

I. PROCEDURAL HISTORY

On January 16, 2004, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from the Bridgeport Way Community Association; Robert A. Warfield; Thomas V. Galdabini; Matt Guss; Cheryl Hart-Guss; and Nancy H. Pearson (collectively, **Bridgeport, BWCA** or **Petitioners**). The matter was assigned Case No. 04-3-0003, and is hereafter referred to as *Bridgeport v. City of Lakewood*. The short title of this case will be *Bridgeport*. Board member Joseph W. Tovar¹ was the Presiding Officer for this matter. Petitioner alleges that City of Lakewood (**Lakewood** or **City**), in its adoption of Ordinance No. 323, failed to comply with certain requirements of the Growth Management Act (**GMA** or **Act**) and the State Environmental Policy Act (**SEPA**). Petitioners have also requested that the Board enter a finding of invalidity as to Ordinance No. 323.

On January 27, 2004, the Board issued the Notice of Hearing in this matter.

On February 13, 2004, the Board received a “Motion to Intervene” from Wal-Mart Stores, Inc. together with the “Declaration of John Clarke in Support of Motion to Intervene.”

The Board conducted the prehearing conference in this matter on February 18, 2004 beginning at 10:00 a.m. in the Training Center adjacent to the Board’s offices, Suite 2470, 900 Fourth Avenue, Seattle, Washington. Present for the Board were presiding officer Joseph W. Tovar and the Board’s legal extern Lara Heisler. Representing the Petitioner was David A. Bricklin. Also in attendance were Nancy Pearson and Bob Warfield. Representing the City was Heidi Ann Wachter. Representing potential Intervenor Wal-Mart was Jack McCullough.

On February 18, 2004, the Board issued “Prehearing Order and Order Granting Intervention” (**PHO**).

On April 14, 2004, the Board received from Petitioner BWCA “Prehearing Brief” (**BWCA PHB**).

On April 22, 2004, the Board received “Stipulation to Moving Hearing to Lakewood City Hall.”

On April 28, 2004, the Board received “Pre-Hearing Brief of Respondent City of Lakewood” (**City Response**) and “Wal-Mart’s Response Brief” (**Wal-Mart Response**).

On April 29, 2004, the Board received a letter from Heidi Wachter, Lakewood City Attorney and a “Notice of Association of Attorneys” indicating that Ms. Wachter and Daniel B. Heid have associated as attorneys for the present matter.

¹ Board Member Tovar’s term expired on June 30, 2004, prior to the issuance of this Order; consequently, he did not participate in this decision.

On May 3, 2004, the Board received a “Cover Sheet” which had attached a copy of “Lakewood Ordinance No. 15.”

On May 5, 2004, the Board received from the City “Amended Index of Materials Adding Index Nos. 116-119.”

On May 6, 2004, the Board received “Bridgeport Way Community Association’s Reply” (**BWCA Reply**).

The Board conducted the hearing on the merits in this matter on May 10, 2004 in the Council Chamber of Lakewood City Hall in Lakewood, Washington. Present for the Board were Bruce C. Laing, Edward G. McGuire, and Joseph W. Tovar, presiding officer. Representing BWCA were David A. Bricklin and Ryan P. Vancil; representing the City were Daniel B. Heid and Heidi Ann Wachter; representing Intervenor Wal-Mart were John C. McCullough and Courtney A. Kaylor. Court reporting services were provided by Valerie L. Torgerson of Byers & Anderson, Inc. of Seattle. No witnesses testified. As a preliminary matter the parties presented oral argument regarding two motions to strike contained in the Wal-Mart Response, after which the presiding officer orally **denied** the Wal-Mart motion to strike Index Exhibit 116 and **granted** the Wal-Mart motion to strike references in the BWCA pleadings concerning goals 2 and 6.

On May 12, 2004, the Board received a letter from the City (**May 12, 2004 City letter**) that transmitted four Index items to respond to the Board’s request for “documents that show the recommendation of the City of Lakewood Planning Advisory Board to the Lakewood City Council.”

On June 2, 2004, the Board received a letter from counsel for BWCA (**June 2, 2004 BWCA letter**) attached to which were unofficial transcripts of the Planning Advisory Board’s (**PAB**) October 23, 2003 and October 29, 2003 meetings (“**unofficial**” **PAB Transcripts**).

On June 2, 2004, the Board received a second letter from counsel for BWCA (**June 4, 2004 BWCA letter**) which stated that the City had no objection to the Board’s consideration of the unofficial PAB Transcripts. The letter stated “If necessary, please treat this as a request to supplement the record . . .” BWCA June 4, 2004 letter, at 1.

On June 7, 2004, the Board received a letter from counsel for the City stating “To be clear the City does in fact object to the submission of partial transcripts in support of a party’s position at his late stage of the proceedings.” On this same date, the Board received a letter from counsel for Wal-Mart also objecting to the submission of the unofficial PAB Transcripts.

On June 9, 2004, the Board received another letter from counsel for BWCA (**June 9, 2004 BWCA letter**) attached to which were more complete versions (albeit still unofficial) of transcripts for the PAB meetings of October 23, 2003 and October 29, 2003

and a document showing a string of email communications between counsels for BWCA, the City and Wal-Mart.

