

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

FUTUREWISE,	)	
	)	<b>CPSGMHB Case No. 05-3-0020</b>
	)	
Petitioner,	)	<i>(Futurewise III v. Snohomish)</i>
	)	
v.	)	
	)	
SNOHOMISH COUNTY,	)	<b>ORDER ON MOTION TO</b>
	)	<b>DISMISS</b>
	)	
Respondent.	)	
	)	

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**I. BACKGROUND**

On February 22, 2005, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Futurewise (**Petitioner** or **Futurewise**). The matter was assigned Case No. 05-3-0020 and is hereafter referred to as *Futurewise III v. Snohomish*. Board member Bruce C. Laing is the Presiding Officer (**PO**) for this matter. Petitioner challenges Snohomish County's (**Respondent** or the **County**) adoption of Amended Ordinance No. 04-130, which amends the County's Comprehensive Plan. And Petitioner asserts the County failed to revise certain existing comprehensive plan policies. The basis for the challenges is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**).

On February 28, 2005, the Board issued a Notice of Hearing setting a date for a prehearing conference (**PHC**) and establishing a tentative schedule for the case.

On March 2, 2005, the Board received a Notice of Appearance from Jason J. Cummings, Deputy Prosecuting Attorney, and Laura C. Kisielius, Deputy Prosecuting Attorney, representing the County.

On March 23, 2005, the Board received the County's Index of the Record.

On March 28, 2005, the Board conducted the PHC in Suite 2430, Union Bank of California Building, 900 Fourth Avenue, Seattle. Board members Margaret Pageler, Edward McGuire and Bruce Laing, Presiding Officer, were in attendance. John Zilavy represented Petitioner. Jason Cummings and Laura Kisielius represented the County. Parties agreed that Petitioner would prepare a restatement of PFR Issue No. 3 and distribute the restatement to the Board and the County via e-mail by close of business March 29, 2005. The Board directed the County to file two copies of the following **Core Documents** with the Board: Comprehensive Plan; Future Land Use Map; Zoning Map.

The Presiding Office requested the parties to submit **electronic copies** of all motions and briefs to the Board Administrator.

On March 29, 2005, the Board received Petitioner's restatement of Issue No. 3 with an attached Table 30.23.030(1) BULK MATRIX.

On April 1, 2005 the Board issued a Prehearing Order (**PHO**) setting forth the final schedule for this case and the legal issues to be addressed.

On April 18, 2005 the Board received Snohomish County's Motion to Dismiss Untimely PFR, with three exhibits attached, (**Motion to Dismiss**) and a Declaration of Barbara Sikorski, with 19 attachments.

On April 19, 2005 the Board received letter from Tom Ehrlichman regarding the potential intervention in this case by the Snohomish County-Camano Association of Realtors.

On May 2, 2005 the Board received Petitioner Futurewise's Response to Snohomish County's Motion to Dismiss PFR (**Response to Motion**).

On May 9, 2005 the Board received Snohomish County's Reply in Support of its Motion to Dismiss Untimely PFR (**Reply on Motion**).

## **II. SNOHOMISH COUNTY'S MOTION TO DISMISS**

The County claims the PFR was not filed within 60 days of the date of publication of notice of action. Motion to Dismiss, at 6-7. Petitioner disputes the date and adequacy of the County's publication of notice of adoption. Response to Motion, at 2-7. Petitioner also asserts that two of the legal issues are "failure to act" claims and are not subject to 60-day deadline. *Id.*, at 7-10. The County replies that the two legal issues are claims of failure to comply rather than claims of failure to act. Reply on Motion, at 10-11; Motion to Dismiss, at 10-12. The Board will first address the County's notice of action and then address the question of failure to act.

### **A. The County's Notice of Action**

#### **1. Applicable Law**

RCW 36.70A.290 provides in pertinent part:

(1) All requests for review to a growth management hearings board shall be initiated by filing a petition that includes a detailed statement of issues presented for resolution by the board. The board shall render written decisions articulating the basis for its holdings. The board shall not issue advisory opinions on issues not presented to the board in the statement of issues, as modified by any prehearing order.

(2) 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 ... must be filed within sixty days after publication by the legislative bodies of the county or city.

...

(b) Promptly after adoption, a county shall publish a notice that it has adopted the comprehensive plan or development regulations, or amendment thereto.

... for purposes of this section the date of publication for a county shall be the date the county publishes the notice that it has adopted the comprehensive plan or development regulations, or amendment thereto.

...

## 2. Discussion

RCW 36.70A.290(2) provides that all petitions to the Board challenging compliance with the GMA “must be filed within sixty days after publication by the legislative bodies of the county or city.” WAC 242-02-220(1).

