

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

1
2
3
4
5
6 JOCELYNNE FALLGATTER,) **Case No. 06-3-0023**
7)
8 Petitioner,) **(Fallgatter VII)**
9)
10 v.)
11) **ORDER OF DISMISSAL**
12 CITY OF SULTAN,)
13)
14 Respondent.)
15)
16)

I. BACKGROUND

17
18
19
20 On May 30, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**)
21 received a Petition for Review (**PFR**) from Jocelynn Fallgatter (**Petitioner** or **Fallgatter**). The
22 matter was assigned Case No. 06-3-0023, and is hereafter referred to as *Fallgatter v. City of*
23 *Sultan (Fallgatter VII)*. Board member Margaret A. Pageler is the Presiding Officer for this
24 matter. Petitioner challenges the City of Sultan’s (**Respondent** or **City**) adoption of Ordinance
25 No. 922-06, which provided for the annexation of the approximately 20-acre city-owned “Reese
26 Park” property, and the adoption of Ordinance No. 923-06, which provide for the annexation of
27 the approximately 35-acre city-owned “Water Treatment Plant” property. Petitioner contends
28 that the actions taken by the City are noncompliant with various provisions of the Growth
29 Management Act (**GMA** or **the Act**), RCW 36.70A.
30

31
32 On June 7, 2006, the Board issued a Notice of Hearing (NOH) in the matter. The NOH stated:
33

34 “The Board questions its jurisdiction to hear a challenge to Sultan’s annexation of
35 two parcels of land within the Sultan UGA. In order to expedite the matter, the
36 Board requests the parties to brief this question simultaneously prior to the
37 [Prehearing Conference (PHC)]. Briefs from Petitioner and Respondent shall be
38 filed concurrently by June 20, 2006. The briefs shall be limited to the question of
39 the Board’s jurisdiction in this matter. At the PHC, the Board will make a ruling
40 on the jurisdictional question; alternatively, the Board may reserve the question
41 for subsequent briefing and argument.”
42

43
44 NOH at 1-2.

45
46 On June 20, 2006, the Board received Petitioner’s “Brief Regarding Board Jurisdiction of PFR
47 and Motion to Amend PFR” (**Petitioner Jurisdiction**) and Respondent’s “Brief on Jurisdiction.”
48 (**Respondent Jurisdiction**).
49
50

1 On June 27, 2006, the Board held a telephonic Prehearing Conference (PHC) on the matter.
2 Presiding Officer Pageler conducted the PHC which was attended by Board Members Bruce
3 Laing and Ed McGuire,¹ and the Board's Law Clerk, Julie Taylor. Jocelyne Fallgatter appeared
4 *pro se* and the City was represented by Craig Knutson.² At the PHC, the parties presented
5 support to the arguments in the briefs previously submitted on the issue of jurisdiction. The
6 Board also reviewed its procedures for the hearing and settlement, confirmed the Legal Issues to
7 be decided, notified the City of the deadline for filing of the Index, and set forth the Final
8 Schedule.
9

10 11 12 **II. DISCUSSION ON MOTIONS**

13 14 *Amendment of PFR*

15
16 On June 20, 2006, Petitioner filed an amendment to the PFR. Petitioner sought to amend the
17 two Legal Issues presented to the Board.
18

19 *Issue 1, as originally stated in the PFR, provided:*
20

21 Did the City of Sultan substantially interfere with the goals of the GMA,
22 specifically RCW 36.70A.020(11) regarding citizen participation, and fail to
23 comply with the notice and public participation requirements of RCW
24 36.70A.035, .130, .140 and the City's own public participation procedures when
25 it:
26

27 a. Adopted Ordinances 922-06 and 923-06 annexing two municipal
28 properties without the required public hearing?
29

30 b. Failed to notify the public of the intent to change the designated use of the
31 Water Treatment Plant to use for open space and parks purposes, with the
32 adoption of Ordinance 923-06?
33
34

35 PFR at 3-4.
36

37 *Issue 1, as restated by the Petitioner, provides:*
38

39 Did the City of Sultan substantially interfere with the goals of the GMA
40 specifically RCW 36.70A.020(11) regarding citizen participation, and fail to
41 comply with the notice and public participation requirements of RCW
42 36.70A.035, .130, .140 and the City's own public participation procedures when
43 it:
44
45
46
47
48

49 ¹ Board Member McGuire participating telephonically.

