

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

JOCELYNNE FALLGATTER and)	
JEFF KIRKMAN,)	Case No. 06-3-0003
)	
Petitioners,)	<i>(Fallgatter V)</i>
)	
v.)	
)	ORDER ON MOTIONS
CITY OF SULTAN,)	
)	
Respondent.)	
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PROCEDURAL BACKGROUND – MOTIONS TO SUPPLEMENT

On March 20, 2006, the Board received “Respondent City of Sultan’s Index to Record.” The Index lists 113 items by Index number. Some Index numbers contain more than one item.

On March 29, 2006, the Board received Petitioners’ “Motion to Supplement the Record and/or To Take Official Notice” (**Supp. Motion #1**). Attached to the motion were two proposed exhibits. On the same date, the Board also received Petitioners’ “2nd Motion to Supplement the Record” listing, but not attaching, 56 items (**Supp. Motion #2**).

On April 3, 2006, the Board received “Sultan’s Response to Motion to Supplement the Record and/or To Take Official Notice; and Sultan’s Response to Second Motion to Supplement the Record” (**City Supp. Response**).

On April 13, 2006, the Board received Petitioners’ “Rebuttal to City’s Response to Motion to Supplement the Record and/or To Take Official Notice; and Rebuttal to City’s Response to Second Motion to Supplement the Record” (**Supp. Rebuttal**).

The Board, having reviewed the above-referenced documents, enters the following ORDER:

ORDER ON MOTIONS TO SUPPLEMENT

Petitioners’ first supplementation motion (Supp. Motion #1) addresses two specific items that Petitioners seek to have included in the record: 1) City of Sultan Organizational Assessment – Final Report, conducted by the Prothman Company and dated January 11, 2006 (“Prothman Report”); and 2) State Auditor’s Report and Management Letter, Report No. 69877 from the Washington State Auditor’s Office and dated November 10, 2005 (Auditor’s Report). Supp. Motion #1, attachments.

Petitioners' second supplementation motion (Supp. Motion #2) objects to the City's failure to include in its Index an itemization of documents associated with various public meetings that are listed on the City's Index as "meeting minutes." The motion also objects to the City's failure to include documents related to the Industrial Park Master Plan, the Six-Year Transportation Improvement Program, and negotiations with Snohomish County regarding the City's UGA expansion request. Supp. Motion #2, at 2. Petitioners then list 56 numbered documents which they request to be included in the record. *Id.* at 3-4.

The City objects to supplementing the record with the Prothman Report and Auditor's Report listed by Petitioner in Supp. Motion #1. City Supp. Response at 4. The City agrees with Petitioners' request that, where the City's Index references the minutes of a meeting on a particular date, the record includes the agenda cover sheet and documents used in the meeting. City Supp. Response, at 4. The City has no objection to the following items on Petitioners' list in Supp. Motion #2: Items 1, 2, 5-27, 31-35, 36, 41-48, 51-56. City Supp. Response, at 5-6. The City opposes the inclusion of items 3 – 2006 City Budget, 4 – Sultan Municipal Code, 28-30 – Regarding Water and Sewer Rates, 36 – Water and Sewer Plan, 37-40 – Water/Sewer Plans, and 49-50 – Sewer Plan. *Id.* The City's objection to inclusion of the documents concerning water and sewer plans is linked to its motion to dismiss the Petitioners' legal issues concerning these plans.

Petitioners' rebuttal responds to each of the City's objections and attaches 10 exhibits, all concerning the City's water and sewer plans. Supp. Rebuttal.

RCW 36.70A.290(4) provides:

The board shall base its decision on the record developed by the city, county, or the state and supplemented with additional evidence if the board determines that such additional evidence would be necessary or of substantial assistance to the board in reaching its decision.

This Order will address the documents noted above.

