

**CENTRAL PUGET SOUND  
GROWTH MANAGEMENT HEARINGS BOARD  
STATE OF WASHINGTON**

RICHARD APOLLO FUHRIMAN,	)	
	)	<b>CPSGMHB Case No. 04-3-0027</b>
Petitioner,	)	<i>(Fuhriman)</i>
	)	
v.	)	
	)	<b>ORDER FINDING</b>
CITY OF BOTHELL,	)	<b>NONCOMPLIANCE – FAILURE</b>
	)	<b>TO ACT</b>
Respondent.	)	<b>[failure to update implementing</b>
<hr/>		<b>development regulations]</b>

**I. BACKGROUND**

On December 2, 2004, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**)<sup>1</sup> from Richard Apollo Fuhriman (**Petitioner**). The matter was assigned Case No. 04-3-0027, and is hereafter referred to as *Fuhriman v. Bothell*. Board member Edward G. McGuire is the Presiding Officer (**PO**) for this matter. Petitioner asserts that the City of Bothell (**Respondent** or **City**) failed to timely complete its Comprehensive Plan and development regulation review and evaluation, as required by RCW 36.70A.130, to determine whether Bothell’s Plan and regulations comply with the Growth Management Act (**GMA** or **Act**). The crux of Petitioner’s challenge is that the City of Bothell failed to complete its review and take the legislative action required in RCW 36.70A.130(1)(a) by the December 1, 2004 deadline, as established in RCW 36.70A.130(4)(a).

On December 6, 2004, the Board issued its Notice of Hearing (**NOH**) in the above captioned matter. The NOH established January 10, 2005 as the date for the prehearing conference (**PHC**). The NOH also provided,

The *Fuhriman* PFR appears to assert that the City of Bothell “failed to act” pursuant to the legislatively established deadline for review and legislative action as established in RCW 36.70A.130(1) and (4). Resolution of this question is a simple matter of fact. Either the City of Bothell took the required legislative action by the December 1, 2004 statutory deadline or it did not. The City of Bothell should be prepared at the PHC to verify and document that it took the required legislative action, in which case the matter will proceed according to the tentative schedule

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<sup>1</sup> The PFR listed 9 Legal issues.

below. Alternatively, if the City of Bothell did not complete its review and take legislative action in adherence to the statutory deadline, the City should be prepared to so stipulate and propose a compliance schedule. In the event the City stipulates to noncompliance, the Board will issue a finding of noncompliance and establish a compliance schedule<sup>2</sup> within which the City shall comply.

12/6/04 NOH, at 4.

On December 23, 2004, the Board received a “Motion to Intervene by Friends of North Creek and Its Neighbors,” (**FNCIN**) with an attached letter from Gendler & Mann, LLP to the Bothell City Council.

On December 29, 2004, the Board received a Notice of Appearance from Michael Weight, Bothell City Attorney.

On December 30, 2004, the Board received “Respondent City of Bothell’s Motion to Stay Proceedings” including a “Declaration of Michael Weight in Support of Bothell’s Motion to Stay Proceedings” and “Declaration of Bill Wiselogle in Support of Bothell’s Motion to Stay Proceedings.” Also attached were three exhibits: A) Resolution No. 1166 (2004),<sup>3</sup> B) Ordinance No. 1942 (2004),<sup>4</sup> and C) a copy of “Update Information” published on the website for the Department of Community, Trade and Economic Development.

On January 3, 2005, the Board received Petitioner’s “Revised Petition for Review” (**Amended PFR**), with 10 attached exhibits. The Amended PFR listed 18 legal issues and was still couched as a “failure to act” challenge, although the City’s December 27,

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<sup>2</sup> RCW36.70A.300(3)(b) provides, in relevant part:

The board shall specify a reasonable time *not in excess of one hundred eighty days* or such longer period as determined by the board in cases of *unusual scope or complexity*, within which the . . . city shall comply with the requirements of this chapter. The board may require periodic reports to the board on the progress the jurisdiction is making towards compliance.

<sup>3</sup> Resolution No. 1166 is entitled, “A Resolution of the City Council of Bothell, Washington, describing work completed to date on an update of the *Imagine Bothell* . . . Comprehensive Plan and development regulations, and *providing a schedule for completion of the update.*” Resolution No. 1166 was passed by the Bothell City Council on December 1, 2004. See Attachment A - Resolution 1166, at 1 and 3, (emphasis supplied).

<sup>4</sup> Ordinance No. 1942 is entitled, “An Ordinance of the City of Bothell, Washington, amending the *Imagine Bothell* . . . Comprehensive Plan, including the official Bothell Comprehensive Plan Map; and providing an effective date and summary publication.” Ordinance No. 1942 was passed by the Bothell City Council on December 27, 2004 and published on December 31, 2004. See Attachment B – Ordinance No. 1942, at 1 and 3.

