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

JOCELYNNE FALLGATTER and JEFF)
KIRKMAN,) **CPSGMHB Case No. 06-3-0017**
)
Petitioners,) **(Fallgatter VI)**
)
v.)
)
CITY OF SULTAN,) **ORDER ON MOTIONS AND**
) **ORDER AMENDING**
Respondent.) **SCHEDULE**
)
)

I. PROCEDURAL BACKGROUND

On March 27, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Jocelynn Fallgatter and Jeff Kirkman (**Petitioners** or **Fallgatter**). The matter was assigned Case No. 06-3-0017, and is referred to as *Fallgatter VI v. City of Sultan*. Petitioners challenge the City of Sultan's (**Respondent** or **City**) adoption of Ordinance No. 904-06, Ordinance No. 913-06, and Task Order 2006-1, alleging that these actions are not in compliance with provisions of the Growth Management Act (**GMA** or **Act**).

On May 1, 2006, the Board received the City of Sultan's certification of "Index to Record" (**Index**). The Index lists 58 items by Index number.

On May 17, 2006, the Board received Petitioner's "Motion to Supplement the Index of the Record and to Take Official Notice" (**Petitioners' Motion to Supplement**). Petitioners ask that the Record be supplemented with nine (9) items. Some, but not all, of the proposed exhibits were attached to the motion.

Also on May 17, 2006, the Board received the City's "Motion to Dismiss as to Ordinance 904-06 and Task Order 2006-1 Amendment 1 (Issues 1, 2, and 5)" (**City's Motion to Dismiss**).

On May 26, 2006, the Board Received the Petitioners' "Response to City of Sultan's Motion to Dismiss as to Ordinance 904-06 and Task Order 2006-1 Amendment 1 (Issues 1, 2, and 5)" (**Petitioners' Response – Dismiss**)

On May 31, 2006, the Board received the City's "Supplementation of Index to the Record" (**City's Index Supplement**).

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3 **II. DISCUSSION ON MOTION TO SUPPLEMENT**

4 Petitioners request nine (9) items be included in the record. Petitioners' Motion to Supplement at
5 2. Petitioners note that some of the requested items for supplementation were not attached to
6 their motion because these documents are core documents in prior cases before the Board and,
7 due to the size of the documents, were not attached. Petitioners' Motion to Supplement at 4.

8
9 The City does not appear to object to supplementing the Record with the items proposed by the
10 Petitioners, but rather voluntarily amends its Index to include most of the requested items,
11 designating six (6) documents, above and beyond those requested by the Petitioner, for inclusion
12 as part of the record in this matter. City's Index Supplement at 1-2.

13
14 The items submitted for supplementation by the Petitioner include:

- 15
16 1. City of Sultan 2004 Comprehensive Plan*
17 2. City of Sultan Development Regulations, SMC Titles 16, 17, and 21*
18 3. The City of Sultan Water System Plan* and Ordinance No. 898-05 adopting City of
19 Sultan Water System Plan, with attachment
20 4. Amendment No. 1 to the City of Sultan Water System Plan, dated March 2006
21 5. May 11, 2006 City Council meeting – Water System Plan Addendum
22 6. Comment letter from Washington State Department of Health, dated December 9, 2005
23 7. Sultan Municipal Code, Section 2.17
24 8. Minutes of December 6, 2005 Planning Commission meeting
25 9. Minutes of December 14, 2005 City Council meeting

26
27
28 The items submitted for supplementation by the Respondent include:

- 29
30 1. Notice of November 7, 2001 Public Open House for the City of Sultan Surface Water
31 Quality Management Plan, including handout materials
32 2. Notice of January 25, 2006 Public hearing, including handout materials
33 3. Resolution No. 05-30 City of Sultan Surface Water Management Plan
34 4. City of Sultan's response to Washington State Department of Health, dated March 7,
35 2006, with referenced attachments
36 5. Notice of March 11, 2006 Public Hearings on Water and Sewer Addendums, including
37 handout materials
38 6. City of Sultan 1994 Comprehensive Plan¹

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41 *Exhibit is on file with the Board as a core document in a prior case.

42
43 The City amended its Index to the Record to include, with the exception of SMC Titles 17 and
44 21,² all of the above-mentioned exhibits. There is no need for the Board to issue an order
45

46
47 ¹ The Board assumes that the City's reference to the 1994 Comprehensive Plan was a typographical error, as the
48 2004 Comprehensive Plan provides the current comprehensive planning guidelines for the City.

