availability for shelter and day centers in the general commercial and community business zones and reduced the buffer setbacks from 1000 feet to 500 feet for all sensitive uses except school, day care, and preschool uses. The ordinance allowed siting of centers and shelters on 191 parcels totaling 417 acres, with new areas in the northeast and southwest of Puyallup, as well as a small area near the central business district. Most of the added parcels abutted or were located near bus routes, and many of the parcels could be accessed by roads with defined sidewalks.

Homeward Bound appealed the Remand Order and the Board's final decision finding compliance.

Original vs Revised





Homeward Bound in Puyallup v. Cent. Puget Sound Growth Mgmt. Hearings Bd., No. 55560-3-II (Wash. Ct. App. Sep. 27, 2022)

Deference to Local Policy Choices:

GMA requires Hearing Boards to give deference "*in how they plan for growth, consistent with the requirements and goals of [the GMA]…. [W]hile this chapter requires local planning to take place within a framework of state goals and requirements, the ultimate burden and responsibility for planning, harmonizing the planning goals of this chapter, and implementing a county's or city's future rests with that community.*" RCW 36.70A.3201.

In its review, a board presumes that a city's development regulation is valid, and it is the petitioner's burden to demonstrate otherwise. RCW 36.70A.320(1), (2).

Homeward Bound in Puyallup v. Cent. Puget Sound Growth Mgmt. Hearings Bd., No. 55560-3-II (Wash. Ct. App. Sep. 27, 2022)

GMA Recognition of Competing Interests:

Local governments must frequently balance mutually competitive goals. Thus, if a local development regulation meaningfully advances other comprehensive plan goals and policies, a finding by the growth board that it fails to advance another goal or policy cannot by itself be an invalidating inconsistency. The board must defer to local planning processes, and where, within the constraints of the GMA, more than one appropriate planning choice exists, boards must defer to a [local jurisdiction's] discretion.

P. 15 (Citations and quotations omitted).

Homeward Bound in Puyallup v. Cent. Puget Sound Growth Mgmt. Hearings Bd., No. 55560-3-II (Wash. Ct. App. Sep. 27, 2022)

Why was Homebound Arguing Essential Public Facility?:

"No local comprehensive plan or development regulation may preclude the siting of essential public facilities." RCW 36.70A.200(5).

Homebound was taking the position that the siting options were so limited and sub-optimal that the regulations precluded the siting of homeless facilities in violation of RCW 36.70A.200(5).

Homeward Bound in Puyallup v. Cent. Puget Sound Growth Mgmt. Hearings Bd., No. 55560-3-II (Wash. Ct. App. Sep. 27, 2022)

So What is An Essential Public Facility?:

The comprehensive plan of each county and city that is planning under [the GMA] shall include a process for identifying and siting essential public facilities. Essential public facilities include those facilities that are typically difficult to site, such as airports, state education facilities and state or regional transportation facilities . . . regional transit authority facilities . . . state and local correctional facilities, solid waste handling facilities, and inpatient facilities including substance abuse facilities, mental health facilities, group homes, [juvenile detention] community facilities . . . and secure community transition facilities.

RCW 36.70A.200(1)(a).

Homeward Bound in Puyallup v. Cent. Puget Sound Growth Mgmt. Hearings Bd., No. 55560-3-II (Wash. Ct. App. Sep. 27, 2022)

Court holds the Hearings Board cannot designate the homeless facilities an epf absent the Plaintiffs expressly making that request to the City.

Court reasons that RCW 36.70A.200 requires cities and counties to designate and regulate epfs. The hearings board do not have the authority to make local policy choices like designating epfs.

Although the hearings boards don't have local policy authority, RCW 36.70A.200 does set state-wide policy on the types of facilities expressly identified to qualify as epfs. Homeless facilities are not expressly listed in RCW 36.70A.200 as epfs and thus the hearings boards had no valid basis to designate homeless facilities as epfs.