The sixty day deadline is jurisdictional. See *Torrance v. King County*, 136 Wn. 2d 783, 792, 966 P. 2d 891 (1998); *Palmer, et al., v. City of Lynnwood*, CPSGMHB Case No.03-3-0001, Order on Motions (Mar. 20, 2003). The Board has no statutory authority to review a county ordinance if the challenge to the ordinance is filed past the 60-day deadline. See e.g., *Montlake Community Club et al. v. City of Seattle*, CPSGMHB No. 99-3-0002c, Order on Dispositive Motions (Apr. 23, 1999).

On December 6 and 13, 2004 the County published in the Everett Herald newspaper a Notice of Action stating in part:

Notice is Hereby Given under the Growth Management Act, RCW.36.70A.290 and the Environmental Policy Act, RCW 43.21C.080, that the Snohomish County Council took the action described in (2) below on November 17, 2004.

Any action to set aside, enjoin, review, or otherwise challenge such action shall be commenced on or before February 11, 2005 by filing a petition for review with the Central Puget Sound Growth Management Hearings Board. ...

2. Description of agency action: Approval of Amended Ordinance No. 04-130.

3. Description of proposal: Responding to the Seven-year compliance review required by the Growth Management Act (GMA); relating to agricultural resource lands and noncommercial playfields; repealing Policy LU 7.B.3 of the County's Growth Management Act Comprehensive Plan - General Policy Plan (GPP) and amending (GPP) Policy LU 7.B.7

...

Declaration of Barbara Sikorski, Attachment S to Motion to Dismiss.

Petitioner asserts that the PFR was timely filed, based on two separate arguments: 1) It was within 60 days of the December 23, 2004 publication of a County Notice of Enactment of Ordinance No. 04-130; Response to Motion, at 2-3. 2) The specific language in the Notice of Action does not conform to the requirements of RCW 36.70A.290(2)(b) in that it does not use the term "adopted"; therefore there has not been a notice of publication which starts a 60 day time period for filing a PFR. *Id.*, at 3-5. The Board is not persuaded.

A County Notice of Enactment is published for all enacted County ordinances pursuant to the provisions of Snohomish County Charter Section 2.110 and SCC 3.48.130(2). Motion to Dismiss, Exhibits 1 and 2. The County Notice of Enactment is distinct from the notice required in RCW 39.70A.290. The County's Notice of Action published on December 6 and 13 states clearly that it is given pursuant to RCW 36.70A.290, that the County Council's action was approval of an ordinance amending the County's Comprehensive Plan, and that any challenge to the action had to be filed with the Central Puget Sound Growth Management Hearings Board by February 11, 2005, (60 days from December 13, 2005). Notice of Action, *supra*. The language of the notice of action is clear and it is consistent with the requirements of RCW 36.70A.290.

### 3. Conclusions.

The County's Notice of Action stating the County Council had approved Ordinance No 04-130, amending the County Comprehensive Plan, was published on December 6 and 13, 2005. The 60 day time period for filing a PFR challenging the compliance of the amendment to the County Comprehensive Plan made by Ordinance No.04-130 expired on February 11, 2005. Petitioner's PFR, received by the Board on February 22, 2005, was **not timely filed**. Petitioner's challenge to Ordinance 04-130 is **dismissed with prejudice**.

## B. Failure to Act vs. Failure to Comply

### 1. Applicable Law

For applicable provisions of RCW 36.70A.290 see Section II.A.1. *Supra*.

WAC 242-02-220(5) provides:

(5) A petition relating to the failure of a state agency, city or county to take an action by a deadline specified in the act may be brought at any time after the deadline for action has passed.

### 2. Discussion

A failure to act challenge is appropriate when a city or county fails to take an action by a deadline specified in the Act. Here, the statutory deadline for Snohomish County to review and update its Plan is December 1, 2004. RCW 36.70A.130(1) and (4). The title of the Ordinance indicates it is being enacted in “response to the seven-year compliance review required by RCW 36.70A.130.” See Ordinance No. 04-130, Title, at 1. It is undisputed that Snohomish County adopted Ordinance No. 04-130 on November 17, 2004. Snohomish County clearly acted pursuant to the statutory deadline and a “failure to act” challenge by Petitioners is misplaced.<sup>1</sup>

It appears to the Board that the essence of Petitioner’s appeal is that in adopting Ordinance No. 04-130, the County did not do all it was required to do – that Ordinance No. 04-130 was not the product of a complete compliance review as required by RCW 36.70A.130. Petitioners challenge then, is basically, that Ordinance No. 04-130 did not comply with the compliance review requirements of RCW 36.70A.130. This is clearly a