49 ² SMC Title 17 – Environment, contains regulations for compliance with the State Environmental Policy Act
50 (SEPA, RCW 43.21C) and Flood Damage Prevention. SMC Title 21 – Other Land Uses, contains regulations for
boundary line adjustments, conditional uses, binding site plans, wireless communication facilities, and rezones.

1 supplementing the Record as the City has already done so. In regards to SMC Title 17 and SMC
2 Title 21, pursuant to WAC 242-02-660(4) the Board may take official notice of matters of law
3 such as ordinances enacted by cities.
4

5 The Petitioners are reminded that prior to submitting a motion to supplement the Record, the
6 Petitioners should notify the City that documents are missing from the Record and that the City
7 should amend its Record to included these documents. It is only after such a request is made
8 and the City denies the request that the Petitioners need to file a motion with the Board.
9

10 **III. DISCUSSION ON MOTION TO DISMISS**

11 The City moves to dismiss those portions of the PFR challenging Ordinance 904-06 [Legal
12 Issues 1 and 2] and Task Order 2006-1 [Legal Issue 5] for lack for subject matter jurisdiction.
13 City's Motion to Dismiss at 1-2. The City argues that Ordinance 904-06, repealing SMC
14 Chapter 2.17 'Planning Commission' and enacting a new SMC Chapter 2.17 'Department of
15 Community Development,' with the City Council acting as an Interim Planning Commission, is
16 part of a broad on-going reorganization of the City's government, and is not a comprehensive
17 plan amendment or development regulation. *Id.* at 2; Index No. 1. According to the City, Task
18 Order 2006-1 Amendment 1 only authorizes the Public Works Director to retain a consultant for
19 assisting the City in amending its Water System Plan to serve anticipated development and the
20 expenditures of funds to achieve this purpose. *Id.*; Index No. 55. The City asserts that since
21 neither the ordinance nor the task order adopts or amends comprehensive plan provisions or
22 development regulations, the Board, pursuant to RCW 36.70A.280, does not have jurisdiction to
23 consider these issues. *Id.*
24

25 In response, Petitioners argue that the City misreads the Board's jurisdiction under RCW
26 36.70A.280. Petitioners' Response at 1. Petitioners assert that the Board is authorized to hear a
27 petition which alleges that a "city planning under [the GMA] ... is not in compliance with [the
28 GMA] ... as it relates to plans, development regulations, or amendments." *Id.* at 2-3 (emphasis
29 in original). In regards to Legal Issues 1 and 2, Petitioners allege that the City repealed SMC
30 2.17 and abolished the Planning Commission without first having a public hearing as required by
31 the City's own municipal code, SMC 16.128.010, and therefore the action violates the GMA's
32 public participation requirement. *Id.* at 4.
33

34 Petitioners assert that Legal Issue 5 pertains to whether or not the City's decision to revise the
35 water service boundary to extend water service beyond the UGA is consistent with the City's
36 adopted Comprehensive Plan. *Id.* at 8. Petitioners argue that a water service boundary
37 permitting service to be extended beyond the UGA, while the comprehensive plan policies
38 require annexation of property in return for this service, creates an internally inconsistent
39 document. *Id.* at 9.
40

41 Ordinance 904-06 and Legal Issues 1 and 2:

42 The PHO states Legal Issues 1 and 2 as follows:
43

44 Legal Issue No. 1: Did the City of Sultan substantially interfere with the goals of
45 the GMA, specifically, RCW 36.70A.020(7) & (11) regarding permitting and
46

1 public participation, by failing to perform its activities in conformity with its
2 Comprehensive Plan, as required by RCW 36.70A.120, when it adopted Ordinance
3 904-06 abolishing the Planning Commission?
4

5 Legal Issue No. 2: Did the City of Sultan substantially interfere with the goals of
6 the GMA specifically RCW 36.70A.020 (11) regarding citizen participation by
7 failing to adhere to the public participation procedures required by RCW
8 36.70A.035, .130 & .140 in the adoption of Ordinance 904-06?
9