III. FINDINGS OF FACT

1. The City of Lakewood adopted Ordinance No. 323 on November 17, 2003. PFR, Attachment 1.
2. The caption of Ordinance No. 323 reads: AN ORDINANCE of the City Council of the City of Lakewood, Washington, amending the Comprehensive Plan and Zoning Maps of the City and amending Policies LU-18.4, LU-30.1, and LU 30.3 of the Lakewood Comprehensive Plan. *Id.*
3. Section 1 of Ordinance No. 323 amends the City's Plan text and maps, and the Zoning Map for specific properties, as follows:

CPA-2003-09 and CPA-2003-10, TEXT AND MAP AMENDMENTS

1. Amending the comprehensive plan land-use map to redesignate and rezone a parcel currently designated as High Density Multi Family [HDMF] to Industrial [I] and rezoning the parcel from JF2 to I2, as shown in "Exhibit A" attached hereto, amending LMC Section 18A.30.630 (c) to allow sales of general merchandise as a permitted use in the I2 zone, and amending LU-18.4, LU-30.1 and LU-30.3 to read as follows:

A. LU-18.4: Prohibit expansion of strip commercial areas, especially through conversion of land from residential to commercial uses; in contrast to piecemeal strip development, encourage large commercial sites to be developed as a whole.

B. LU-30.1: Provide industrial lands for regional research, manufacturing, warehousing, concentrated business/employment parks, large-scale sales of general merchandise, or other major regional employment uses.

C. LU-30.3: Protect prime industrial sites (especially those near rail lines) from encroachment by incompatible uses such as housing and unrelated, small-scale retail activity.

Proponent: Center Investment Services (Wal-Mart)

Property Owner: Wal-Mart

Location: East of Bridgeport Way W, north of 75th Street W.

Assessor's tax parcel no: 0220262042

Size of site: 25 acres

Id.

4. The Lakewood Municipal Code (LMC) includes the rules governing the City Council's procedures. These rules provide in relevant part:

All meetings of the Council and of Committees shall be open to the public and the rules of the Council shall provide that the citizens of the city or town shall have a reasonable opportunity to be heard at any meetings in regard to any matter being considered there at.

LMC 36.18.170

IV. STANDARD OF REVIEW/BURDEN OF PROOF/DEFERENCE

A. Board Review of Local Government Decisions

Petitioners challenge the City's adoption of Ordinance No. 323 alleging that the Ordinance does not comply with the goals and requirements of the Growth Management Act. Pursuant to RCW 36.70A.320(1), Ordinance No. 323 is presumed valid upon adoption by the City. Petitioners bear the **burden of proof** of overcoming the City's **presumption of validity** by presenting evidence and argument that demonstrates clear error.

The Board is directed by RCW 36.70A.320(3) to review the challenged action using the "**clearly erroneous**" standard of review. The Board "shall find compliance unless it determines that the actions taken by [a jurisdiction] are clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." For the Board to find the City's actions clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

Pursuant to RCW 36.70A.3201, the Board will grant **deference** to the City in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. In 2000, the State Supreme Court reviewed RCW 36.70A.3201 and clarified that, "Local discretion is bounded . . . by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearing Board (King County)*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000).

In 2001, Division II of the Court of Appeals further clarified, "Consistent with *King County*, and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent with the requirements and goals of the GMA.'" *Cooper Point Association v. Thurston County (Cooper Point)*, No. 26425-1-II, 108 Wn. App. 429, 31 P.3d 28 (Wn.App. Div. II, 2001). In 2002, the Supreme Court upheld the *Cooper Point* court. *Thurston County v. Western Washington Growth Management Hearing Board*, Docket No. 71746-0, November 21, 2002, at 7.

B. Judicial Review of Board Decisions

Any party aggrieved by a final decision by a growth management hearings board may appeal the decision to superior court as provided in RCW 34.05.514 or 36.01.050 within thirty days of the final order of the Board. RCW 36.70A.300(5).

RCW 36.70A.260(1) requires that board members be “qualified by experience or training in matters pertaining to land use planning.” The Board has been endowed by the legislature with quasi-judicial functions due to its expertise in land use planning. Accordingly, under the Administrative Procedures Act, a reviewing court accords substantial weight to this agency’s interpretation of the law. The Supreme Court, in *Cooper Point*, specifically affirmed this standard of review of a Growth Management Hearings Board decision:

Although we review questions of law *de novo*, we give substantial weight to the Board’s interpretation of the statute it administers. *See Redmond*, 136 Wn.2d at 46. Indeed “[I]t is well settled that deference [to the Board] is appropriate where an administrative agency’s construction of statutes is within the agency’s field of expertise . . .

Id.

V. MISCELLANEOUS MOTIONS

A. MOTION TO STRIKE INDEX Nos. 116, 117, and 118

Wal-Mart’s Motion to Strike Index Nos. 116, 117, and 118 is **denied**.

B. MOTION TO STRIKE REFERENCES TO GOALS 2 AND 6 IN BWCA BRIEFS

Wal-Mart’s Motion to Strike references to Goals 2 and 6 in the BWCA Briefs is **granted**.

C. MOTION TO ADMIT PAB TRANSCRIPTS AS SUPPLEMENTAL EVIDENCE

The Board construes the request on June 2, 2004 to place the unofficial PAB transcripts before the Board to constitute a late motion to supplement. The motion to supplement the record with the unofficial PAB transcripts is **denied**.

VI. BOARD JURISDICTION, TIMELINESS, AND STANDING

Applicable Law

RCW 36.70A.280 provides in relevant part:

(1) A growth management hearings board shall hear and determine only those petitioners alleging either:

(a) That a state agency, county, or city planning under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW; or . . .