1. *Prothman Report (copy provided) and Auditor's Report:* Petitioners argue that these reports "substantiate Petitioners' assertions that the City has failed to perform its activities and make its capital budget decision in conformity with its comprehensive plan as required by RCW 36.70A.120 for the simple reason that these reports document very clearly the City's struggles with budgeting and long-term, strategic planning." Supp. Motion #1, at 3. The City objects first, because these reports are not part of the record in taking the actions at issue here, and second, because the Board doesn't need to understand the City's governance and finance problems in order to make a ruling concerning GMA compliance. City Supp. Response, at 4. The Board notes that its jurisprudence is limited to determining whether city plans, development regulations, and amendments comply with the GMA; matters of governance, operations, and performance are generally beyond the purview of Board decisions. In the present case, the Board

agrees with the City that this information, while interesting, is neither necessary nor of substantial assistance to the Board in reaching its decision. **Denied.**

2. 2006 City of Sultan Budget (Item 3, Supp. Motion #2): Petitioners asserts that the 2006 City Budget is necessary to the Board's determination of "whether or not the City has performed its activities and made capital budget decision in conformity with its comprehensive plan." Supp. Rebuttal, at 5. The City repeats its arguments with respect to the prior items. City Supp. Response, at 5. The Board concurs with the City for the reasons stated above. **Denied.**
3. Sultan Municipal Code (Item 4, Supp. Motion #2): Petitioners argue that Issue 7 of the PFR alleges that the City has failed to review and revise its development regulations as required by RCW 36.70A.040 and .130; therefore the municipal code is an essential part of the record. Supp. Rebuttal, at 5. The City argues that the municipal code is a public document of which the Board may take notice. Supp. Response, at 5. The Board **takes official notice** of the Sultan Municipal Code in effect at the time of the action. Petitioners may introduce and attach copies of sections of the Sultan Municipal Code which are germane to their arguments. The Board will expect the City to stipulate to the accuracy and currency of code sections introduced. **Board takes official notice.**
4. Regarding water and sewer rates (Items 28-30, Supp. Motion #2): Petitioners argue that water and sewer rates discussion and decisions are part of the record because they are part of the analysis undertaken by the City in enacting the General Sewer Plan and Water System Plan. Supp. Rebuttal, at 6-7. The City objects that water and sewer rates are not at issue in this proceeding. Supp. Response, at 5. The Board concurs with the City. While understanding that analysis and action concerning rates played a part in the sequence that led to the adoption of the water and sewer plans, as well as to issues about amendment or failure to amend the Capital Facilities Plan, the Board anticipates that the parties will be able to make their arguments from the plans themselves and from the financial chapters in the plans. **Denied.**
5. Water and Sewer Plans and related documents (Items 36, 37-40, 49-50, Supp. Motion #2): The City objects to including these items in the record because it seeks dismissal of the legal issues in the PFR concerning the General Sewer Plan and the Water System Plan. Supp. Response, at 5-6. Based on the Board's denial of the dispositive motion (below), these items are **admitted as part of the record.**

The items included in the Record, as discussed *supra* and noted in the summary table below, have been determined to be necessary or may be of substantial assistance to the Board in reaching its decision.

In the summary tables below:

- “Admitted” means the proposed exhibit becomes a supplemental exhibit. Each new exhibit is assigned an Index No.
- Items “Admitted as part of record” are documents from the record below that were omitted from the Index. **The City will provide an Amended Index including and providing Index numbers for these items.**
- “Board takes notice” means that the Board recognizes the existence of a decision, order, statute, ordinance, resolution, or document adopted by such instrument. Each is assigned an Index Number. However, since the Board may not have access to a copy of such documents, the party offering the exhibit shall provide the Board with copies of the relevant portion of the document.
- Exhibits that indicate “Denied” do not become supplemental exhibits to the Record. No Index number is assigned.