10 Ordinance 904-06 repealed SMC Chapter 2.17 entitled “Planning Commission” and enacted a
11 new Chapter 2.17 entitled “Department of Community Development.” The newly enacted SMC
12 2.17 creates a separate administrative department for the City in order to consolidate all
13 planning, environmental, and permitting functions into a single department. *Ordinance No. 904-*
14 *06.* Section 2.17.020 designated the Sultan City Council itself, on an interim basis as the
15 planning agency for the City, specifically responsible for all duties formerly assigned to the
16 Planning Commission and all other duties required by statute of the planning agency of a
17 municipality. The City argues that the Board lacks jurisdiction to review the repeal and
18 substitution of SMC Chapter 2.17, because the section is merely administrative and is not a
19 comprehensive plan or development regulation. *Citing* RCW 36.70A.280.
20
21

22 The Board disagrees. RCW 36.70A.140 requires each city and county planning under the Act to
23 establish a program that provides for early and continuous public participation in the
24 development and amendment of comprehensive land use plans and development regulations
25 implementing such plans. The Growth Management Hearings Boards were created to determine
26 compliance with the GMA and clearly have jurisdiction to enforce the mandate of Section .140.
27
28

29 The City’s motion to dismiss Legal Issues 1 and 2 for lack of subject matter jurisdiction is
30 **denied.** The parties may brief and argue the issues in further proceedings on the merits.
31 However, in light of the facts and arguments already presented to the Board on this matter, the
32 Board offers three preliminary observations.
33

34 Mootness. At the June 8, 2006, Hearing on the Merits in *Fallgatter V*, CPSGMHB Case No. 06-
35 3-0003, the attorney for the City stated that the City Council had under consideration the
36 appointment of a Planning Board to replace the City Council interim Planning Commission
37 function. If Ordinance 904-06 has been repealed, or significantly amended, the issue raised in
38 Legal Issue No. 1 may be moot. See *Giba v. City of Burien*, CPSGMHB Case No. 06-3-0008,
39 Order of Dismissal (Apr. 17, 2006); *Fallgatter IV v. City of Sultan*, CPSGMHB Case No. 05-3-
40 0035, Order of Dismissal (Oct. 27, 2005). If so, the parties should so advise the Board in an
41 agreed motion to dismiss.
42
43

44 Legal Issue No. 1 – Deference. Based on the materials presented to the Board in the motions
45 practice, the Board would be inclined to defer to the City’s discretion in its reorganization of the
46 City’s planning function, including abolishing the Planning Commission. Although Sultan’s
47 adoption of Ordinance 904-06 modified its administrative structure and public process for
48 guiding planning and development, the GMA does not mandate a specific process. The Board
49 does not decide what this process should be; this is left to the local jurisdiction’s discretion. It is
50 not the Board’s role to determine whether local government action constitutes wise policy, or

1 reflects the choice the Board might have made; rather, the Board's role is to discern whether the
2 GMA has been violated. *Bridgeport Way Comm. Assoc., et. al. v. City of Lakewood*, CPSGMHB
3 Case No. 04-3-0003, Final Decision and Order (July 14, 2004), at 12. Although the Petitioners,
4 and others,³ may not agree with the City's decision, the Board notes that the Planning
5 Commission no longer had a quorum due to resignations and expirations of terms. It had
6 essentially become dysfunctional, with only 3 of the 7 members remaining. Petitioners' Motion
7 to Supplement, Attachment 5. The City Council made a decision to modify the existing structure
8 rather than simply filling the vacancies.⁴ Petitioners have a substantial burden to prove that this
9 choice was clearly erroneous.
10

11
12 Legal Issue 2 – Notice and Hearing. The Petitioners' challenge not only the abolishment of the
13 Planning Commission but the City's failure to conduct a public hearing as required by the Sultan
14 Municipal Code prior to amending its Development Code. SMC 16.128.030 requires notice and
15 public hearing prior to an amendment to SMC Title 16, the City's Uniform Development Code.
16 Petitioners claim that Ordinance No. 904-06 was adopted without notice and hearing. Petitioners
17 provide a March 9, 2006, letter to the City from Bricklin Newman Dold, LLP on behalf of
18 several clients objecting that the Ordinance was adopted without notice and hearing. Petitioner
19 Response, Attachment 3. Minimum requirements for notice and hearing for city planning and
20 land use enactments are embodied in state law [RCW 35.21.530] and in the Sultan Municipal
21 Code [SMC 16.128.010 and .030] and form the backdrop for more stringent requirements in the
22 GMA. The City will have the opportunity to introduce countervailing facts, if any, in the briefing
23 on the merits.
24

25 *Conclusion*

26
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28 The City's motion to dismiss Legal Issues 1 and 2 concerning Ordinance No. 904-06 for lack of
29 jurisdiction is denied. However, if the City has taken subsequent action that renders the challenge
30 moot, the parties should promptly inform the Board.
31