(2) A petition may be filed only by: (a) The state, or a county or city that plans under this chapter; (b) a person who has participated orally or in writing before the county or city regarding the matter on which a review is being requested; (c) a person who is certified by the governor within sixty days of filing the request with the board; or (d) a person qualified pursuant to RCW 34.05.530.

RCW 36.70A.290(2) provides:

All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter or chapter 90.58 or 43.21C RCW must be filed within sixty days after publication by the legislative bodies of the county or city.

Discussion

Positions of the Parties

Neither respondent nor intervenor challenged the timeliness of the BWCA PFR, nor the standing of Petitioners to bring this challenge to the Board. Wal-Mart does, however, challenge the Board's jurisdiction to hear BWCA's challenge to the rezone and what it characterizes as the petitioners' project-level SEPA claims. Wal-Mart's Response, at 12. Further, Wal-Mart opines that the comprehensive plan map amendment at issue in this case is also quasi-judicial and infers that the Board also lacks jurisdiction to review the plan amendment. *Id.*

In response, BWCA argues that the Board has jurisdiction in this case to review zoning map amendments in Ordinance 323 made in conjunction with a Comprehensive Plan amendment. BWCA's Reply, at 2. Board jurisdiction exists because the zoning amendments are development regulations designed to implement the Comprehensive Plan amendments. *Id.* BWCA supplied the position that the zoning amendments are not quasi-judicial because they do not relate only to Wal-Mart's property, but also amend the zoning code text and change zoning on an adjacent 4-acre parcel. *Id.*, at 3. Finally, BWCA contends that the Board has jurisdiction over Petitioner's SEPA claims raised as they relate to the City of Lakewood's GMA plans and regulations. *Id.*, at 4.

Board Discussion

The fact that Ordinance No. 323 redesignates and rezones a single parcel does not transform the legislative action of the City amending its Plan and zoning map into a quasi-judicial action. Nor does the fact that the owner of the effected site (Wal-Mart) has on file with the City specific development permit materials alter the nature of this legislative action. By its explicit terms, Ordinance No. 323 amends “the comprehensive plan land-use map” as well as comprehensive plan text policies LU-18.4, LU-30.1 and LU-30.3, subjects over which the Board clearly has jurisdiction. RCW 36.70A.280. By bundling the rezoning components (map and text) together with the comprehensive plan components (significantly, plan amendments upon which those rezoning actions are dependent), the City has made the entire package of amendments legislative rather than quasi-judicial.²

The Board holds that any action to amend either the text or map of a comprehensive plan or the text of a development regulation is a legislative action subject to the goals and requirements of RCW 36.70A, including the subject matter jurisdiction provisions of RCW 36.70A.280. Any amendment to the official zoning map that is proposed and processed concurrently with enabling plan map or text amendments or development regulation text amendments is necessarily a legislative action subject to the goals and requirements of the GMA.

Conclusion – Board Jurisdiction

The Board finds that Petitioners’ PFR was timely filed, pursuant to RCW 36.70A.290(2); Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged Ordinance, pursuant to RCW 36.70A.280(1)(a).

VII. LEGAL ISSUES

LEGAL ISSUE NO. 2 – PUBLIC PARTICIPATION

Whether in adopting Ordinance No. 323, the City failed to provide adequate public participation and failed to comply with established programs and procedures for public participation in violation of RCW 36.70A.020(11) and RCW 36.70A.140.

² The Board does not at this time address the underlying question of whether quasi-judicial rezones even retain any relevance or validity in a GMA universe, a regulatory regime in which RCW 36.70A.040 demands *consistency* between plans (e.g., Future Land Use Maps) and implementing development regulations (e.g., official zoning maps) and in which RCW 36.70A.020(7) demands permit processes that are *timely, fair and predictable*.

Applicable Law

RCW 36.70A.020(11) provides:

Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts

RCW 36.70A.140 provides:

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall 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. In enacting legislation in response to the board's decision pursuant to RCW. 36.70A.300 declaring part or all of a comprehensive plan or development regulation invalid, the county or city shall provide for public participation that is appropriate and effective under the circumstances presented by the board's order. Errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed.

Discussion

Positions of the Parties

BWCA alleges that the City, in adopting Ordinance No. 323, violated GMA goals and requirements for public participation in RCW 36.70A.020(11) and RCW 36.70A.140. BWCA PHB, at 24-32. In support of this assertion, BWCA cites to numerous Board cases that demonstrate the essential component of public participation in the GMA planning process. *Id.*, at 24-25. In this case, BWCA claims that the City did not comply with the GMA's .140 requirements by: 1) failing to provide for "continuous" public participation, since the City "[cut] off public input to the record nearly two months before the City Council vote[d] and more than a month before the PAB made its recommendations;" and 2) failing to adopt a public participation program for its planning process. *Id.*, at 24-31.

According to BWCA, the City failed to meet established requirements by not allowing City Councilmembers to directly hear their constituents. *Id.*, at 28-31. BWCA claims that the September 24, 2003 cutoff date for public comment did not adequately allow for

continuous public participation, nor did it allow for public comment on the PAB recommendations to the City Council, including the adoption of what Petitioner refers to as the PAB's "hybrid" amendment³ or the adequacy of the Final SEIS. *Id.*, at 28. Finally, BWCA contends that the City failed to meet the requirements of its own code, pursuant to LMC 35.18.170, regarding citizen opportunity to be heard. *Id.* at 31. Petitioners quote this provision of the Lakewood City Code (LMC 35.18.170) as providing:

All meetings of the Council and of Committees shall be open to the public and the rules of the Council *shall provide that the citizens of the city or town shall have a reasonable opportunity to be heard at any meetings in regard to any matter being considered there at.*

BWCA PHB, at 31, *citing* LMC 36.18.170, (emphasis supplied).