Homeward Bound in Puyallup v. Cent. Puget Sound Growth Mgmt. Hearings Bd., No. 55560-3-II (Wash. Ct. App. Sep. 27, 2022)

Had Plaintiffs requested that the City designate homeless facilities and been denied, then apparently Plaintiffs could have appealed that determination and the hearings board would have had the authority to assess whether the denial was consistent with RCW 36.70A.200:

Homeward Bound could have petitioned Puyallup to designate day use centers and overnight shelters as essential public facilities under the City's local discretion and then appealed any denial to the Board. Further, if the City's process for responding to such a request was inadequate or otherwise problematic, Homeward Bound could have challenged the actual process the City applied. Unfortunately, here, Homeward Bound did not ask Puyallup to identify day use centers and overnight shelters as essential public facilities. And Homeward Bound did not challenge the adequacy of the provisions in the City's comprehensive plan addressing essential public facilities until its reply brief before this court in this case, leaving us with no record on which we could decide this issue.

P. 26-27.

Homeward Bound in Puyallup v. Cent. Puget Sound Growth Mgmt. Hearings Bd., No. 55560-3-II (Wash. Ct. App. Sep. 27, 2022)

Homeless Facility Regulations Not Preclusive:

Court rules that even if the homeless facilities qualified as epf, the City's homeless facility regulations were not preclusive in violation of RCW 36.70A.200(5).

As used in RCW 36.70A.200(5), preclude means to render impossible or impracticable.

"Here, PMC 20.72 allows day use centers and overnight shelters to be sited on almost 200 parcels on over 400 acres through conditional use permits. The permitting and application requirements may make siting such facilities more costly, but not impracticable. Homeward Bound has not established that any of the prerequisites for obtaining a conditional use permit for a day use center or overnight shelter are more onerous than the barriers in City of Airway Heights or City of Des Moines such that they render siting impracticable. Thus, even if centers and shelters were essential public facilities, PMC 20.72 does not preclude their siting."

P. 28-29.

Homeward Bound in Puyallup v. Cent. Puget Sound Growth Mgmt. Hearings Bd., No. 55560-3-II (Wash. Ct. App. Sep. 27, 2022)

Homeless Facility Regulations Consistent with Comprehensive Plan:

The Court agreed with the Hearing Board determination that the City had successfully amended its homeless facility regulations to be consistent with its comprehensive plan upon remand.

The specific policies assessed by the Court applied to housing; access to transit and pedestrian safety; and limiting commercial uses in industrial zones

Homeward Bound in Puyallup v. Cent. Puget Sound Growth Mgmt. Hearings Bd., No. 55560-3-II (Wash. Ct. App. Sep. 27, 2022)

Housing Policies – Inapplicable because homeless regs only temporary shelter:

The City's comprehensive plan included policies that encouraged housing availability for persons with special needs, which expressly included the homeless. The policies also encouraged a range of housing types.

Plaintiffs argued that the homeless regulations failed to conform to the housing policies because the homeless facilities were segregated out of residential and medical districts and were also not allowed in the downtown business district. The City successfully argued that the housing policies only applied to treatment facilities, permanent residences or transitional facilities and that the homeless shelter regulations were inapplicable because they applied to temporary shelter.

Homeward Bound in Puyallup v. Cent. Puget Sound Growth Mgmt. Hearings Bd., No. 55560-3-II (Wash. Ct. App. Sep. 27, 2022)

Transit and Pedestrian Safety Policies:

The City's transit and pedestrian safety policies encouraged the location of community service facilities to be located near transit and pedestrian facilities.

Homeward Bound argued that the policies were not met by the amended homeless facility regulations because no transit centers were located within 1,000 feet of available parcels. It also argued that the degree of increased centralization, public transit access, and pedestrian safety of the available parcels is insufficient.

Homeward Bound in Puyallup v. Cent. Puget Sound Growth Mgmt. Hearings Bd., No. 55560-3-II (Wash. Ct. App. Sep. 27, 2022)

Transit and Pedestrian Safety Policies:

"*We expect growth management hearings boards to respect local jurisdictions' discretion in the implementation of their comprehensive plans. A reviewing court will give substantial weight to a board's interpretation of the GMA, but this deference is superseded by the GMA's statutory requirement that boards give deference to [local] planning processes*."

The Court found that the Hearings Board correctly determined that the amendments had increased available sites to those with access to sidewalks and mass transit. "…*although many of the parcels did border the edges of the City, a small cluster was made available in the central general commercial zoning district. No longer is the overwhelming majority of the available land located in a light industrial zone separated from the City by a river.*" P. 34.

