



May 25, 2021

Hon. Brett Gailey, Co-Chair
Hon. Nate Nehring, Co-Chair
Ms. Cynthia Pruitt, SCT Coordinator
Snohomish County Tomorrow
3000 Rockefeller Ave
Everett, WA 98201

RE: OPEN PUBLIC MEETINGS

Dear Brett, Nate, and Cynthia:

Our firm is concerned about Snohomish County Tomorrow Steering Committee's April action to reclassify sub-committees (like the PAC sub-committee) as work groups, thereby excluding the public from listening to meetings where growth management policies are being developed and deliberated. At best this is an awfully bad approach to transparency by government agencies. At worst, we believe it violates the Open Public Meetings Act (OPMA). To that end, RCW 42.30.030 is clear that "all meetings" of a governing body of a public agency shall be open and all persons shall be permitted to attend any meeting of the governing body of a public agency.

We believe the action taken in April was a direct result of our asking if we could virtually attend SCT PAC meetings to listen in to the discussion on development of the CPPs – meetings that SCT contends can be private, working groups. While we did not participate in the 2015 update to the CPPs, I participated in the 2005 process and never recall sub-committees being off-limits for the public to attend and learn. What we have been told, and what we have heard in the meetings we have been allowed to attend, is that SCT believes that it is not a public agency and that its Planning Advisory Committee (PAC) and its sub-committees are not subject to OPMA. We respectfully disagree.

In its Legislative Declaration for the OPMA, the Legislature made it exceptionally clear:

*The legislature finds and declares that all public commissions, boards, councils, committees, subcommittees, departments, divisions, offices, and **all other public agencies of this state and subdivisions thereof** exist to aid in the conduct of the people's business. **It is the intent of this chapter that their actions be taken openly and that their deliberations be conducted openly.***

*The people of this state do not yield their sovereignty to the agencies which serve them. **The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know.** The people insist on remaining informed so that they may retain control over the instruments they have created.*

RCW 42.30.020(1) defines a Public Agency as:

- (a) Any state board, commission, committee, department, educational institution, or other state agency which is created by or pursuant to statute, other than courts and the legislature;
- (b) Any county, city, school district, special purpose district, or other municipal corporation or political subdivision of the state of Washington;
- (c) **Any subagency of a public agency which is created by or pursuant to statute, ordinance, or other legislative act, including but not limited to planning commissions, library or park boards, commissions, and agencies;**
- (d) Any policy group whose membership includes representatives of publicly owned utilities formed by or pursuant to the laws of this state when meeting together as or on behalf of participants who have contracted for the output

of generating plants being planned or built by an operating agency.

RCW 42.30.020(2) states further that a Governing Body:

*means the multimember board, commission, committee, council, or other policy or rule-making body of a public agency, **or any committee thereof when the committee acts on behalf of the governing body, conducts hearings, or takes testimony or public comment.***

SCT clearly qualifies as a public agency under (c) above as it is a subagency of the County and the cities of Snohomish County, which was created by motions and resolutions (legislative acts) of the County and each city to fulfill GMA statutory obligations to coordinate their growth plans, etc.

To support our assertions, we point out the following:

1. Snohomish County Motion 89-159 passed in June of 1989 adopted the Snohomish County Tomorrow (SCT) Planning Process, including the SCT Steering Committee.
2. Resolutions to participate in SCT were adopted by participating jurisdictions, including the City of Lake Stevens, which did so by Resolution 1989-20 in October 1989 reads in part:

The cities and Snohomish County are willing to designate a special committee with an elected representative from each jurisdiction to work on the outline of the long term growth strategy and corresponding technical work program.

3. SCT is utilized by the County and the City to fulfill multiple statutory obligations for growth management, including:
 - RCW 36.70A.100 requiring that comprehensive plans must be coordinated between the County and cities.
 - RCW 36.70A.210 making comprehensive and inter-jurisdictional planning for growth management a mandatory requirement for cities, towns, and the County, **including a requirement that the County and cities adopt a set of countywide planning policies in cooperation with each other and establish a policy for joint county and city planning within urban areas.** This is especially important given that the County and cities are statutorily required to have local comprehensive plans that are consistent with the adopted countywide planning policies.
 - RCW 36.70A.215 requiring “consultation” on a review and evaluation program for buildable lands, which the buildable lands report produced by Snohomish County is reviewed and approved by Snohomish County Tomorrow. And such recommendation by SCT is vetted, deliberated upon, and finalized by the PAC.
 - The County and its cities under RCW 30.70A.140 have a legislatively prescribed duty to provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments. Further, the specific duty requires “*early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans.*”

SCT has the most substantive role developing and approving the CPPs and Buildable Lands Report, but it conducts very little public process.¹ What SCT develops and recommends is the basis for all comprehensive planning the County and its cities. As such the SCT work to develop county-wide planning policies, the buildable lands review and evaluation program, and population and employment allocations is the substantive process by which growth policy is developed, but it does not have a substantive due process for public input. And by the time public comments are made

¹ The Community Advisory Board (CAB) and minimal citizen representation on the Steering Committee is not a substitute for the type of broad dissemination and public participation envisioned in GMA.

at the County Council (or city) level, the public is told that these policies, buildable lands methodologies, and allocations were developed and recommended by SCT.

4. The SCT Planning Advisory Committee (PAC) and its sub-committees (now “work groups”) are a “committee thereof” under RCW 42.30.020(2), because the staff of the cities is acting on behalf of the cities to evaluate, deliberate, consider and review policies. This work clearly constitutes “action” as defined in 42.33.020(3)². We contend that unlike an internal staff meeting of a single member jurisdiction, the SCT PAC subcommittee is made up of appointed staff from each of the cities who are charged with representing their communities in the evaluation, deliberation, consideration, and of policies – the act of which is to determine the scope of the policies to be reviewed, narrow alternatives, etc. As such, they are acting in a defined, purposeful role and participating on behalf of their respective governments.