In response, the City contends that the process for amending their Comprehensive Plan, including public participation, complies with state requirements for the roles of a PAB and the City Council as a legislative body. City PHB, at 9-10. The City states:

Each time the Comprehensive Plan has been amended by the City, the process has included a public comment period, notice of public hearing and submission of the entire record to the City Council. The PAB creates the record, and submits everything, verbatim, in conjunction with recommendation to the City Council. To date each time the City Council has considered proposed Comprehensive Plan Amendments, the decision has been rendered based on this record without any additional public hearings.

This process follows precisely the process outlined in state law. *Chapter 35A.63 specifically requires a PAB to both conduct a public hearing and prepare Comprehensive Plan Amendments and charges the legislative body only with affirming or denying the recommendation.* [Citing, but not quoting, RCW 35.63.072⁴].

³ Wal-Mart had proposed two alternative Plan/zoning amendments to the City for consideration during the amendment process (CPA 2003-09 and CPA 2003-10). CPA 2003-09 proposed changing the Plan designation from High Density Multi Family (**HDMF**) to Corridor Commercial and rezoning the area from Multi-family 3 (**MF3**) to Commercial 2 and amending 3 commercial land policies (LU-18.1, 18.4 and 18.5). CPA 2003-10 proposed changing the Plan designation from HDMF to Industrial and rezoning the area from MF3 to Industrial 2 and amending two industrial land policies LU-30.1 and 30.3). *See* Ex. 27. Ordinance No. 323 essentially adopted CPA 2003-10. The Plan and zoning designations became Industrial and Industrial 2, respectively; Policies LU-30.1 and 30.3 were amended, as well as, LU-18.4 (proposed in CPA 2003-09). *See* Ordinance No. 323.

⁴ RCW 35A.63.072 provides:

Within sixty days from its receipt of the recommendation for the comprehensive plan, as above set forth, the legislative body at a public meeting shall consider the same. The legislative body within such period as it may by ordinance provide, *shall vote to approve*

Id. (emphasis supplied). The City contends this is the same process it used in adoption of Ordinance No. 323.

The City continues, “Petitioner’s argument that this process denies “continuous” public participation is a red herring. The reality is that the input has to be cut off at some point, the only question is where.” *Id.*, at 12.

Intervenor Wal-Mart argues that the City of Lakewood adopted and followed a public participation program that satisfies the requirements of the GMA, pursuant to RCW 36.70A.130(2)(a) and RCW 36.70A.140, and SEPA. Wal-Mart’s Response, at 15. Additionally, Wal-Mart argues that the City met process and public participation requirements under its own Comprehensive Plan and under the LMC, which was adopted to implement the Comprehensive Plan. (*Citing* Title 18A LMC – City of Lakewood Land Use and Development Code). *Id.* at 15-16. Intervenor then cites a sentence from RCW 36.70A.140 which states, “Errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulation invalid if the spirit of the program and procedures is observed.” *Id.*, at 15.

Intervenor contends that the City met the requirements under the LMC for “Process IV” decisions; “Process IV” decisions include site-specific Comprehensive Plan map amendments and specific Comprehensive Plan text amendments. *Id.*, at 16. Wal-Mart then asserts that these specific LMC requirements control over the more general requirements cited by BWCA. *Id.*, at 18. Wal-Mart also claims that the City of Lakewood has not cited to any Board decision that would render the City’s program noncompliant with the GMA. *Id.*, at 18-19.

In reply, BWCA counters that the City’s defense that “we’ve always done it this way,” if noncompliant with the GMA, does not create license to continue the process in the future. BWCA Reply, at 14. Petitioners also stress that Intervenor Wal-Mart insists that the process used here was proper to avoid *ex parte* communications, which are a major consideration in quasi-judicial matters. However, the appropriate process here was not a quasi-judicial process, but a legislative process that involves policy, not permit, decisions of the City Council. In this context, the public, under the GMA must have the opportunity to participate. *Id.*

or disapprove or to modify and approve as modified, the comprehensive plan or refer it back to the planning agency for further proceedings in which case the legislative body shall specify the time within which the planning agency shall report back to the legislative body its findings and recommendations on the matters referred to it. The final form and content of the comprehensive plan shall be determined by the legislative body. An affirmative vote of not less than a majority of total members of the legislative body shall be required for adoption of a resolution to approve the plan or its parts. The comprehensive plan, or its successive parts, as approved by the legislative body, shall be filed with an appropriate official of the code city and shall be available for public inspection.

(Emphasis supplied).

Board Discussion

The heart of Petitioners' complaint is an assertion that local elected officials have a duty to hear from their constituents before taking legislative action. The Board would agree that this principle is a hallmark of good government, good planning and has constitutional antecedents as well. Nevertheless, as the Board has consistently held, allegations regarding constitutional matters are beyond the Board's jurisdiction. Likewise, it is not the Board's role to determine whether a given local government action constitutes wise policy, or the choice that the Board might have made; rather, the Board's charge is to discern whether the GMA duty articulated at RCW 36.70A.020(11) and RCW 36.70A.140 has been violated. We conclude that, in this matter, it has.