Homeward Bound in Puyallup v. Cent. Puget Sound Growth Mgmt. Hearings Bd., No. 55560-3-II (Wash. Ct. App. Sep. 27, 2022)

Policy Limiting Commercial Uses in Industrial Zones:

Policy LU-22.2 calls for the City to "*[l]imit commercial uses in industrial areas to uses that are supportive of and incidental to industries and businesses*."

Court finds that the homeless facilities are not commercial uses and thus the policy doesn't apply.

Court distinguishes the Puyallup's industrial zone policy from the policies of other cities that discourage "non-industrial" uses in industrial zones. This is an important distinction that cities may wish to consider if they are inclined to place non-desirable uses in their industrial zones.

Homeward Bound in Puyallup v. Cent. Puget Sound Growth Mgmt. Hearings Bd., No. 55560-3-II (Wash. Ct. App. Sep. 27, 2022)

Takeaways:

Homeless facilities could still be found to qualify as epfs as part of a Hearings Board challenge to epf regulations or the determination of an open-ended local designation process.

As shall be discussed by Emily Terrell, a City's ability to restrict homeless facilities is limited by HB 1220.

Municipalities attempting to restrict homeless facilities should also consider applicability of the American with Disabilities Act and the Rehabilitation Act.

HB 1220 alters RCW 36.70A.070(2) the Housing Element

Changed GMA housing goal:

- "Plan for and accommodate ~~encourage the availability of affordable~~ housing affordable to all economic segments."

Requires Commerce to provide projected housing need to local governments:

- For moderate, low, very low, and extremely low-income households
- For permanent supportive housing, emergency housing and emergency shelters (referred to as special housing needs)

Local housing element to:

- Identify sufficient capacity of land for identified housing needs
- Within urban growth areas (UGAs), moderate density housing options
- Document barriers to housing availability such as gaps in local funding, development regulations, etc.
- Consider housing locations in relation to employment locations
- Consider role of accessory dwelling units (ADUs)

Housing Units by Income Band	Area Median Income (AMI)
Shelters	Group quarters
Extremely low:	0-30% AMI, including some PSH*
Very low	31-50%
Low	51-80%
Moderate	81-120%
Other	Above 120%

**PSH = permanent supportive housing*

HB 1220 and Disparate Impacts

Identify local policies and regulations that result in racially disparate impacts, displacement, and exclusion in housing:

- Zoning that may have a discriminatory effect
- Areas of disinvestment and infrastructure availability

Begin to undo racially disparate impacts, displacement, and exclusion in housing

Identify areas at higher risk of displacement and establish anti-displacement policies including:

- Preservation of historic and cultural communities
- Investments in housing for lower income segments
- Equitable development initiatives and land disposition policies
- Inclusionary zoning and community planning requirements
- Tenant protections

Homeward Bound as it relates to HB 1220

HB 1220 Sections 3 and 4:

Code cities:

- *shall not prohibit transitional housing or permanent supportive housing in any zones in which residential dwelling units or hotels are allowed*.
- *shall not prohibit indoor emergency shelters and indoor emergency housing in any zones in which hotels are allowed, except in such cities that have adopted an ordinance authorizing indoor emergency shelters and indoor emergency housing in a majority of zones within a one-mile proximity to transit*.
- May provide for reasonable occupancy, spacing and intensity of use requirements by ordinance.
- Any above requirements may not prevent the siting of a sufficient number of permanent supportive housing, transitional housing, indoor emergency housing, or indoor emergency shelters necessary to accommodate each code city's projected need for such housing and shelter under RCW 36.70A.070(2)(a)(ii).

Homeward Bound as it relates to HB 1220

How does Puyallup fare?

Code cities:

- *shall not prohibit transitional housing or permanent supportive housing in any zones in which residential dwelling units or hotels are allowed*.

Puyallup's code specifically is not related to transitional housing or permanent supportive housing. These are day use and overnight shelters only.

Homeward Bound argued the restrictions applied to "any facility, with overnight sleeping accommodations, the primary purpose of which is to provide temporary shelter for the homeless" and that the chapter would regulate a landlord with a duplex who offered housing to people experiencing homelessness, in addition to single-night shelters. The GMHB disagreed.