Proposed Exhibit: Documents	Ruling
1. Prothman Report	<i>Denied</i>
2. Auditor’s Report	<i>Denied</i>
3. 2006 City of Sultan Budget	<i>Denied</i>
4. Sultan Municipal Code	<i>Board takes notice</i>
5. Regarding water and sewer rates (items 28-30 – Supp. Motion #2)	<i>Denied</i>
6. Items admitted without objection (items 1, 2, 5-27, 31-35, 41-48, 51-56 – Supp. Motion #2)	<i>Admitted as part of the record – City will provide an amended index including these items</i>
7. Items concerning water and sewer plans (items 36, 37-40, 49-50 – Supp. Motion #2)	<i>Admitted as part of the record – City will include in amended index.</i>

Each exhibit filed with the Board shall reference the document numbers as indicated in the Index as amended pursuant to this Order. Exhibits shall be filed with briefs. The parties are cautioned that **each exhibit must be relevant** to the issues before the Board. Its listing on the Index as a part of the City’s record, or its admission as a supplemental exhibit, does not necessarily mean that a specific exhibit is relevant to the legal issues, as set forth in the PHO.

PROCEDURAL BACKGROUND – MOTION TO DISMISS

On March 29, 2006, the Board received Respondent City of Sultan’s Motion to Dismiss as to Ordinances 897-05 and 898-05 (Issues 1, 2 and 3) [**City Motion**]. The Board also received the City of Sultan’s General Sewer Plan – July 2005 Draft - and Water System Plan – July 2005 Draft.

On April 7, 2006, the Board received Petitioners’ Response to City of Sultan’s Motion to Dismiss as to Ordinances 897-05 and 898-05, with 15 attached exhibits [**Petitioners’ Response**].

DISCUSSION AND ANALYSIS

The City of Sultan moves to dismiss Legal Issues 1, 2, and 3 pertaining to the Sewer General Plan and Water System Plan. The City of Sultan adopted its Sewer General Plan and Water System Plan on December 14, 2005, subject to review and approval by the Department of Health and the Department of Ecology, respectively. Petitioners in Legal Issues 1, 2, and 3 challenge the water and sewer plans as inconsistent with the City of Sultan Comprehensive Plan because the target population numbers are not the same.

The Board's prehearing order states Petitioners' Legal Issues 1, 2, and 3 as follows:

Issue 1: Did the City of Sultan substantially interfere with the goals of the Growth Management Act, specifically, RCW 36.70A.020(1), (3), & (12) by failing to perform its activities and make capital budget decisions in conformity with its comprehensive plan per RCW 36.70A.120 by:

- a) Adopting a Transportation Improvement Plan inconsistent with the Comprehensive Plan?
- b) Adopting a Sewer General Plan inconsistent with the Comprehensive Plan?
- c) Adopting a Water System Plan inconsistent with the Comprehensive Plan?

Issue 2: In adopting Ordinances 897-05 and 898-05, adopting sewer and water plans respectively, did the City of Sultan substantially interfere with the public participation goal of RCW 36.70A.020(11) by failing to adhere to RCW 36.70A.035, .130 & .140 which require procedures that are "reasonably calculated" to provide "effective" notice and "broad dissemination to the public" of proposals and alternatives?

Issue 3: In adopting Ordinances 897-05 and 898-05 did the City of Sultan substantially interfere with the goals of the GMA, specifically RCW 36.70A.020(1) & (12), by failing to concurrently amend the Comprehensive Plan as required by RCW 36.70A.070 & .130(2)(b)?

The City does not seek dismissal of the portion of Legal Issue 1 that deals with the City's Transportation Improvement Plan.

Applicable Law

RCW 36.70A.280(1) provides:

- (1) A growth management hearings board shall hear and determine only those petitions alleging ... (a) That a ... city planning under this chapter is not in compliance with the requirements of this chapter ...

The City also relies on RCW 36.70A.290(2) [the filing deadline provision], for its description of certain petitions for review: “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 ...”