Use of the PAB to hold hearings and review comprehensive plan amendments, as authorized by RCW 35A.63.072, is certainly within the scope of, and consistent with, the requirements of RCW 36.70A.140. The Board notes that, contrary to the City's assertions, that statute not only authorizes approval/disapproval actions by the legislative body, but it also clearly enables the legislative body to *modify* or redirect for more analysis, the PAB recommendation. This statute certainly suggests a more active role in review and adoption of Plans and Plan amendments than the passive role the City asserts. After all, it is the elected officials, not the PAB, that are the ultimate land use decision-makers.

Although elected officials are the ultimate land use decision-makers, this power can be tempered by the legislative body. The Board has acknowledged that the GMA does not explicitly prohibit a GMA planning jurisdiction from empowering its planning advisory body from conducting the bulk of, or even all, of its public hearings. See *Weyerhaeuser Real Estate Company, Land Management Division v. City of DuPont (WRECO)*, CPSGMHB Case No. 98-3-0035, Final Decision and Order, (May 19, 1998), at 13. Finding the appropriate balance of responsibility is the critical factor.

Petitioners' view is that the City improperly truncated the "early and continuous" public participation process by not allowing public testimony on the Plan amendments at the Council level. The City's view is that it can decide when the record can be closed and public input ended. As the City states, "input has to be cut off at some point, the only question is where." Selecting the balance point is one local government must do.

The Board has commented on this question and observed,

Consistently refusing to ever have a public hearing on plan amendments [by the legislative body] could undermine the public's faith in the accessibility and accountability of its elected officials. Conversely, always conducting duplicative hearings by the legislative body on actions already heard by the planning commission could erode the credibility and effectiveness of an important advisory body.

WRECO, at 13, footnote 9.

Deciding where the “cut-off” point for public testimony is one logically left to the local government. This decision is one in which the Board will typically defer to the local governments choice. Here, the City Council opted for no public testimony prior to making its decision on the Plan amendments.⁵ However, as Petitioners’ argued, the City has an explicit provision in its code, which is consistent with RCW 36.70A.140, directing that the City Council provide its citizens *a reasonable opportunity to be heard at any meeting in regard to any matter being considered there at*. LMC 35.18.170.⁶ This the City did not do. Significantly, the City did not respond to this argument. *See* City Response, at 1-13. Therefore, the Board concludes that the City **clearly erred** in precluding public comment on the proposed Plan amendments in this instance, due to failure to follow its own GMA compliant public process procedures. The adoption of Ordinance No. 323 **did not comply** with the public participation requirements of RCW 36.70A.140, and .020(11), as reflected in LMC 35.18.170.

The Board notes, that since Intervenor was pursuing simultaneous quasi-judicial (permit approvals) and legislative changes (plan and zoning changes), it is understandable if confusion arose as to whether the action the Council was taking was quasi-judicial in nature, or legislative. As the Board decided *supra*, the action taken by the City was a legislative action subject to Board review; it was not a quasi-judicial review of a permit application.⁷ Therefore, the limitations on access to the legislative body when it is acting in a quasi-judicial capacity do not apply. Here the adoption of Ordinance No. 323 was a legislative action – a policy decision, subject to the Council’s rules of procedure.

The Board does agree with the City that the Council needs to base its GMA action on the record before it, and that fundamental fairness demands that after the close of the record, no further evidence, either documentary or spoken, is appropriate. Prior Board cases have underscored the need for local legislative bodies to be sure that their actions are supported by the materials in the record below, and that they be certain that the public has had a reasonable opportunity to review and comment upon all those materials prior to final legislative action.⁸

Conclusion

⁵ This may in fact be consistent with the procedures followed in prior plan amendment cycles; however, those amendments are time barred from Board review.

⁶ This provision of the LMC is clearly in compliance with the requirements of RCW 36.70A.140.

⁷ The Board notes that Wal-Mart’s citations to the City Code – Title 18 and the “Process IV” references are within the City’s administrative procedures for processing permits and site-specific rezones, not legislative policy decisions.

⁸ The Board has held:

When a change is proposed to an amendment to a comprehensive plan, the public must have an opportunity to review and comment on the proposed change before the legislative body votes on the proposed change... under the facts of this case, the Board concludes that the opportunity for review and comment on the proposed revisions to the [plan] was not reasonable. *Andrus v. City of Bainbridge Island [Andrus]*, CPSGMHB Case No. 98-3-0030, FDO, March 31, 1999, at 11.

The Board concludes that that the City of Lakewood’s action was **clearly erroneous** in precluding public comment before the City Council on the proposed Plan amendments in this instance, due to failure to follow its own GMA compliant procedures. The adoption of Ordinance No. 323 **did not comply** with the public participation requirements of RCW 36.70A.140, nor follow the guidance provided by RCW 36,70A.020(11), both as reflected in LMC 35.18.170. The Board will **remand** Ordinance No. 323 for the City to take legislative action to bring it into compliance with the goals and requirements of the Act.

LEGAL ISSUE NO. 1 – INTERNAL CONSISTENCY

Whether Ordinance No. 323 created internal inconsistencies in the City’s Comprehensive Plan in violation of the requirement in RCW 36.70A.070 (first paragraph) that mandates that comprehensive plans be internally consistent?

Applicable Law

RCW 36.70A.070(preamble), in relevant part, provides:

The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140.

Discussion

Having found that the City’s adoption of Ordinance No. 323 failed to comply with the public participation requirements of the GMA, the Board could end its inquiry without ever addressing this Legal Issue. Nonetheless, the Board will address this substantive GMA compliance issue.