Homeward Bound as it relates to HB 1220

PMC 20.72.020 Definitions:

(1) “Daytime drop-in center” means a center which has a primary purpose of serving homeless individuals, whose clientele may spend time during day or evening hours, but with *no overnight stays*. Services may include counseling and/or medication monitoring on a formal or informal basis, personal hygiene supplies, facilities for showering, shaving, napping, laundering clothes, making necessary telephone calls and other basic supportive services. Centers may also provide meals or facilities for cooking.

(2) “Overnight shelter” means a facility with overnight sleeping accommodations, the primary purpose of which is to provide *temporary shelter* for the homeless in general or for specific populations of the homeless. Temporary shelter facilities associated with disaster relief are excluded from this use category. Homeless drop-in center services may also be provided on the same site during daytime hours.

Homeward Bound as it relates to HB 1220

With respect to HB 1220 definitions:

"Emergency housing" means *temporary* indoor accommodations for individuals or families who are homeless or at imminent risk of becoming homeless that is intended to address the basic health, food, clothing, and personal hygiene needs of individuals or families. Emergency housing may or may not require occupants to enter into a lease or an occupancy agreement.

"Emergency shelter" means a facility that provides a *temporary* shelter for individuals or families who are currently homeless. Emergency shelter may not require occupants to enter into a lease or an occupancy agreement. Emergency shelter facilities may include day and warming centers that do not provide overnight accommodations.

Both of the types of uses Puyallup is regulating fall within the definition of Emergency Shelter under HB 1220. It's clear Puyallup is regulating temporary and not permanent or transitional facilities in Chapter 20.73 PMC and therefore the definitions in HB 1220 apply.

Homeward Bound as it relates to HB 1220

How does Puyallup fare?

Code cities:

- *shall not prohibit indoor emergency shelters and indoor emergency housing in any zones in which hotels are allowed, except in such cities that have adopted an ordinance authorizing indoor emergency shelters and indoor emergency housing in a majority of zones within a one-mile proximity to transit*.

Hotels are defined as general commercial uses (PMC 20.15.005) and are allowed in Puyallup's commercial zones (Chapter 20.30 PMC). Puyallup's Chapter 20.72 PMC complies with this section.

Homeward Bound as it relates to HB 1220

How does Puyallup fare?

Code cities:

- May provide for reasonable occupancy, spacing and intensity of use requirements by ordinance.
- Any above requirements may not prevent the siting of a sufficient number of permanent supportive housing, transitional housing, indoor emergency housing, or indoor emergency shelters necessary to accommodate each code city's projected need for such housing and shelter under RCW 36.70A.070(2)(a)(ii).

In the original incarnation, Chapter 20.72 PMC did not comply with HB 1220 because there were not enough potential sites for indoor emergency housing or shelters. As amended, with 191 potential sites on 400 acres, there is likely sufficient land to meet Puyallup's needs for these services. However, that will ultimately depend on the allocation they receive from Pierce County for this population. They won't know until next year or later.

What is Reasonable and Sufficient?

- Reasonable occupancy, spacing, and intensity of use requirements may be imposed to protect public health and safety.
- Depends on geographic size and population of the jurisdiction
- Depends on the current siting of these special housing types
- Should be justified by reference to building code, fire code, or other citation within a staff report to reduce litigation risk
- May not prevent the siting of a sufficient number of permanent supportive housing, transitional housing, indoor emergency housing, or indoor emergency shelters
- At this time many cities and counties don't have projected population needs by income bracket
- At the time of periodic update restrictions on siting will need to be reviewed

We won't know if Puyallup meets the Reasonable and Sufficient test, potentially for years. Commerce cautions against using a blanket conditional use procedure for these types of housing.

Goertz v. City of Kirkland, 2:21-cv-00208-JHC (W.D. Wash. Nov. 15, 2022)

Primary Holding: Prohibiting development on half of a 1.52-acre parcel not a taking of property without just compensation, even if City runoff was responsible for creating part of wetland prior to purchase.

Goertz v. City of Kirkland, 2:21-cv-00208-JHC (W.D. Wash. Nov. 15, 2022)

Facts:

Plaintiffs buy 1.52-acre parcel in October, 2016 in Kirkland. The northern half of the parcel was designated as wetlands since as early as 1998. Plaintiffs knew of the wetland designation at time of purchase.

