

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

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LIZ GIBA, DON BENNETT, ERIC)	CPSGMHB Case No. 06-3-0020
DICKMAN, HEIDI R. JOHNSON,)	
MARTHA KOESTER, MAGGIE)	<i>(Giba II)</i>
LARRICK, CHERISSE LUXA, SAVUN)	
NEANG, RUSS KAY and BARBARA)	
PETERS)	
)	
Petitioners,)	
)	
STEPHEN LAMPHEAR)	
)	
Intervenor,)	ORDER of DISMISSAL
)	
v.)	
)	
CITY OF BURIEN,)	
)	
Respondent.)	
)	

I. BACKGROUND

On April 14, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Liz Giba, Don Bennett, Eric Dickman, Heidi R. Johnson, Martha Koester, Maggie Larrick, Cherrisse Luxa, and Savun Neang, Russ Kay and Barbara Peters (**Petitioners** or **Giba**). The matter was assigned Case No. 06-3-0020, and is hereafter referred to as *Giba II, et al., v. City of Burien*. Board member Edward G. McGuire is the Presiding Officer (**PO**) for this matter. Petitioners challenge the City of Burien’s (**Respondent** or the **City**) adoption of Ordinance No. 448, relating to the City’s 2005 Comprehensive Plan amendments. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**).

On April 17, 2006, the Board issued a “Notice of Hearing” in the above-captioned case.

On May 15, 2006, the Board received a “Motion to Intervene” from Stephen Lamphear.

On May 22, 2006, the Board conducted the prehearing conference; and on May 31, 2006, the Board issued its “Prehearing Order and Order on Intervention” (**PHO**). The PHO set

forth the final schedule for this matter, identified the Legal Issues to be decided and **granted** Stephen Lamphear's motion to intervene.

The Record and Motions to Supplement the Record

On May 22, 2006, at the PHC, the Board received Burien's "Respondent's Index to the Record" (**Index**). The Index listed 24 items.

The Petitioners requested that the City amend its Index to include various items requested by Petitioners. Although the City did agree to amend the Index to include some items, the City declined to include other items. Due to this refusal, on June 8, 2006, the Board received "Petitioners' Motion to Supplement the Record to Include Additional Evidence" (**Giba Motion – Supp.**). Petitioners attached four exhibits (A-D) that each included numerous documents. Exhibit "A" includes several items from the Record in the *Giba I* matter (CPSGMHB Case No. 06-3-0008) related to Burien's adoption of a prior Ordinance – Ordinance No. 445. Exhibit "B" includes items that were not included in Burien's Index for *Giba I*, but which Petitioners now seek to include in the present record. Exhibit "C" contains excerpts from Burien's Municipal Code, pertaining to the City's notice and public participation procedures. Exhibit "D" is the full Index of the Record from *Giba I*.

On June 9, 2006, the Board received Intervenor Lamphear's "Memorandum in Support of Petitioners Motion to Supplement the Record."

On June 21, 2006, the Board received "Burien's Response to Motion to Supplement the Record" (**Burien Response – Supp.**). The City objected to the inclusion of items from the *Giba I* record pertaining to Ordinance No. 445, since the relevant portion of that Ordinance – Section 2, the phasing provision – had been repealed by the presently challenged Ordinance No. 448. The City contends that none of the items would be necessary or of substantial assistance to the Board in rendering its decision. Burien Response – Supp., at 1-4.

On June 29, 2006, the Board received "Reply in Support of Petitioners' Motion to Supplement the Record to Include Additional Evidence" (**Giba Reply - Supp.**)

Motion to Dismiss

On June 7, 2006, the Board received "The City of Burien's Motion to Dismiss," with four attachments.¹ (**Burien Motion – Dismiss**). The City also provided a signed copy of Ordinance No. 445.

¹ Attachment A is a copy of Ordinance No. 445 with the three exhibits adopted by it [Table of Comprehensive Plan text amendments and a revised figure 2LU-2 (Planned Land Use Intensity map); Table of Comprehensive Plan map amendments, with attached Plan map; and Table of Zoning Map amendments, with attached Zoning map. Attachment B is a copy of Ordinance No. 448, the repealer ordinance and the subject of this challenge. Attachment C is a copy of a Memorandum of Understanding

On June 22, 2006, the Board received “Petitioners’ Response to Burien’s Motion to Dismiss” (**Giba Response – Dismiss**).

On June 29, 2006, the Board received “Burien’s Reply to Petitioners’ Response to Burien’s Motion to Dismiss,” with six attached exhibits.² (**Burien Reply – Dismiss**).

All filings were timely and the Board did not hold a hearing on any of the motions. The Board first addresses the City of Burien’s Motion to Dismiss, and then turns to Petitioners’ Motion to Supplement.