Positions of the Parties

Petitioner contends that the amendments pertaining to the Wal-Mart parcel in Ordinance No. 323 create internal inconsistencies within the City of Lakewood’s Comprehensive Plan in violation of RCW 36.70A.070. BWCA’s PHB, at 32. These amendments, BWCA argues, conflict with existing provisions in of the Comprehensive Plan. *Id.* Specifically, BWCA argues, the amendments result in internal inconsistency with the Plan’s goals and policies of 1) promoting commercial growth in commercial districts and corridors to control urban sprawl, 2) the preservation of existing neighborhoods, and 3) promoting industrial use. *Id.*, at 32-41.

Petitioner argues that, contrary to the goals of the Comprehensive Plan, the Plan amendments at issue in this case further urban sprawl, adversely affect nearby neighborhood character, and allow for encroachment of incompatible land use in

industrial lands. *Id.* Petitioner cites to several Comprehensive Plan policies to support this argument, including policies under LU-16, LU-17, LU-18, LU-23 and LU-24. *Id.*, at 34-39. Because of these policy conflicts, Petitioner argues that authorization of a “big-box” retailer at the specified location creates internal inconsistencies in the Comprehensive Plan. *Id.*, at 13.

The City argues that the provisions of the City of Lakewood Comprehensive Plan and subsequent amendments meet the test established by the Growth Management Hearings Board for internal inconsistency – one provision may not thwart another provision, they must work together to achieve a common goal. City Response, at 9. Further, Respondent maintains that Petitioner does not have the authority to prioritize goals within the Comprehensive Plan over the City’s choice of prioritization. *Id.*, at 11.

Intervenor also asserts that the Comprehensive Plan is internally consistent. Wal-Mart’s Response, at 20. Intervenor further argues that consistency has been achieved because, “the Comprehensive Plan amendment is compatible with and furthers the goals and policies of the Comprehensive Plan”. *Id.*, at 21. Contrary to Petitioner’s assertion, Intervenor interprets the language of the Comprehensive Plan policies cited by Petitioner as promoting commercial uses within designated commercial areas, rather than prohibiting commercial uses outside of these areas. *Id.*, at 22. Thus, the Wal-Mart project site at issue in this case furthers Comprehensive Plan Policies 16, 17, and 18; Policy 23.4 is not relevant in this case. *Id.*, at 22-23.

Intervenor points to additional Comprehensive Plan Economic Development and Land Use goals and policies in support of their argument that the Wal-Mart Project and the Comprehensive Plan amendment is consistent with and furthers the Comprehensive Plan. *Id.*, at 24-25. Intervenor also alleges that Petitioner “stretches the meaning” of Comprehensive Plan policies concerning neighborhood preservation and that these Plan policies and amendment are consistent. *Id.*, at 26-28. With regard to industrial goals and policies, Intervenor contends that BWCA has not cited to the record to show that the Comprehensive Plan amendment will conflict with industrial uses. *Id.*, at 29. Therefore, Intervenor concludes, the Plan and the amendments are consistent, and BWCA’s arguments in this area are “bare assertions.” *Id.*

In reply, Petitioners’ contend that diffuse growth is exactly what led to the sprawl that is Lakewood, a condition that the Plan finds undermines not just the City’s sense of identity but its economic well-being. BWCA Reply, at 5. BWCA then goes on to argue that the amendments are also inconsistent with the economic development policies that Intervenor argues are ignored by Petitioner. *Id.*, at 8-10.

Board Discussion

Ordinance No. 323 changed designations on the future land use map and zoning map and amended three Plan policies to read as follows [underlining indicates new amendatory language]:

LU-18.4 – Prohibit expansion of strip commercial areas, especially through conversion of land from residential to commercial uses; in contrast to piecemeal strip development, encourage large commercial sites to be developed as a whole.

LU-30.1 – Provide industrial lands for regional research, manufacturing, warehousing, concentrated business/employment parks, large scale sales of general merchandise, or other major regional employment uses.

LU-30.3 – Protect prime industrial sites (especially those near rail lines) from encroachment by incompatible uses such as housing and unrelated, small-scale retail activity.

Ordinance No. 323, Section 1, at 2-3.

Petitioner asserts that these amendments are inconsistent with numerous Lakewood Plan goals and policies, including:

LU-16 – Strengthen Lakewood’s and the region’s economy by retaining, intensifying, expanding, and reinvesting in existing businesses and by attracting new uses and businesses.

LU-16.3 – Establish functional and distinct commercial districts and corridors within the city.

LU-17 – Concentrate commercial development within appropriate commercial areas and clarify the different types of commercial lands.

LU-17.2 – Promote the CBD as the primary location for businesses serving a citywide market.

LU-17.4 – Promote the corridor commercial areas as the primary locations for larger scale, auto-oriented businesses serving a regional market.

LU-18 – Promote, within commercial districts and corridors, the infill of vacant lands, redevelopment of underutilized sites, and intensification of existing sites.

LU-18.1 – Concentrate commercial development within existing commercial areas.

LU-23 – Foster a strong sense of community through the provision of neighborhood services within neighborhood business districts.

LU-23.1 – Provide for a mix of activities including residential, retail, office, social, recreational, and local services in neighborhood business districts.

LU-23.4 – Foster an array of needed community services by prohibiting the domination of a neighborhood business district by any single use of type of use.

LU-24 – Establish a compact urban character and intensity of use within neighborhood business districts.