In July 2017 Kirkland approves 9-lot short plat for southern half of property. A native growth protection easement (NGPE) was required for northern half.

Goertz v. City of Kirkland, 2:21-cv-00208-JHC (W.D. Wash. Nov. 15, 2022)

Facts: (no good deed goes unpunished)

In June 2018 Plaintiffs advise City they found an 18-inch culvert draining into wetlands area, which brought in question whether the wetland was artificially created and thus not subject to wetland regulations. City authorizes a "reopener" that gives Plaintiff a year to establish whether the culvert changed the regulatory impact of the wetland.

Goertz v. City of Kirkland, 2:21-cv-00208-JHC (W.D. Wash. Nov. 15, 2022)

Facts: (what is a wetland?)

Wetland = "*areas that are inundated or saturated by surface water or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions*." This definition excludes "*. . . those wetlands created after July 1, 1990, that were unintentionally created as a result of the construction of a road, street, or highway*." RCW 36.70A.030(31); Kirkland Zoning Code (KZC) 5.10.985.

Goertz v. City of Kirkland, 2:21-cv-00208-JHC (W.D. Wash. Nov. 15, 2022)

Facts:

In July 2019 Plaintiffs submit a wetland report concluding that the wetlands were created by a diversion of water from ditches along Slater Avenue draining into the 18-inch culvert. The report also concluded that the wetland wasn't formed until after 2006. Plaintiffs assert the northern half wasn't composed of wetlands under wetlands definition.

Goertz v. City of Kirkland, 2:21-cv-00208-JHC (W.D. Wash. Nov. 15, 2022)

Facts:

Kirkland denies the request, citing prior environmental reports and a recommendation letter from the Washington State Department of Ecology. Plaintiffs appealed to superior court, which remanded the case back to Kirkland for further review on the date the wetland was created. Kirkland determined that the wetland was created prior to July 1, 1990 and thus qualified as a wetland. Plaintiffs appealed again and this time the superior court upheld the City's decision.

Goertz v. City of Kirkland, 2:21-cv-00208-JHC (W.D. Wash. Nov. 15, 2022)

Facts:

Plaintiff's file the subject suit in federal court under USC 42 USC 1983, claiming that the wetland restrictions violate the 5th Amendment to the United States Constitution for taking their property without just compensation.

Goertz v. City of Kirkland, 2:21-cv-00208-JHC (W.D. Wash. Nov. 15, 2022)

The US Supreme Court has identified four types of takings:

(1) physical takings;
(2) per se regulatory takings that deprive owners of all economic use of their property;
(3) general regulatory takings; and
(4) land-use exactions.

Goertz v. City of Kirkland, 2:21-cv-00208-JHC (W.D. Wash. Nov. 15, 2022)

Physical Takings:

When the government requires an owner to suffer a permanent physical invasion of their property, regardless of the size of the invasion, a physical taking occurs.

See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 42122 (1982) (installation of a 1.5 cubic foot cable box on a private building was a physical taking).

Physical takings are subject to a per se, categorical rule: no public use will justify a physical taking without compensation.

Goertz v. City of Kirkland, 2:21-cv-00208-JHC (W.D. Wash. Nov. 15, 2022)

Physical Takings:

Plaintiffs claim that there was a "per se, physical taking" when the City used the property as a floodplain for discharge of the City's stormwater, changing its character from developable land into a wetland that cannot be used.

Court agrees that flooding caused by government can constitute a physical taking, but an owner who purchases property after a permanent flooding does not have a claim for compensation under the Fifth Amendment. Since Plaintiffs were subsequent purchasers, there's no physical takings even if the wetland were artificially created.

Important to note this concept only applies to physical takings, not regulatory takings. *See Palazzolo v. Rhode Island*, 533 U.S. 606 (2001)

Goertz v. City of Kirkland, 2:21-cv-00208-JHC (W.D. Wash. Nov. 15, 2022)

Per Se Regulatory Takings:

Plaintiffs claimed a per se taking for the portion of their property encumbered by wetlands.

Per se regulatory takings are found in extraordinary cases where a regulation deprives an owner of all economically beneficial uses of their land. The loss of value to the property must be so complete as to leave the property economically idle. Usually this entails requiring land to be left substantially in its natural state.