Positions of the Parties

The City states that Ordinance 897-05, the City of Sultan 2005 General Sewer Plan, was adopted pursuant to RCW 90.48.110, WAC 173-240-050, and RCW 35.67.030, and not pursuant to the GMA. Similarly, the City states that Ordinance 898-05, the City of Sultan Water System Plan, was adopted pursuant to RCW 43.20.250 -.260 and WAC 246-290-100, not pursuant to the GMA. City Motion, at 2. The City points to the statutes that give the City original jurisdiction over its water and sewer systems [RCW 35.67.020(1) and RCW 35.92.010] and notes that two state agencies have been designated as the reviewing authorities – the Department of Health for water and the Department of Ecology for wastewater. *Id.* at 4-6. In its adoption of these ordinances, according to the City, Sultan “did *not* adopt a GMA-based comprehensive plan or a development regulation.” *Id.* at 6 (emphasis supplied).

Petitioners respond by pointing out that the Capital Facilities Element of the City’s Comprehensive Plan relies on the City’s sewer and water plans and incorporates them by reference.

Separate management plans have been prepared for water and sewer facilities and those plans form the bases for the capital facilities analysis. Relevant discussion is summarized in this plan, which incorporates and adopts the utilities management plans by reference as part of the Sultan Comprehensive Plan.

The 2004 City of Sultan Wastewater Facility Plan and the Sewer Rate and General Facilities Charge Analysis shall be considered a part of this capital facilities element and as such are adopted as part of the Sultan Comprehensive Plan upon adoption of this element.

Sultan 2004 Comprehensive Plan, at VIII-1, VIII-5.

Petitioners argue that the GMA requires coordinated and inclusive planning, citing to the guidance provided by CTED in WAC 365-195-700; -735(1), (2), and (6); and -500, concerning integrating the requirements of other regulations, such as water and sewer specifically, in comprehensive plans. Petitioners’ Response, at 7-9. Sultan’s comprehensive plan has a 20-year target population of 11,000, whereas the water and sewer plans project service for only 7,000 people. The inconsistencies between the plans are a GMA issue for Board review, Petitioners assert. *Id.* at 18.

Board Discussion

Required elements of a comprehensive plan, under the GMA, include a “capital facilities plan element” [RCW 36.70A.070(3)]. The capital facilities plan inventories existing facilities, forecasts future needs for capital facilities, and provides a six-year financing plan. *Id.* The capital facilities plan must be consistent with the comprehensive plan, of which it is one element. “The plan shall be an internally consistent document and all elements shall be consistent with the future land use map.” RCW 36.70A.070.

The City of Sultan’s Comprehensive Plan contains a capital facilities element that incorporates by reference the City’s water and sewer plans. See, above. The City recognized the need for consistency in the plans. In its January 27, 2005, task orders with consultant Berryman and Henigar, the City agreed that the consultants must “[r]econcile the land uses and proposed GMA additions adopted by the City in the 2004 Comprehensive Plan with the [Water Plan/Sewer Plan] documentation and revise as necessary.” Petitioners’ Response, Ex. 11, 12.

It is important for both Petitioners and the City to understand that the Board has no jurisdiction to review the challenged sewer or water plans for compliance with chapters 90.48, 35.67 or 43.20 RCW. However, since these plans were incorporated into the City’s capital facilities element to fulfill certain GMA requirements, they fall within the Board’s review parameters.

The Board finds and concludes that it has jurisdiction to hear the matters alleged in Legal Issues 1, 2, and 3. The Board has reached no decision on the merits, and will not do so until the matter has been fully briefed and argued.

ORDER ON MOTION TO DISMISS

The Board finds and concludes that it has jurisdiction to hear Legal Issues 1, 2, and 3 pursuant to RCW 36.70A.070 and RCW 36.70A.280(1). The City’s Motion to Dismiss is **denied**.

So ORDERED this 24th day of April, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Margaret A. Pageler
Presiding Officer

Edward G. McGuire, AICP
Board Member

Bruce C. Laing, FAICP
Board Member