Other Economic Development goals and policies are discussed in the Wal-Mart Response and BWCA Reply.⁹

While consistency is an important central organizing concept of the GMA, equally important GMA premises are that urban growth is to be directed to urban areas (RCW 36.70A.020(1) and (2)), that cities are to be the primary location of urban growth by virtue of being the preferred providers of urban governmental services (RCW 36.70A.210), and that cities enjoy broad discretion within their city limits regarding specifically how to locate, configure and serve the urban growth that is allocated to it. The Board affirms its prior holdings in this latter regard,¹⁰ and further clarifies that,

⁹ Wal-Mart raises certain of the Plan's Economic Development and Land Use goals and policies in its Response; Petitioner addresses these in its Reply. Goals and Policies argued include:

- Goal ED-1: Support job creation and the development of business opportunities compatible with the City's other goals.
- Policy ED-1.1: Work with economic development agencies, other local agencies, and private interests to implement economic development policies.
- Policy ED-1.4: Promote economic activities that are consistent with the values expressed in Lakewood's comprehensive plan.
- GOAL ED-2: Seek a diversified employment base.
- Policy ED-2.2: Target recruitment efforts toward businesses and industries that will strengthen and broaden the city's economy and provide living-wage jobs.
- GOAL LU-16: Strengthen Lakewood's and the region's economy by retaining, intensifying, expanding, and reinvesting in existing businesses and by attracting new uses and businesses.
- Policy LU-16.1: Ensure that commercial development and redevelopment contributes to Lakewood as a community and to the vitality of individual commercial areas within the city...

¹⁰ The Board described this broad city discretion in an early case:

[A] city enjoys broad discretion in its comprehensive plan to make many specific choices about how growth is to be accommodated. These choices include the specific location of particular land uses and development intensities, community character and design, spending priorities, level of service standards, financing mechanisms, site development standards, and the like.

Aagaard v. City of Bothell, CPSGMHB Case No. 94-3-0011, Final Decision and Order, (Feb. 11, 1995); *See also WHIP/Moyer v. City of Covington*, CPSGMHB Case No. 03-3-006c, Final Decision and Order in the Coordinated *WHIP II* and Consolidated *WHIP III* and *Moyer* Proceedings, (Jul. 31, 2003).

absent a clear and compelling state interest,¹¹ the range of land use choices available to a local legislative body is far broader within urban growth areas than is the case within the natural resource lands and rural lands parts of the GMA landscape. *See Forster Woods v. King County*, CPSGMHB Case No. 01-3-0008c, Final Decision and Order, at 16-19. With this broad understanding of multiple GMA duties in mind, the Board addresses the specific allegations here.

It is clear that the City intended to permit the redesignation of land to accommodate “large-scale” commercial uses on the property identified in the Ordinance. Even some of the plan language upon which BWCA relies, states that such uses are to be directed “primarily” to the CBD and commercial corridors (*i.e.*, LU-17.2 and .4), not “exclusively” to these locations. Review of the noted Plan goals and polices does not indicate to the Board that they cannot work together in pursuit of a common goal (*i.e.*, Lakewood’s accommodation of urban growth). Many of the policies are not locationally directive or restrictive. The choice of whether to accommodate “big box” retail within the city limits, and whether such uses are consistent with the jurisdiction’s vision, is one each city must make. Absent a clear conflict, the Board will generally defer to the City’s choice. On balance, given these facts, the Board will defer to the City’s reading of its own words. Therefore the Board concludes that the Plan amendments adopted in Ordinance No. 323 are not internally inconsistent and **comply with** the internal consistency requirements of RCW 36.70A.070(preamble).

Conclusion

The Board concludes that the Plan amendments adopted in Ordinance No. 323 are internally consistent and **comply with** the requirement of RCW 36.70A.070(preamble).

LEGAL ISSUES NO. 3 AND PORTION OF NO. 4¹² - SEPA ISSUES

¹¹ Three of the more prominent examples of GMA requirements that will limit the range of local choices, even within a UGA, are: 1) the concurrency requirements of RCW 36.70A.070(6); the critical areas requirements of RCW 36.70A.060, .170 and .172; the essential public facility requirements of RCW 36.70A.200. For a general discussion of concurrency, *see Bennett v Bellevue*, CPSGMHB Case No. 01-3-0022c, Final Decision and Order (Apr. 8, 2002); for a general discussion of critical areas, *see Pilchuck v. Snohomish County*, CPSGMHB Case No. 95-3-0047c, Final Decision and Order, (Dec. 6, 1995), and for a general discussion of essential public facilities (**EPFs**), see the Board’s Digest of Decisions under keyword - Essential Public Facilities.

¹² Legal Issue No. 3 is stated as:

Whether Ordinance No. 323 was adopted in reliance on an inadequate Environmental Impact Statement and Supplemental EIS in violation of the requirements of RCW 43.21C.030?

Legal Issue No. 4 is stated as:

If the Comprehensive Plan amendments in Ordinance No. 323 are found to be inconsistent with the requirements of the GMA or SEPA, whether the zoning amendments

Discussion

In their PFR, Petitioners assert SEPA standing in reliance upon Wal-Mart's proposed "project." Petitioners' allege that "the EIS and SEIS failed to provide the City with adequate information about the *project's* direct and secondary land use, traffic, safety, noise, habitat, quality of life, and other impacts." PFR, at 4; (emphasis supplied). The focus of BWCA's concern is potential adverse environmental impacts stemming from a proposed project. These project level concerns are appropriately addressed at the project review level and not to the Board. Project decisions and related issues are outside the Board's jurisdiction. See RCW 36.70A.280; and *Philip Hanson, Anne Herfindahl, Jake Jacobovitch and Vashon Maury Community Council v. King County [Sprint PCS – Intervenor]*. CPSGMHB Case No. 94-3-0015, Order Granting Dispositive Motions, (Sep. 9, 1998). Therefore, Petitioners' SEPA claims, Legal Issues 3 and part of 4 are dismissed.