50 ² Mr. Knutson is from the Law Offices of Weed, Graafstra, and Benson.

1 a. Changed the zoning district boundary upon adoption of Ordinances 922-
2 06 and 923-06, without the public hearing required by Sultan Municipal Code
3 16.128.020?
4

5 b. Failed to act to notify the public of the intent to change the designated use
6 of the Water Treatment Plant to include use for Open Space and Parks purposes in
7 order to circumvent a level of service failure for parks and recreation?
8

9
10 Petitioner Jurisdiction at 3.

11
12 *Issue 2, as originally stated in the PFR, provided:*

13
14 Did the City of Sultan violate RCW 36.70A.070 requiring that a comprehensive
15 plan “shall be an internally consistent document and all elements shall be
16 consistent with the future land use map” by:
17

18 a. Failing to designate land use zoning for urban growth areas on the Future
19 Land Use Map?
20

21 b. Annexing municipal property without any designated zoning?
22

23 c. Changing the designated use of the Water Treatment Plant to Open Space
24 and Parks?
25

26
27 PFR at 4.

28
29 *Issue 2, as restated by the Petitioner, provides:*

30
31 Did the City of Sultan substantially interfere with the goals of the GMA, and
32 violate RCW 36.70A.070 requiring that a comprehensive plan “shall be an
33 internally consistent document and all elements shall be consistent with the future
34 land use map” and fail to “perform its planning activities ... in conformity with its
35 comprehensive plan” as required by RCW 36.70A.120 by:
36

37 a. Failing to act to designate land use zoning for urban growth areas on the
38 Future Land Use Map?
39

40 b. Failing to act to designate zoning for municipal property annexed by the
41 adoption of Ordinances 922-06 & 923-06?
42

43 c. Changing the designated use of the Water Treatment Plant property to
44 Open Space and Park purposes by adopting Ordinance 923-06?
45

46 d. Failing to act to review and revise development regulations to implement
47 the Comprehensive Plan?
48
49

50
Petitioner Jurisdiction at 3

1
2 As provided in WAC 242-02-260(1), the PFR may be amended as a matter of right until thirty
3 days after its date of filing. Petitioner's amended PFR was timely filed and was accepted by the
4 Board at the PHC.
5

6
7 Jurisdiction

8
9 Positions of the Parties

10
11 Petitioner asserts that the City's authority to annex the property is not being challenged, rather
12 what is at issue is the City's "continual disregard for the implementation of its Comprehensive
13 Plan and for the involvement of the public in the decision making process." Petitioner
14 Jurisdiction at 2. The Petitioner asserts that the annexation ordinances provided "a trigger for the
15 City's failure to act, a specific date by which the City was required to have acted to amend the
16 future land use and zoning map ... [and with these annexation ordinances] the City made
17 changes to the land use designations and zoning boundaries which were required to follow a
18 public notice and participation process ... [and land use and zoning changes which are required]
19 to be in conformance with and implement the comprehensive plan." Petitioner Jurisdiction at 2.
20 At the Prehearing Conference Ms. Fallgatter explained that the Failure to Act challenge stems
21 from the City's failure to amend its Future Land Use Map (FLUM) because, upon annexation,
22 the properties were not zoned by the City and the existing County zoning does not have a
23 comparable designation within the City's Comprehensive Plan. The Petitioner cites to various
24 deadlines that the City has failed to meet arising from the adopting of the 2004 Comprehensive
25 Plan, the allocation of the annexed land by Snohomish County into the City's UGA, and the
26 adoption of Ordinances 922-06 and 923-06. *Id.*
27
28

29 In response, the City states that the PFR should be dismissed for lack of jurisdiction because the
30 Board does not have authority over a city's exercise of its legislative powers to annex under
31 RCW Title 35A. Respondent Jurisdiction at 2. The City further asserts that the GMA's
32 mandate of continued public participation does not apply to RCW 35A.14 nor does the GMA
33 require that every property must have a zoning designation. *Id.* at 3. The City argues that RCW
34 36.70A.070(1) only requires that the land use element of a comprehensive plan provide for the
35 "general location and extent" of uses of land, not specific zoning, and that the City was well
36 within its authority in determining to what use it would put the newly annexed property. *Id.*
37 According to the City, these decisions, made under the authority of RCW Title 35A, are not
38 within the Board's jurisdiction. *Id.* At the Prehearing Conference, Mr. Knutson represented that
39 the City will address any zoning and/or land use designations during the annual Comprehensive
40 Plan Update cycle and/or during project review.
41
42