2004 adoption of its Plan Update, was referenced in Legal Issue 4.<sup>5</sup> See Amended PFR, at 4 – 7.

On January 7, 2005, the Board received Petitioner's: 1) "Response to Motion to Intervene by Friends of North Creek and Its Neighbors." This pleading urged the Board to deny intervention; 2) "Dispositive Motion of Petitioner Fuhriman Regarding Issues 2, 3, 5 and 9"; and 3) "Petitioner Fuhriman's Request to Deny Respondent City of Bothell's Motion to Stay."

On January 10, 2005, the Board held the prehearing conference in the above captioned matter. Board member Edward G. McGuire, PO, convened the PHC. Board members Margaret A. Pageler and Bruce C. Laing were also present. Richard Apollo Fuhriman appeared *pro se*. Michael Weight represented Respondent City of Bothell. David Mann attended on behalf of potential intervenor FNCIN. Also in attendance were Robert Fuhriman, Ingrid Fuhriman and Rob Fuhriman (Petitioner), Bill Wiselogle (Respondent) and Linda Stores (Administrative Officer for the Board) and Jeremy Yates (Board legal extern).

## **II. Failure to Act - Discussion**

After introductions, the Board explained that absent a request for settlement extension, as provided for in RCW 36.70A.300(2), the Board had no authority to stay its proceedings, and would therefore **deny** the City's motion for stay.

Then the Board sought clarification from the City of Bothell regarding whether it had taken the required legislative action to update its comprehensive plan and development regulations by December 1, 2004, as required by RCW 36.70A.130(1)(a) and (4)(a). The City conceded, as evidenced by Resolution No. 1166, that it had not acted by December 1, 2004 to complete its Plan *and* development regulation update. The Resolution indicated that the City intended to act on an ordinance updating the Imagine Bothell Comprehensive Plan by December 27, 2004 and to complete the update of its development regulations by the end of the first quarter of 2005 and update its critical areas regulations by the end of the second quarter of 2005. See Sections 1 and 2, Resolution 1166, at 2.

The City also noted that on December 27, 2004 it had, in fact, adopted Ordinance No. 1942, updating the *Imagine Bothell*. . . Comprehensive Plan, but **conceded that the City had not adopted updates of its implementing development regulations**. See Ordinance No. 1942. Therefore, **the Board** concluded, and orally **ruled, that it would issue an Order Finding Noncompliance** regarding a failure to act to update the City's implementing development regulations. The Board's Order would include a compliance

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<sup>5</sup> The Board noted that it was not clear from the Amended PFR whether Petitioner was challenging Ordinance No. 1942, adopted on December 27, 2004.

schedule and date for a compliance hearing. The Board indicated that it would allow the City the full statutory compliance period, 180-days, in order to take the required action, but that if the City acted prior to the date set for the compliance hearing, the City could move to accelerate the compliance hearing date. The only issue at the compliance hearing will be whether the City of Bothell enacted the required update(s) to its implementing development regulations, the substance of those enacted regulations will not be part of the compliance proceeding<sup>6</sup> in this case – CPSGMHB Case No. 04-3-0027 *Fuhriman v. City of Bothell*.

The Board noted that Ordinance No. 1942 was published on December 31, 2004. Therefore the window for challenging that enactment extended until March 1, 2005.

In light of the Board's decision to issue a Finding of Noncompliance related to the City of Bothell's Failure to Act with regards to its implementing development regulations; Petitioner agreed to reconsider the original and Amended PFR and file a new PFR clearly and specifically challenging the *Imagine Bothell* Plan Update adopted by Ordinance No. 1942.

The Board encouraged this approach to clarify and narrow the scope [focusing on Ordinance No. 1942] of Petitioner's challenge and to also to allow for the possibility of consolidating PFRs if other challenges to this action were filed with the Board.

Also in light of the Board's decision, the representative of FNCIN, withdrew its motion to intervene in the present action, but reserved the right to intervene in any future proceedings involving the City of Bothell's Update to its Plan or implementing development regulations.

With no further matters to come before the Board, the Board informed the parties that an Order Finding Noncompliance would be forthcoming, and the PHC was adjourned at 3:30 p.m.

The Board finds and concludes:

1. RCW 36.70A.130(1)(a) required the City of Bothell to "take legislative action to review, and if needed, revise its comprehensive land use plan and development regulations to ensure the plan and regulations comply with the requirements of [the GMA] by December 1, 2004. See RCW 36.70A.130(4)(a).

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<sup>6</sup> The Board and the parties discussed and acknowledged the possibility of the substance of any update to the City's implementing development regulations being substantively challenged through a new petition for review.