II. DISCUSSION OF MOTIONS

A. Burien Motion to Dismiss

The City argues that Ordinance No. 448 does not amend the City’s Comprehensive Plan (the **Plan**) or development regulations. The City contends all Ordinance No. 448 does is repeal Section 2 of Ordinance No. 445, pertaining to a phasing provision for future amendments to the City’s Plan. The City does not dispute that Ordinance No. 445 did amend its Plan. Since Section 2 of Ordinance No. 448 does not amend the City’s Plan or development regulations, the City asserts that the Board does not have jurisdiction to review it. Burien Motion – Dismiss, at 4-6. The City also contends that by challenging Ordinance No. 448 Petitioners are challenging the very relief they sought and received in the *Giba I* matter. *Id.* at 6. The City also indicates that on March 29, 2006, it entered into a Memorandum of Understanding (**MOU**) regarding the North Highline Community area with King County and the City of Seattle. Finally, the City acknowledges that once the City makes a decision regarding the North Highline Community area [Planned Annexation Area (**PAA**) and annexation] after negotiations with King County and the City of Seattle, Petitioners may challenge that action. *Id.* at 6-7.

Petitioners counter that Ordinance No. 448 amended Ordinance No. 445, which in turn amended the City’s Plan; therefore, Petitioners assert that Ordinance No. 448 also amended the City’s Plan. Therefore, the Board has jurisdiction. *Giba Response*, at 8-10. Petitioners also commence argument on the merits related to notice [Legal Issue 1 from the PHO], annual review of Plan amendments [Legal Issue 2] and compliance with

(**MOU**) executed in March 2006 by King County, Seattle and Burien pertaining to “resolution of the North Highline annexation.” The MOU has a *North Highline Community Engagement Plan* and a *North Highline Governance Resolution Work Program and Schedule* attached. Attachment D is a copy of this Board’s April 17, 2006 Order on Motions in *Giba I*, CPSGMHB Case No. 06-3-0008. Pursuant to WAC 242-02-660, the Board takes **official notice** of these items – hereafter Exs. A, B, C and D, respectively.

² Three Exhibits are the same as submitted by the City – Exs. A, B and C. Three additional exhibits are attached: 1) Burien Resolution No. 219 [setting the City’s 2005 docket for Plan amendments]; 2) Ref. No. 2004-7 [Draft Policies and map for North Highline PAA]; and 3) PAA Question and Answer sheet. Pursuant to WAC 242-02-660, the Board takes **official notice** of these three additional items – hereafter Exs. E, F and G, respectively.

certain goals of the act and the provisions of RCW 36.70A.100. Giba Response – Dismiss, at 1-3, 10-12, and 12, respectively.

In reply, the City contends that the Ordinance No. 448 was not adopted pursuant to the GMA so the GMA’s notice and public participation provisions do not apply. Burien Reply – Dismiss, at 1-2. The City goes on to explain that the “repeal” of an ordinance [or portion thereof] is different than an “amendment” of an ordinance, since a repeal revokes or abrogates the prior act, rather than modify such act. *Id.* The City also notes that the MOU specifically includes a North Highline Community Engagement Plan to fully involve interested members of the community in the decision-making process regarding a PAA. *Id.* at 3-4. Finally, the City again acknowledges that once the MOU process is complete, “Petitioners will have a full, fair, and complete opportunity to challenge those substantive comprehensive plan amendments before this Board.” *Id.*

Context for Discussion

The North Highline Community Area:

The area in dispute in this matter is the North Highline Community area. The area is within an unincorporated urban growth area (**UGA**) as determined by King County. In King County, pursuant to the King County Planning Policies (**CPPs**), each city is to designate, in collaboration with surrounding jurisdictions, part or all of the various unincorporated urban growth areas as Potential Annexation Areas (**PAAs**). This PAA process is to further the purposes of RCW 36.70A.210, which directs that “cities are the primary provider of urban governmental services within urban growth areas.”

The North Highline Community area is “the only undesignated urban unincorporated area in King County.” Ex. C, MOU. at 2. Both Burien and Seattle³ are interested in potentially annexing all or part of the North Highline Community area and the MOU has been executed to facilitate the decision on PAA designation. *Id.* The MOU incorporates a “North Highline Community Engagement Plan” and a “North Highline Governance Resolution Work Program & Schedule.” *Id.* Attachments A and B. The “Work Schedule” indicates that by December 2006, Burien and Seattle will adopt comprehensive plan amendments resulting alone or in combination in PAA [designation]. *Id.* Attachment B, at 8.

In short, the MOU verifies that, to date, no decision has been made regarding a PAA designation(s) for the North Highline area. Nor have any decisions been made pertaining to which jurisdiction(s) will provide which urban governmental services, or where they will provide them. The North Highline Community area remains an unincorporated urban area without a PAA designation. *See also* Exs. F and G.

³ The MOU indicates that neither Tukwila nor SeaTac chose to participate in the MOU/PAA process.

Ordinance 445 – Giba I:

It is undisputed that Sections 1, 3 and 4 of Ordinance No. 445 amended the City of Burien’s Comprehensive Plan; and that Section 5 amended the City’s zoning map. However, Section 2 of that Ordinance did not amend the Plan. Section 2 of that Ordinance stated:

Section 2. Phase II Included in 2005 Amendments. *The City Council will consider and may take action on the Phase II amendments, which include policies and a map designating a Potential Annexation Area in 2006. Any further action by the City Council with regard to such amendments shall be considered a part of the City’s 2005 amendments to the Comprehensive Plan.*⁴

Ordinance 445, at 2, (emphasis supplied).