Court rules that must look at parcel as a whole for per se regulatory takings. Since southern portion can be developed, there's no per se regulatory takings.

Goertz v. City of Kirkland, 2:21-cv-00208-JHC (W.D. Wash. Nov. 15, 2022)

General (Penn Central) Regulatory Takings:

General regulatory takings are based upon a balancing of the following considerations:

(1) the economic impact of the regulation on the claimant;

(2) the extent to which the regulation has interfered with distinct investment-backed expectations; and

(3) the character of the governmental action.

The magnitude of a regulation's economic impact and the degree to which it interferes with legitimate property interests are the most important factors

Goertz v. City of Kirkland, 2:21-cv-00208-JHC (W.D. Wash. Nov. 15, 2022)

Court finds no general regulatory takings for the following reasons:

1. Economic. Plaintiffs failed to identify economic impact;
2. Investment-Backed Expectations. Plaintiffs purchased with knowledge of wetland restrictions.
3. Character of Gov't Action. Wetland regulations are wide-spread in Washington and Plaintiffs were not unfairly singled out. However, the context and history of how those regulations have been applied runs slightly in favor of Plaintiffs (presumably because the wetlands were created by the government).

Overall, because there's no evidence of economic impact and plaintiffs purchased with knowledge of restrictions, Court finds no regulatory takings.

Goertz v. City of Kirkland, 2:21-cv-00208-JHC (W.D. Wash. Nov. 15, 2022)

Land Use Exactions:

Plaintiffs asserted that the short plat condition requiring an NGPE constated an illegal land use exaction.

Permit conditions based upon unconstitutional takings of property are known as land use exactions.

Land-use exactions are a specific category of taking that involve a special application of the 'doctrine of unconstitutional conditions, which asserts that the government may not require property owners to choose between ceding property without compensation or providing the government a discretionary benefit that has little or no relationship to the property.

An impermissible land-use exaction occurs when the government enforces a land use permit condition that has no "essential nexus" to the state interest motivating the condition. Also, the government must "make some sort of individualized determination" that there is "rough proportionality" both "in nature and extent" between the required land use dedication and the impact of the proposed development.

Goertz v. City of Kirkland, 2:21-cv-00208-JHC (W.D. Wash. Nov. 15, 2022)

Land Use Exactions:

Court finds required nexus and proportionality:

Here, there is an essential nexus between the state interest of wetland conservation-a field of regulation that the Washington legislature assigns to the City-and an easement that protects the wetland area on the Property from development or harm. There is also an adequate relationship between the potential environmental impact of Plaintiffs' developments on the Property's northern wetland areas and a conservation easement for those areas. The City made an individualized determination of the nature and extent of that relationship, as shown by the dozens of pages of environmental studies and wetland mitigation plan in Plaintiffs' short plat application approval.

Futurewise v. Spokane Cnty., No. 38657-1-III (Wash. Ct. App. Sep. 22, 2022)

Facts:

Spokane County adopted an update to its comprehensive plan in 2020, which included an updated capital facilities element.

Futurewise appealed to GMA Hearings Board. The Hearings Board upheld the plan.

The parties agree that remand is necessary and agree on some of the required revisions. The Court of Appeals decision provides clarification on some points of disagreement.

Futurewise v. Spokane Cnty., No. 38657-1-III (Wash. Ct. App. Sep. 22, 2022)

Agreed Upon Deficiencies:

1. Plan failed to address noncounty-owned public facilities such as schools.

2. Plan failed to included unincorporated rural areas.

Futurewise v. Spokane Cnty., No. 38657-1-III (Wash. Ct. App. Sep. 22, 2022)

GMA requires the capital facilities element to contain the following:

(a) An inventory of existing capital facilities owned by public entities, showing the locations and capacities of the capital facilities; (b) a forecast of the future needs for such capital facilities; (c) the proposed locations and capacities of expanded or new capital facilities; (d) at least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes; and (e) requirement to reassess the land use element if probable funding falls short of meeting existing needs and to ensure that the land use element, capital facilities plan element, and financing plan within the capital facilities plan element are coordinated and consistent. Park and recreation facilities shall be included in the capital facilities plan element.

RCW 36.70A.070(3).