32 Task Order 2006-1 and Legal Issue 5:

33
34 The PHO states Legal Issue No. 5 as follows:

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37 Legal Issue No. 5: Did the City of Sultan fail to perform its activities in
38 conformity with its comprehensive plan as required by RCW 36.70A.120; and
39 substantially interfere with the goals of the GMA, specifically, RCW
40 36.70A.020(1) & (2) pertaining to the encouragement of development within
41 urban areas and reducing sprawl, with the decision to expand the water service
42 area boundary beyond the UGA in the approval of Task Order 2006-1
43 Amendment No. 1 to Water System Plan?
44

45 In February 2006, the Public Works Director submitted a Task Order to the Sultan City Council
46 requesting that the Council authorize the retention of a consulting service to assist the City in
47

48 ³ See Petitioner's Response – Dismiss at 6 and Attachment 3 (Bricklin Newman Dold letter, dated March 9, 2006).

49 ⁴ Pursuant to SMC 16.128.020, the Planning Commission was to be made up of 7 members. The City Council is
50 comprised of 7 members. At the Hearing on the Merits, the City indicated that a Planning Board was being
constituted to assume some or all of the functions of the former Planning Commission.

1 amending its Water System Plan by developing a revised water service area map, providing
2 revised population projections and water demands, creating a draft Amendment No. 1 to the
3 Water System, and assisting the Council with the adoption of the amendment. Index No. 55;
4 City's Motion to Dismiss at 5-6.
5

6 Petitioners characterize "approval of Task Order 2006-1" as "the decision to expand the water
7 service area boundary beyond the UGA." However, the Task Order, in and of itself, does not
8 adopt or amend any comprehensive plan provisions or development regulations; it is simply an
9 authorization for the retention of a consultant to assist the City in developing a proposal for
10 changes to the Water System Plan that may or may not be enacted by the Council. The Board has
11 previously stated:
12

13
14 The Board recognizes that local government must undertake many steps, internal
15 communications, and activities prior to the development of a proposed
16 amendment to a GMA plan or regulation, at least some of which actions are not
17 GMA actions. And, the Board has never articulated a standard from when such
18 local government steps, communications, and activities arise to the status of a
19 "proposed GMA amendment" that would be subject to the provisions of the
20 GMA.
21

22
23 *Upper Green Valley Preservation Society v. King County*, CPSGMHB Case No. 98-3-0008c,
24 Final Decision & Order (July 29, 1998), at 10-12.
25

26 Task Order 2006-1 authorizes a preliminary study; it does not commit the City to a particular
27 action. It is not yet "a *decision* to revise the water service boundary to extend water service
28 beyond the UGA" and so the matter is not ripe for Board review. The Board's jurisdiction, as
29 limited by RCW 36.70A.280(1), does not include such preliminary matters.
30

31 Conclusion
32

33 Based on the above, the Board finds that the Board lacks jurisdiction to review Task Order 2006-
34 1. The City's motion to dismiss Legal Issue No. 5 is **granted**.
35
36

37 **IV. AMENDED CASE SCHEDULE**
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39 The Amended Case Schedule is as follows:
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DATE	EVENT
June 29, 2006	Board Order on Motions
July 5, 2006	Respondent's Supplemental Index due
July 12, 2006	Deadline for Petitioner's Prehearing Brief (with exhibits)
July 26, 2006	Deadline for Respondent's Prehearing Brief (with exhibits)
August 2, 2006	Deadline for Petitioner's Reply Brief (optional)
July 31, 2006	Deadline for Requesting Settlement Extension ⁵
August 7, 2006	Hearing on Merits of Petition: 10:00 a.m. Board's offices

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⁵ See: RCW 36.70A.300(2), *i.e.* no later than one week before the HOM.

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3 **V. ORDER**

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5 Based upon review of the Petition for Review, the Board's Rules of Practice and Procedure, the
6 briefs and exhibits submitted by the parties, the GMA, prior orders of this Board and other
7 Boards, and having deliberated on the matter, the Board ORDERS:
8

- 9
- 10 1. The Record for CPSGMHB Case No. 06-3-0017 consists of the 58 items listed in the
11 City's Index; and the sixteen (16) additional items included in the Record, as noted
12 above. These documents constitute the Record to this proceeding.
13
 - 14 2. The City shall submit an Amended Index of the Record no later than July 5, 2006.
15
 - 16 3. The City's Motion to Dismiss Legal Issues 1 and 2, as they pertain to the adoption of
17 Ordinance 904-06, is **DENIED**.
18
 - 19 4. The City's Motion to Dismiss Issue 5 in its entirety, as it pertains to the authorization of
20 Task Order 2006-1, is **GRANTED**.
21
 - 22 5. The schedule for briefing the remaining issues on the merits is modified as set forth
23 above.
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25
26 So ORDERED this 29th day of June, 2006.