In one instance over the last several months we heard it explained that the OPMA did not apply to SCT as it was a “member organization” of the cities and County. This does not negate the applicability of the OPMA. In fact, the courts have found that OPMA applies to “an association or organization created by or pursuant to statute which serves a statewide public function.” *West v. Wash Ass’n of Cnty. Officials* 162 Wn. App. 120 | 252 P.3d 406 | 2011 Wash. App. LEXIS 1265. More specifically the court addresses the notion of ‘statewide public function’ as follows:

Nevertheless, because we construe the OPMA liberally to reach its intended purpose, we hold that for purposes of the OPMA, a “state agency” may be an association or organization created by or pursuant to statute which serves a statewide public function. RCW 42.30.910. An entity is created “pursuant to” a statute if it is created “in conformity with or in the course of carrying out [a statute], implying that what is done is in accordance with an instruction or direction.” *Cathcart*, 85 Wn.2d at 104 (citing *Knowles v. Holly*, 82 Wn.2d 694, 702, 513 P.2d 18 (1973)). Accordingly, RCW 42.30.020(1)(a) requires that an enabling statute exist prior to or be enacted simultaneously with the creation of an entity carrying out a statewide public function.

As our firm points out in this letter, GMA has clearly placed statutory requirements on the County and its cities to plan, to coordinate planning, and to have plans consistent with each other. Pursuant to this statutory direction, the County and cities created and rely upon SCT to serve that purpose. In fact, on the agendas of the SCT Steering Committee it states “A Growth Management Advisory Council.”

The Court in *West* added “we hold that because elected public officials perform WACO activities financed by public money with an express legislative mandate to act as a coordinating agency for the activities of Washington’s 39 counties, such activities are subject to the OPMA.”

Our firm points this out because of its similarity with SCT’s role as a coordinating agency for the growth management planning activities of Snohomish County and its cities.

5. We contend that SCT meets the four-part test for governing bodies as described in Attorney General Opinion (AGO) 1991 No. 5. Although not law or definitive, this test and similar tests used by the Courts³ provide affirmative direction.
 - i. Government Function. The organization performs a government function, acting to develop countywide planning policies and meet statutory obligations created by RCW 36.70A. If SCT were to cease to function, its responsibilities would otherwise be required to be performed by the County and cities both individually and collectively in some other manner.
 - ii. Government Funding. It is funded by government through membership dues paid from each individual government based on their per capita population. Those dues come from general or other government funds. Further, the policies created by SCT guide and influence decisions on growth planning, transportation planning, capital facilities planning, annexations, etc. to which each member government is responsible for funding.
 - iii. Government Control. The government is involved in SCT’s operation and regulation via appointed elected officials that serve on behalf of their communities and have voting authority based on the size of their communities. Further, the

² RCW 42.33.020(3) “Action” means the transaction of the official business of a public agency by a governing body including but not limited to receipt of public testimony, deliberations, **discussions**, **considerations**, reviews, evaluations, and final actions.

³ *Telford v. Board of Comm’rs* 95 Wn. App. 149 | 974 P.2d 886 | 1999 Wash. App. LEXIS 680

County's Planning and Development Services Department provides SCT with access to its long-range planners to assist in the carrying out of SCT's annual work plan.

- iv. Government Origin. SCT was created by the motions and resolutions adopted by the County and cities and SCT is part of a clear hierarchy of government process as reflected in its own operating guidelines:

Once a recommendation has been made by the Steering Committee, the Coordinator shall transmit the recommendations(s) and appropriate attachments to the County Council Clerk and to each SCT member jurisdiction.

From time to time the SCT Steering Committee will be required to assume responsibility for business delegated by the Puget Sound Regional Council (PSRC). The occasions that require SCT action shall be given specific designation on published agendas and shall be accompanied by a brief summary of requirements and guidelines as provided by the PSRC for use by SCT.

It is clear from these provisions that SCT:

- Is used by the County and cities as a 'de-facto' planning commission for purposes of establishing county-wide planning policies, buildable lands methodologies, and complying with statutorily obligated GMA planning responsibilities under RCW 36.70A.
- The SCT Committee is also used by the County and its cities to act in concert with the Puget Sound Regional Council (PSRC) to conduct planning on a regional-wide basis. This directly relates to distribution of transportation funds and enactment of policies that must be consistent regionally. The PSRC is both a federal Metropolitan Planning Organization and state Regional Transportation Planning Organization and it is responsible for the creation of multi-county planning policies (MPPs) under RCW 36.70A.210(7), which MPPs the countywide planning policies developed by Snohomish County Tomorrow must be consistent.

Our firm respectfully requests the Steering Committee:

1. Reconsider the recent changes to its operating guidelines that call subcommittee meetings "workgroups."
2. Make all meetings, even sub-committee meetings open to the public.
3. Provide for meaningful opportunities for broader public input from individuals and stakeholders prior to making decisions that will limit the range of planning alternatives to be considered in forthcoming comprehensive plan updates. Otherwise, by the time the public is fully engaged in the process, many of the concerns they may raise will be dismissed as having already been settled or otherwise limited by these present policy decisions.

SCT should ensure broad and meaningful early and continuous public participation throughout the entire planning process and comply with the OPMA.

Thank you for your time and consideration.

Very Sincerely,



David Toyer
President

CC: Steering Committee Members
Duana Kolouskova, JMMK