Futurewise v. Spokane Cnty., No. 38657-1-III (Wash. Ct. App. Sep. 22, 2022)

What is the definition of capital facilities?:

In summary, a "capital facility" as contemplated by RCW 36.70A.070(3) is a fixed, physical facility that has been built, constructed, or installed to perform a service relevant to the considerations at issue in the GMA, such [sic] the "public services" listed in RCW 36.70A.030(21). Capital facilities include the "public facilities" listed in RCW 36.70A.030(20), but are not necessarily limited to facilities falling under the "public facilities" definition.

P. 8-9.

Court further elaborates that capital facilities are not limited to those necessary to support development.

Futurewise v. Spokane Cnty., No. 38657-1-III (Wash. Ct. App. Sep. 22, 2022)

Public Services and Public Facilities Definitions:

RCW 36.70A.030:

(20) "Public facilities" include streets, roads, highways, sidewalks, street and road lighting systems, traffic signals, domestic water systems, storm and sanitary sewer systems, parks and recreational facilities, and schools.

(21) "Public services" include fire protection and suppression, law enforcement, public health, education, recreation, environmental protection, and other governmental services.

Futurewise v. Spokane Cnty., No. 38657-1-III (Wash. Ct. App. Sep. 22, 2022)

Are transportation facilities included as capital facilities under RCW 36.70A.070(3)?:

Court rules no, since transportation facilities are included in a separate transportation element in RCW 36.70A.070(6).

Futurewise v. Spokane Cnty., No. 38657-1-III (Wash. Ct. App. Sep. 22, 2022)

What are the ownership requirements of capital facilities?:

The capital facilities plan element must include *"(a) An inventory of existing capital facilities owned by public entities, showing the locations and capacities of the capital facilities; (b) a forecast of the future needs for such capital facilities; [and] (c) the proposed locations and capacities of expanded or new capital facilities . . . ."* RCW 36.70A.070(3)

For RCW 36.70A.070(3)(a) and (b), the ownership is to all publicly owned facilities. For RCW 36.70A.070(3)(c), ownership is limited to the city/county preparing the comprehensive plan.

Futurewise v. Spokane Cnty., No. 38657-1-III (Wash. Ct. App. Sep. 22, 2022)

Must the capital facilities element include not only the sources of public money, but also a breakdown of the amounts of money to be secured from each source?:

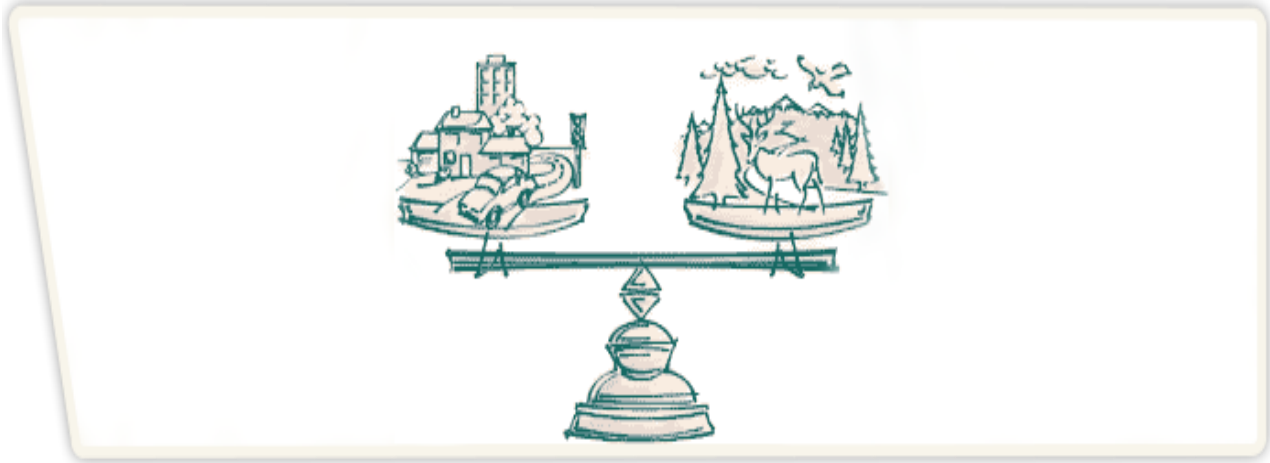
The capital facilities plan element must include "*at least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes.*" RCW 36.70A.070(3)(d).