43 Board's Analysis

44
45 The Petitioner's allegations arise from two ordinances, adopted by the City on April 27, 2006.
46 Each of these ordinances authorized the annexation of property to the City. Ordinance 922-06 is
47 entitled: AN ORDINANCE OF THE CITY OF SULTAN CITY COUNCIL PROVIDING FOR
48 THE ANNEXATION OF CERTAIN MUNICIPAL PROPERTY KNOWN AS REESE PARK
49 TO THE CITY OF SULTAN. Ordinance 922-06 authorized the annexation of approximately 20
50 acres of land commonly known as Reese Park. At the time of annexation, the site was

1 municipally-owned and was utilized for park purposes and, according to Section 4 of the
2 ordinance, it will be retained for municipal park purposes. *PFR Attachment 1.*
3

4 Ordinance 923-06 is entitled: AN ORDINANCE OF THE CITY OF SULTAN CITY COUNCIL
5 PROVIDING FOR THE ANNEXATION OF CERTAIN MUNICIPAL PROPERTY KNOWN
6 AS WATER TREATMENT PLANT TO THE CITY OF SULTAN. Ordinance 923-06
7 authorized the annexation of approximately 35 acres of land identified as the Water Treatment
8 Plant. At the time of annexation, the site was municipally-owned and was utilized for water
9 treatment plant and, according to Section 4 of the ordinance, it will be retained for municipal
10 purposes, including water treatment plant, open space and park purposes. *PFR Attachment 2.*
11

12 Pursuant to RCW 35A.14.300,³ a code city may annex city-owned property, contiguous or non-
13 contiguous, for municipal purposes. The main restriction on this annexation is that no city may
14 annex property that is not contained within the UGA. Both of these parcels of land are located
15 within the expanded Urban Growth Area for the City⁴ and are owned by the City.
16
17

18 Issue 1, as amended, is based on the City's failure to comply with its own code when annexing
19 the properties. Petitioner alleges that the ordinances were adopted without public notice and
20 without a public hearing, as required by SMC 16.128, giving rise to a violation of the GMA's
21 public participation requirements. Petitioner Jurisdiction at 3. Issue 2, as amended, is also based
22 on the annexation of the properties. This issue alleges various "Failure to Act" claims stating
23 that because the City failed to zone the properties upon annexation, to designate that zoning on
24 the FLUM, and to review and revise development regulations, that the City failed to act in
25 consistency and conformity with its FLUM and Comprehensive Plan. Petitioner Jurisdiction at
26 3.
27

28
29 If a PFR alleges that a local jurisdiction fails to comply with a statute other than one named in
30 RCW 36.70A.280(1),⁵ the Board does not have jurisdiction to make a decision on the issue of
31 compliance. *Bremerton, et. al. v. Kitsap County*, CPSGMHB Case No. 95-3-0039c, Order on
32 Request for Clarification (Nov. 6, 1995). Although the Petitioner couches the issues in
33 violations of RCW 36.70A, the actions that the City undertook were clearly an annexation
34 pursuant to RCW 35A.14.300, and the Board does not have jurisdiction to review the actions
35 taken by a city council acting pursuant to this section of the RCW. RCW 35A.14.300 does not
36 set forth any public participation requirements nor does RCW 35A.14 require zoning of annexed
37

38
39 ³ RCW 35A.14.300 provides: "Legislative bodies of code cities may by a majority vote annex territory outside the
40 limits of such city whether contiguous or noncontiguous for any municipal purpose when such territory is owned by
41 the city."

42 ⁴ The City's UGA was expanded by the Snohomish County Council when it adopted Amended Ordinance 05-082 in
43 December 2005.