Conclusion

Petitioners' Legal Issues 3 and part of 4 are **dismissed with prejudice**.

VIII. REQUESTS FOR INVALIDITY

The Board has previously held that a request for invalidity is a prayer for relief and, as such, does not need to be framed in the PFR as a legal issue. Nevertheless, here Petitioners have framed the request as Legal Issue No. 6:

Whether Ordinance No. 323 should be held invalid because the continued validity of the Ordinance would substantially interfere with the fulfillment of the goals of the GMA (RCW 36.70A.302(1)(b)?

Applicable Law

RCW 36.70A.302 provides:

- (1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
 - (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
 - (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and

in ordinance No. 323 should be found to be inconsistent with the remainder of the Comprehensive Plan and therefore in violation of the consistency requirement in RCW 36.70A.040(3) and RCW 36.70A.130(b)?

- (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.
- (2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or City. The determination of invalidity does not apply to a completed development permit application for a project that vested under state or local law before receipt of the board's order by the City or city or to related construction permits for that project.

Findings of Fact and Conclusions of Law

In its discussion of Legal Issue 1, *supra*, the Board found and concluded that the public participation procedures used by the City in the adoption of Ordinance No. 323 did **not comply** with the public participation requirements of RCW 36.70A.140 and its action was **not guided** by Goal 11 – “Encourage the involvement of citizens in the planning process” – RCW 36.70A.020(11). The Board is also **remanding** the Ordinance with direction to the City to comply with the requirements of the GMA.

In light of this procedural, but critical, deficiency in the City's process (as recognized by the Council's own procedures LMC 35.18.170) the Board concludes that the continued validity of the amendments adopted by Ordinance No. 323 substantially interferes with Goal 11 – RCW 36.70A.020(11).¹³ Therefore, the Board enters a **determination of invalidity** with respect to Ordinance No. 323.

IX. ORDER

Having reviewed and considered Ordinance No. 323, the GMA, the City's code provisions, prior Board cases, the briefing and argument of the parties and attached documents, and having deliberated on the matter, the Board ORDERS:

1. The City of Lakewood's adoption of Ordinance No. 323 was **clearly erroneous** in precluding public comment on the proposed Plan amendments in this instance, due to failure to follow its own GMA compliant rules. The adoption of Ordinance No. 323 **did not comply** with the public participation requirements of RCW 36.70A.140, nor follow the guidance provided by RCW 36,70A.020(11), both as reflected in LMC 35.18.170.

¹³ It is uncertain, after the City adheres to its own procedures and the GMA public participation provisions, whether the elected officials of Lakewood will reach the same conclusions they did in adopting Ordinance No. 323.

2. Further, the adoption of Ordinance No. 323 substantially interferes with the fulfillment of Goal 11 – RCW 36.70A.020(11), and the Board enters a **finding of invalidity** with respect to this Ordinance.
3. The Board **remands** Ordinance No. 323 to the City with direction to take appropriate legislative action to bring it into compliance with the goals and requirements of the Act.
 - By no later than **October 14, 2004**, the City shall take appropriate legislative action to bring its Plan into compliance with the goals and requirements of the GMA [RCW 36.70A.140 and .020(11)], as interpreted and set forth in this Final Decision and Order (**FDO**).
 - By no later than **October 21, 2004**, the City shall file with the Board an original and four copies of a Statement of Action Taken to Comply (**SATC**) with the GMA, as interpreted and set forth in this FDO. The SATC shall attach copies of legislation enacted in order to comply. The City shall simultaneously serve a copy of the SATC, with attachments, on Petitioner and Intervenor. By this same date, the City shall file a “**Remand Index**,” listing the procedures and materials considered in taking the remand action.
 - By no later than **October 28, 2004**,¹⁴ the Petitioner or Intervenor may file with the Board an original and four copies of Comments on the City’s SATC. Petitioner and Intervenor shall each simultaneously serve a copy of its Comments on the City’s SATC on the City and each other.
 - By no later than **November 1, 2004**, the City may file with the Board an original and four copies of the City’s Reply to Comments. The City shall simultaneously serve a copy of such Reply on Petitioner and Intervenor.

Pursuant to RCW 36.70A.330(1), the Board hereby schedules the **Compliance Hearing** in this matter for **10:00 a.m. November 8, 2004** at the Board’s offices. With the consent of the parties, the compliance hearing may be conducted telephonically.

If the City takes legislative compliance actions prior to the September 3, 2004 deadline set forth in this Order, it may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 14th day of July 2004.

¹⁴ September 20, 2004 is also the deadline for a person to file a request to participate as a “participant” in the compliance proceeding. See RCW 36.70A.330(2).

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP
Board Member

Edward G. McGuire, AICP
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300. Any party wishing to file a motion for reconsideration of this final order must do so within ten days of service of this order. WAC 242-02-830(1). Any party wishing to appeal this final order to superior court must do so within thirty days of service of this order. WAC 242-02-898.