Court rules no breakdown required. Only sources of funding required.

Viking JV, LLC v. City of Puyallup, 509 P.3d 334 (Wash. Ct. App. 2022)

Primary Holding:

Two-tiered examiner system authorized by state statute



City of Ferndale website picture

Viking JV, LLC v. City of Puyallup, 509 P.3d 334 (Wash. Ct. App. 2022)

Facts:

City of Puyallup really likes hearing examiners, for impact fee appeals has one hold the open record hearing and authorizes closed record appeal to second examiner.

Viking assessed $388,725 park impact fees for a 450,000 square foot warehouse. Asserts that fee excessive because using long-term storage, which results in significantly less employees than estimated by park impact fee ordinance for warehouse space

Viking JV, LLC v. City of Puyallup, 509 P.3d 334 (Wash. Ct. App. 2022)

Facts:

Viking appeals impact fee determination to hearing examiner, who rules in favor of City.

Viking then goes straight to superior court via petition under Land Use Petition Act, Chapter 36.70C RCW (LUPA) and fails to appeal to appellate examiner as authorized by Puyallup code

Viking JV, LLC v. City of Puyallup, 509 P.3d 334 (Wash. Ct. App. 2022)

Facts:

Puyallup seeks dismissal of LUPA appeal on basis that LUPA requires exhaustion of administrative remedies for standing, i.e. that Viking had obligation to exhaust its appellate examiner remedy.

Viking argues it didn't have to exhaust appellate examiner option because appellate examiner not authorized by law.

Viking JV, LLC v. City of Puyallup, 509 P.3d 334 (Wash. Ct. App. 2022)

Analysis:

Issue of whether two-tiered examiner system authorized is dependent on two statutes:

Planning and Zoning in Code Cities, Chapter 35A.63, which authorizes hearing examiners; and

Regulatory Reform Act, Chapter 36.70B RCW, which sets parameters on local land use permit review.

Viking JV, LLC v. City of Puyallup, 509 P.3d 334 (Wash. Ct. App. 2022)

RCW 35A.63.170(2)(Planning and Zoning in Code Cities):

(2) Each city legislative body electing to use a hearing examiner pursuant to this section shall by ordinance specify the legal effect of the decisions made by the examiner. The legal effect of such decisions may vary for the different classes of applications decided by the examiner but shall include one of the following:

(a) The decision may be given the effect of a recommendation to the legislative body;

(b) The decision may be given the effect of an administrative decision appealable within a specified time limit to the legislative body; or

(c) Except in the case of a rezone, the decision may be given the effect of a final decision of the legislative body.

Viking points out that none of the options above give the examiner the authority to issue a decision appealable to another examiner. Court ultimately finds differently, finding that a decision from the first examiner that isn't timely appealed to the second is given the effect of a final decision of the legislative body.

Viking JV, LLC v. City of Puyallup, 509 P.3d 334 (Wash. Ct. App. 2022)

Court rules that Puyallup two-tiered system also fully compatible with Regulatory Reform Act:

RCW 36.70B.050(2) requires that local land use permitting review processes "*provide for no more than one open record hearing and one closed record appeal*."

RCW 36.70B.020(3) provides that an *"[o]pen record hearing*" is "*a hearing, conducted by a single hearing body* ***or officer*** *authorized by the local government to conduct such hearings, that creates the local government's record through testimony and submission of evidence and information*."

RCW 36.70B.020(1) provides that a "*[c]losed record appeal*" is "*an administrative appeal on the record to a local government body* ***or officer*** *, including the legislative body, following an open record hearing on a project permit application*."

Examiner is an "officer" and hence no problem in having an examiner serve in original or appellate jurisdiction under Regulatory Reform Act above.

Viking JV, LLC v. City of Puyallup, 509 P.3d 334 (Wash. Ct. App. 2022)

Takeaway – Hire lots and lots of Examiners!

Arguably not necessary to do so – two good examiners will consistently give you the same or very similar rulings so need for second tier debatable.

Jefferson County used to have two-tiered system. Ask them or Puyallup for advantages/disadvantages.

Questions

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