44 ⁵ RCW 36.70A.280(1) provides, in relevant part:

- 45 (1) A growth management hearings board shall hear and determine only those petitions alleging either:
46
47 (a) That a state agency, county, or city planning under this chapter is not in compliance
48 with the requirements of this chapter, chapter [90.58](#) RCW as it relates to the adoption of
49 shoreline master programs or amendments thereto, or chapter [43.21C](#) RCW as it relates
50 to plans, development regulations, or amendments, adopted under RCW [36.70A.040](#) or
chapter [90.58](#) RCW; ...

1 property to occur concurrently. *RCW 35A.14.330*. And, even if *RCW 35A.14* did provide for
2 these things, the Board does not have jurisdiction to review compliance with that statute.
3

4 The Board notes that Attachments 4 and 5 to the PFR indicate that the Sultan City Council
5 enacted these ordinances on the second of two regular public meetings, where the items were
6 listed on the published agenda, citizen comment was taken, and at least one amendment was
7 made in response to public participation.
8

9 During the PHC, the City's attorney acknowledged that amendment to the land use designation,
10 the zoning, and development regulations that are required due to this annexation, will be
11 accomplished during the annual Comprehensive Plan update process. The Board notes that the
12 "Overview of Comprehensive Place Amendment Tasks and Schedule" prepared by the City
13 March 21, 2006, includes amendments to the City's comprehensive plan that are based on the
14 ordinances at issue. *See, Appendix B to Fallgatter V v. City of Sultan, CPSGMHB Case No. 06-*
15 *3-0003, Final Decision and Order (June 29, 2006), at 29.* Task 4 seeks to update and amend the
16 comprehensive plan consistent with the UGA; Task 7 provides for updates and amendments to
17 the Park Element; Task 11(b) concerns zoning regulations for any newly annexed areas; and
18 Task 11(c) adopting development regulations for areas within the City's UGA. *Id.* The City
19 should be aware that the annexations will require amendments to its Comprehensive Plan and
20 related documents and that such amendments should be included within this year's update cycle
21 as the City's attorney acknowledged during the PHC.⁶ Failure to amend the comprehensive
22 planning documents to reflect these annexations during that process may give rise to a Failure to
23 Act challenge.
24
25

26 **III. ORDER**

27
28
29 Having considered the laws of the State of Washington, the Board's rules, previous decisions of
30 the Board, the Petition for Review, and the briefing received on the issue of jurisdiction, and
31 having deliberated on the matter, the Board enters the following Order:
32

- 33 • The matter of *Fallgatter VII v. City of Sultan, CPSGMHB Case No. 06-3-0023* is
34 **dismissed with prejudice**.
- 35 • The briefing schedule and hearing on the merits are **cancelled** and this matter is **closed**.
36
37

38 So ORDERED this 29th day of June, 2006.
39

40 CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD
41
42

43
44 _____
45 Bruce C. Laing, FAICP
46 Board Member
47

48
49 ⁶ The Board would anticipate that the Comprehensive Plan amendment and land use designation process will allow
50 citizens timely opportunity to voice their concerns, such as those indicated by Petitioner at the Prehearing
Conference regarding whether open space and park designation is appropriate for the water treatment plant property.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45
46
47
48
49
50

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 242-02-832.⁷

⁷ Pursuant to RCW 36.70A.300 this is a final order of the Board.

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the date of mailing of this Order to file a motion for reconsideration. The original and three copies of a motion for reconsideration, together with any argument in support thereof, should be filed with the Board by mailing, faxing or otherwise delivering the original and three copies of the motion for reconsideration directly to the Board, with a copy served on all other parties of record. Filing means actual receipt of the document at the Board office. RCW 34.05.010(6), WAC 242-02-240, WAC 242-020-330. The filing of a motion for reconsideration is not a prerequisite for filing a petition for judicial review.

Judicial Review. Any party aggrieved by a final decision of the Board may appeal the decision to superior Court as provided by RCW 36.70A.300(5). Proceedings for judicial review may be instituted by filing a petition in superior Court according to the procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil Enforcement. The petition for judicial review of this Order shall be filed with the appropriate Court and served on the Board, the Office of the Attorney General, and all parties within thirty days after service of the final order, as provided in RCW 34.05.542. Service on the Board may be accomplished in person or by mail, but service on the Board means actual receipt of the document at the Board office within thirty days after service of the final order. A petition for judicial review may not be served on the Board by fax or by electronic mail.

Service. This Order was served on you the day it was deposited in the United States mail. RCW 34.05.010(19)