Section 2 of Ordinance 445, on its face, did not amend the City of Burien’s Comprehensive Plan policies or maps pertaining to a PAA – *i.e.* the North Highline Community area. The Section 2 indicated that any PAA amendment, if undertaken, would occur through a separate action in 2006.⁵ Nonetheless, the North Highline Area was not designated as a PAA by Ordinance 445 in 2005.

Petitioners subsequently appealed the City’s adoption of Ordinance 445, specifically Section 2. *See* Legal Issues 1 and 2, March 24, 2006 PHO, at 7. The City then adopted Ordinance No. 448, which repealed Section 2 of Ordinance No. 445, and the Board dismissed the matter as moot, noting that the City had provided the relief requested by the Petitioners. *See Giba v. City of Burien*, CPSGMHB Case No. 06-3-0008, Order of Dismissal, (April 17, 2006), at 3. Now Petitioners have filed a PFR challenging the City’s adoption of Ordinance No. 448, and the City has moved to dismiss this matter.

Ordinance No. 448 – Dismiss?

In the present dispositive motion, the question before the Board is quite simple – Did Ordinance No. 448 amend the City’s Plan? Quite simply, the answer is No.

⁴ One of the WHEREAS clauses in Ordinance No. 445 stated, “the Phase II amendments which include policies and a map designating a Potential Annexation Area *will be considered for adoption for the Council in the 2006* and, although not implemented by this Ordinance, are part of the 2005 annual review of the Comprehensive Plan and are being considered concurrently with the amendments to the Comprehensive Plan adopted pursuant to this Ordinance so that the cumulative effects of these amendments may be ascertained.” (Emphasis supplied.)

⁵ However, the affect of the second sentence of Section 2 would have been questionable, since any action occurring in the 2006 annual amendment cycle triggers the requirement to assess amendments concurrently so the cumulative impacts can be ascertained. *See* RCW 36.70A.130.

Ordinance No. 448 provides in relevant part:

AN ORDINANCE OF THE CITY OF BURIEN, WASHINGTON, RELATING TO 2005 COMPREHENSIVE PLAN AMENDMENTS, REPEALING SECTION 2 OF ORDINANCE 445, PROVIDING FOR SEVERABILITY AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, the Burien City Council adopted Ordinance 445 on December 19, 2005; and

WHEREAS, Ordinance 445 adopted certain Comprehensive Plan amendments designated as “Phase I” of the 2005 Comprehensive Plan amendments. Ordinance 445 did not adopt, but did establish for future consideration “Phase II” amendments of the 2005 Comprehensive Plan amendments which relate to the designation of a Potential Annexation Area; and

WHEREAS, the “Phase II” amendments described in Ordinance 445 were challenged before the Central Puget Sound Growth Management Hearings Board; and

WHEREAS, the City Council has received numerous assurances from Seattle and King County that the three jurisdictions will work cooperatively in 2006 regarding the Potential Annexation Area at issue in the Phase II amendments;

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF BURIEN, WASHINGTON DOES ORDAIN AS FOLLOWS:

Section 1. Repealer. Section 2 of Ordinance 445 is hereby repealed. The remainder of Ordinance 445 shall remain in full force and effect.

...

Ordinance 448, at 1.

Ordinance No. 448 did not amend the City of Burien’s Comprehensive Plan or development regulations – matters over which the Board has review jurisdiction. *See* RCW 36.70A.280. Ordinance No. 448 simply repealed Section 2 of Ordinance No. 445, which as discussed *supra*, did not amend the City’s plan either. The Board is without jurisdiction to review Ordinance No. 448, and Petitioners’ PFR will be **dismissed with prejudice** for lack of subject matter jurisdiction.

The fact of the matter is that the North Highline Community area remains an unincorporated UGA within King County. No jurisdiction has designated the area as a

PAA as provided for by King County CPP. However, the present MOU between the Cities of Burien and Seattle and King County indicates that decisions regarding a PAA designation for this area are anticipated by December of 2006. Once those decisions are made, and plans or development regulations are amended to designate a PAA(s) and policies are adopted affecting the PAA area, an appeal to this Board of those decisions would be ripe. *See also* Ex. G.

B. Petitioners Motion to Supplement

Having dismissed with prejudice Petitioners' challenge to Ordinance No. 448, the Board need not and will not address Petitioners' Motion to Supplement the Record.

III. ORDER

Based upon review of the Petition for Review, the briefs and materials submitted by the parties, the Act, and prior decisions of this Board and other Growth Management Hearings Boards, the Board enters the following ORDER:

- The City of Burien's Motion to Dismiss is **granted**.
- The matter of *Giba II v. City of Burien*, CPSGMHB Case No. 06-3-0020 is **dismissed with prejudice**.
- All further proceedings in this matter are **cancelled** and the matter is **closed**.

So ORDERED this 3rd day of July, 2006.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Bruce C. Laing, FAICP⁶
Board Member

Edward G. McGuire, AICP
Board Member

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.

⁶ Board member Laing's term, set to expire on June 30, 2006, has been extended by the Governor.