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28 **CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD**
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33 _____
34 Bruce C. Laing, FAICP
35 Board Member

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39 Edward G. McGuire, AICP
40 Board Member

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44 Margaret A. Pageler
45 Board Member [Board member Pageler files a
46 concurring opinion]
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Concurring Opinion of Board Member Pageler

I concur with my colleagues in all respects in the rulings on the motions before us. However, I write separately to comment on the significant task faced by the City of Sultan under GMA. The City of Sultan has abolished its Planning Commission and is reorganizing its planning function and processes. The City lacks specialized staff and has limited funds for consultants. The City is still updating its development regulations and critical areas ordinances, a task with an original legislative deadline of December 1, 2004, now made more complex by converging with a required Shoreline Master Program update.

In *Fallgatter V v. City of Sultan*, CPSGMHB Case No. 06-3-0017, Final Decision and Order (June 29, 2006), the Board found the City’s General Sewer Plan and Water System Plan to be non-compliant with the GMA because these functional plans were based on twenty-year populations significantly lower than the target population assigned to the City by Snohomish County pursuant to RCW 36.70A.130. Recognizing that Sultan is trying to transition to a more effective planning function, the Board set a compliance schedule of a year, with progress reports to be filed quarterly.

In light of the compliance schedule in *Fallgatter V*, I make two suggestions with respect to the issues in the present case.

First, in the present matter, the Board concludes that it does not have jurisdiction over Ordinance No. 904-06 and must leave this matter to the City’s discretion. However, to accomplish the planning tasks faced by the City of Sultan, which must accommodate 11,000 people over the next twenty years, the City needs a realistic and workable planning function. Amending and then consistently applying a GMA-compliant public participation process should help the City, not only in meeting its statutory requirements, but in rebuilding citizen confidence.

Second, while the Board retains jurisdiction of the legal issues concerning the Stormwater Ordinance in the present PFR,⁶ I would suggest that the parties consider the possibility of resolving disputed matters concerning the Stormwater Ordinance in the context of the other Comprehensive Plan amendments and Capital Facilities Element updates which the City will undertake during the *Fallgatter V* compliance period. I note that further work on the stormwater issues is contemplated in the City’s work program:

⁶ The PHO states Legal Issues 3 and 4 as follows:

Legal Issue No. 3: Did the City of Sultan substantially interfere with the goals of the Growth Management Act, specifically RCW 36.70A.020(10) & (12) pertaining to protecting the environment and providing public facilities and services, by failing to adhere to the requirements of RCW 36.70A.070 & 130 in the adoption of Ordinance 913-06 approving and adopting a Surface Water Quality Management Plan?

Legal Issue No. 4: Did the City of Sultan substantially interfere with the goals of the GMA specifically RCW 36.70A.020(11) regarding citizen participation by failing to adhere to the public participation procedures required by RCW 36.70A.130 & .140 in the adoption of Ordinance 913-06?

1 Task 3. Complete Stormwater Plan and incorporate the Stormwater Plan as an
2 Appendix to the Comprehensive Plan.

3
4 Task 8. Amend and Update Capital Facilities Element of Comprehensive Plan.

5
6 Task 11. Consider ... (g) Development Regulations for Storm and Surface Waters
7 consistent with the Storm Water Plan; (h) Creation of a Storm Water Utility and
8 establishment of rates ...
9

10 Fallgatter Response, Attachment 4. The Board in *Fallgatter V*, Final Decision and Order (June
11 29, 2006), at 17, fn. 16, recognized this work plan, not as a binding document, but as an
12 indication of the City's good-faith endeavor to meet GMA and other planning requirements.
13

14 Pursuant to the Amended Case Schedule, July 31, 2006, is the deadline for requesting settlement
15 extension. A settlement extension, if requested by the parties, would allow orderly consideration
16 and enactment of any necessary Comprehensive Plan, Capital Facilities Plan and Storm Water
17 Plan revisions while this matter remains pending.
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