2. The City of Bothell acknowledged revisions and amendments were needed to its Plan and development regulations to ensure that they complied with the requirements of the GMA. *See* Resolution No. 1166, at 1-3.
3. The City of Bothell concedes, and Resolution No. 1166 verifies, that the City of Bothell **did not** adhere to the update requirements of RCW 36.70A.130(1) and (4). *See* Sections 1 and 2, Resolution 1166, at 2.
4. On December 27, 2004, after the statutory update deadline had passed, the City of Bothell adopted Ordinance No. 1942, amending and updating the *Imagine Bothell* Comprehensive Plan and land use map. Enactment of Ordinance No. 1942 discharges the City's duty to act to update its Plan, as set forth in RCW 36.70A.130(1), and **complies** with this requirement of the GMA as it relates to Bothell's Plan.
5. The City of Bothell concedes, and as evidenced by Resolution No. 1166, Ordinance No. 1942 [and the updated *Imagine Bothell* Plan, at 8], that it has not acted to update its implementing development regulations as required by RCW 36.70A.130(1)(a) and (4)(a).
6. Therefore the Board will enter an Order Finding of Noncompliance – Failure to Act [regarding the City of Bothell's implementing development regulations for its GMA Plan – *Imagine Bothell*].
7. Having failed to act to update and revise its Plan *implementing development regulations* pursuant to RCW 36.70A.130(1) and (4) the Board will set forth a compliance schedule within which the City shall take the required action to update and revise its implementing development regulations.

### **III. ORDER**

Based upon the Board's review of the GMA, the Board's Rules of Practice and Procedure, the *Fuhriman* PFRs, the submittals of the parties, the City of Bothell's Resolution No. 1166 and Ordinance No. 1942, having discussed the matter with the parties at the prehearing conference, and having deliberated on the matter the Board ORDERS:

- The City's Motion for a Stay to the Board's proceedings is **denied**;
- The City's December 27, 2004 adoption of Ordinance No. 1942, revising and updating the *Imagine Bothell* Comprehensive Plan, **complies** with, and discharges the City's *duty to act* to revise and update its *Plan* as required by RCW 36.70A.130(1) and (4);

- Although the adoption of Ordinance No. 1942 complies with the GMA's "legislative action" requirement that the City review, evaluate and update its Plan; the Board is not opining on the substance of Ordinance No. 1942, amending and updating the *Imagine Bothell* Comprehensive Plan. Ordinance No. 1942 may be timely challenged regarding its compliance with the goals and requirements of the GMA;
- The City of Bothell has **failed to act** to revise and update its comprehensive plan *implementing development regulations* and **has not complied** with the requirements of RCW 36.70A.130(1) and (4), regarding these development regulations. Therefore, the City of Bothell is directed to take the necessary legislative action to comply with the review, evaluation and update requirements of RCW 36.70A.130(1) for its implementing development regulations according to the following compliance schedule:
  1. By no later than **July 11, 2005**, the City of Bothell shall take appropriate legislative action to comply with the review, evaluation and update requirements of RCW 36.70A.130 for its *implementing development regulations update*.
  2. By no late than **July 18, 2005**, the City of Bothell shall file with the Board an original and four copies of the legislative enactment(s) adopted by the City of Bothell to comply with RCW 36.70A.130 along with an statement of how the enactments comply with RCW 36.70A.130 (**compliance statement**). The City shall simultaneously serve a copy of the legislative enactment(s) and compliance statement on Petitioner.
  3. By no later than **July 21, 2005**, Petitioner *may* file with the Board a Petitioner's Response to the City's compliance statement and the legislative enactments. Petitioner shall simultaneously serve a copy of such comment on the City.
  4. Pursuant to RCW 36.70A.330(1), the Board hereby schedules the Compliance Hearing in this matter for **10:00 a.m. July 25, 2005** at the Board's offices. The only matter at issue at this compliance proceeding will be whether the City of Bothell enacted the required update(s) to its implementing development regulations. The substance of those enacted updated development regulations will **not** be part of the compliance proceeding in this case – CPSGMHB Case No. 04-3-0027 *Fuhriman v. City of Bothell*. Any challenges to the substance of those enactments must be brought through a timely filed petition for review.

If the parties [*Fuhriman* and *City of Bothell*] so stipulate, the Board will consider conducting the compliance proceeding telephonically. If the City of Bothell takes the

required legislative action prior to the July 11, 2005 deadline set forth in this Order, the City may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 12<sup>th</sup> day of January 2005.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Bruce C. Laing, FAICP  
Board Member

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Edward G. McGuire, AICP  
Board Member

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Margaret A. Pageler  
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.