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<sup>1</sup> Petitioner’s reliance on *1000 Friends v. Kitsap County* is misplaced. In that case, petitioner Harless challenged Kitsap County’s failure to conduct the review and update of its UGAs which is required by RCW 36.70A.130(3). The County acknowledged that no UGA reassessment had been undertaken or intended in its 2004 Comprehensive Plan revision. The Board held that a failure-to-act challenge specific to the UGA reassessment was not time-barred. *1000 Friends of Washington, et al., v. Kitsap County*, CPSMGHB Case No. 04-3-0031c, Order on Reconsideration (March 31, 2005)

In the present case, Petitioners do not challenge Snohomish County’s action or lack thereof with respect to UGA boundaries or urban densities within urban growth areas. See Appendix A – Legal Issues. Thus there is no issue before the Board here concerning Subsection (3) of RCW 36.70A.130 and its action deadlines.

However, it should be noted that the Board dismissed as untimely Harless’ failure-to-act challenge to Kitsap County’s adoption of the “reasonable measures” required by RCW 36.70A.215. *1000 Friends of Washington v. Kitsap County*, Order on Motions Dismissing Harless Petition (March 15, 2005). The Board held that the County **acted** by adopting Resolution 158-2004 “Providing an Addendum to the Buildable Lands Analysis Report for Reasonable Measures” and that any challenge to the sufficiency of those measures must be brought within 60 days of notice of action, not masked as “failure to act.”

compliance challenge. Had the Petitioners filed a timely PFR, the Board would have been able to address this question. However, as decided *supra*, they did not file a timely challenge to Ordinance No. 04-130. Therefore, whether this Ordinance complied with the specific compliance review requirements of the Act, or not, is now beyond the Board's authority to review and decide.

### 3. Conclusions.

Petitioner's "failure to act" challenge is misplaced. The crux of Petitioner's challenge to Ordinance No. 04-130 was that it did not comply with the compliance review requirements of RCW 36.70A.130A. However, as the Board discussed and decided *supra*, Petitioner's challenge to Ordinance No. 04-130 was untimely. Therefore, whether this Ordinance complied with the specific compliance review requirements of the Act, or not, is now beyond the Board's authority to review and decide. Again, Petitioner's challenge to Ordinance 04-130 is **dismissed** with prejudice.

### **III. ORDER**

Based upon review of the Motion to Dismiss, the GMA, prior Order of this Board and the other GMHBs, case law, the briefs and exhibits submitted by the parties, having considered the arguments of the parties, and having deliberated on the matter, the Board **ORDERS**:

- Petitioner's PFR, received by the Board on February 22, 2005, was **not timely filed**. Petitioner's challenge to Ordinance 04-130 is **dismissed with prejudice**.
- The briefing schedule and hearing dates for CPSGMHB Case No. 05-3-0020, *Futurewise v. Snohomish County (Futurewise III)* are **cancelled**; and this matter is **closed**.

So ORDERED this 23<sup>RD</sup> day of May, 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.

## APPENDIX A – Legal Issues

### STATEMENT OF LEGAL ISSUES FROM PHO

#### **Legal Issue No. 1**

Does adoption of *Ordinance 04-130*, amending comprehensive plan General Policy Plan LU 7.B.7 to encourage non-agricultural, recreational uses on agricultural resource lands of long term commercial significance fail to comply with RCW 36.70A.020(8), RCW 36.70A.040, RCW 36.70A.060, RCW 36.70A.177 and *King County v. Central Puget Sound Growth Management Hearings Board* when the allowed uses are incompatible with agriculture, fail to encourage agriculture economy and fail to conserve designated agricultural land?

#### **Legal Issue No. 2**

By failing to update and revise its comprehensive plan and development regulations and retaining the allowance for the construction of detached accessory dwelling units on lots of less than 10 acres, has the County failed to comply with RCW 36.70A.020(2), RCW 36.70A.020(1), RCW 36.70A.020(9) RCW 36.70A.070(5) and RCW 36.70A.110(1) when the preexisting and unrevised provisions allow for densities that fails to protect rural lands and rural character?

#### **Legal Issue No. 3**

By failing to update and revise its comprehensive plan and development regulations and retaining rural designations that allow for development at densities of greater than one unit per five acres, (specifically within the R-5, RC and RD designations) has the County failed to comply with RCW 36.70A.020(2), RCW 36.70A.020(1), RCW 36.70A.020(9) RCW 36.70A.070(5) and RCW 36.70A.110(1) when the preexisting and unrevised provisions allow for densities that fails to protect rural lands and rural character?

#### **Legal Issue No. 4**

Does adoption of *Ordinance 04-130* and the failure to update and revise the preexisting provisions challenged above substantially interfere with the goals of the Growth Management Act?