

**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,)	FINAL DECISION AND ORDER
)	
Respondent.)	
)	
)	

SYNOPSIS

*Jocelynnne Fallgatter and Jeff Kirkman, petitioners pro se, challenged the City of Sultan’s adoption of Ordinance No. 904-06, abolishing the Planning Commission, and Ordinance No. 913-06, adopting the 2002 Surface Water Quality Management Plan [**Stormwater Plan**].*

The Board dismissed the challenge to Ordinance No. 904-06 as moot. The Board traced the series of City actions leading to the creation of a Planning Board in Ordinance 924-06 and found that at no time did the City lack an adopted public participation process as required by RCW 36.70A.140. Though there were process flaws in the adoption of Ordinance 904-06, the adoption of Ordinance 924-06 rendered the challenge moot.

The Board also dismissed the challenge to Ordinance No. 913-06, the Stormwater Plan. The Board found that the Stormwater Plan meets the requirements of RCW 36.70A.070(1) and that Petitioners had not carried their burden of proving that the City’s action in adopting the Plan was clearly erroneous.

I. PROCEDURAL BACKGROUND¹

On March 27, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Jocelynnne 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 challenged the City of Sultan’s (**Respondent** or **City**) adoption of Ordinance No. 904-06, abolishing the Planning Commission, Ordinance No. 913-06, adopting the 2002 Surface Water Quality Management Plan, and Task Order 2006-1, regarding the Water System Plan, alleging

¹ A complete chronology of procedures in this case is attached as Appendix A.

that these actions are not in compliance with provisions of the Growth Management Act (**GMA** or **Act**).

The Prehearing Conference was conducted on May 1, 2006, and the Prehearing Order (**PHO**) was issued the same day.

In May 2006, the Board received the City of Sultan's 2004 Comprehensive Plan as a core document and the City's "Index to Record" (**Index**), listing 58 items by Index number. Subsequently, Petitioner filed "Motion to Supplement the Index of the Record and to Take Official Notice," asking that the Record be supplemented with nine (9) items. The City responded with a "Supplementation of Index to the Record."

Also in May, 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)" and 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)."

On June 29, 2006, the Board issued its Order on Motions and Order Amending Schedule. The Board granted the City's motion to dismiss the challenge to Task Order 2006-1 and denied the motion to dismiss the challenge to Ordinance 904-06. *The Board noted in its Order that the City was considering action that might make the challenge to Ordinance 904-06 moot.* In a concurring opinion, Presiding Officer Margaret Pageler suggested that the parties might use the extended compliance period simultaneously established in *Fallgatter V v. City of Sultan*, CPSGMHB Case No. 06-3-0003, Final Decision and Order (June 29, 2006) to address the matters raised in the *Fallgatter VI* PFR.

On July 6, 2006, the Board received a letter from the City of Sultan requesting, on behalf of all parties, a 30-day settlement extension. Three 90-day extensions were subsequently requested and granted.

On April 30, 2007, the Board received a letter from Petitioner Jocelyne Fallgatter stating that further settlement extensions would not be requested and that the matter would proceed to a hearing on the merits.

Briefing on the merits was timely submitted as follows:

- Petitioners' Prehearing Brief [**Fallgatter PHB**]
- Respondent City of Sultan's Prehearing Brief [**Sultan Response**]
- Petitioner's Reply to Respondent City of Sultan's Prehearing Brief [**Fallgatter Reply**]

The City of Sultan submitted the City of Sultan Surface Water Quality Management Plan 2002 [**Stormwater Plan**] as a Core Document.

The Hearing on the Merits was convened on June 7, 2007, at 2:00 p.m. in the Board's offices. Present for the Board were Margaret Pageler, Presiding Officer, Board members

Ed McGuire and Dave Earling, law clerk Julie Taylor, and extern Linda Jenkins. Thom Graafstra represented the City of Sultan, with City Administrator Deborah Knight also in attendance. Petitioners Jocelynn Fallgatter and Jeff Kirkman appeared *pro se*. Court reporting services were provided by Barbara Hayden of Byers and Anderson. The hearing was adjourned at 3:00 p.m. The Board did not order a transcript of the proceedings.

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF, STANDARD OF REVIEW, AND DEFERENCE TO LOCAL JURISDICTIONS

Upon receipt of a petition challenging a local jurisdiction's GMA actions, the legislature directed the Boards to hear and determine whether the challenged actions were in compliance with the requirements and goals of the Act. *See* RCW 36.70A.280. The legislature directed that the Boards "after full consideration of the petition, shall determine whether there is compliance with the requirements of [the GMA]." RCW 36.70A.320(3); *see also*, RCW 36.70A.300(1). *See, Ferry County v. Concerned Friends of Ferry County, et al. (Ferry County)*, 155 Wn.2d 824, 833, 123 P.3d 102 (2005): "The Board adjudicates compliance with the GMA and must find compliance unless a county's or city's action is clearly erroneous."

Petitioners challenge the City's adoption of Ordinance 904-06, abolishing the Planning Commission, and Ordinance 913-06, adopting the Surface Water Quality Management Plan. Comprehensive plans and development regulations, and amendments thereto, adopted by the City of Sultan pursuant to the Act, are presumed valid upon adoption. RCW 36.70A.320(1).

The burden is on the Petitioners to demonstrate that the actions taken by the City are not in compliance with the Act. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board "shall find compliance unless it determines that the actions taken by [the City] are clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." For the Board to find the City's actions clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

The GMA affirms that local jurisdictions have discretion in adapting the requirements of the GMA to local circumstances and that the Board shall grant deference to local decisions that comply with the goals and requirements of the Act. RCW 36.70A.3201. Pursuant to RCW 36.70A.3201, the Board will grant deference to the City of Sultan in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. In *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224, 248, 110 P.3d 1132 (En Banc 2005), the State Supreme Court said: "We hold that deference to county planning actions that are consistent with the goals and requirements of the GMA . . . cedes only when it is shown that a county's planning action is in fact a 'clearly erroneous' application of the GMA." Thus "[l]ocal discretion is bounded . . . by the goals and requirements of the

GMA.” *King County v. Central Puget Sound Growth Management Hearing Board*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000).

The scope of the Board’s review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to those issues presented in a timely petition for review.

III. JURISDICTION

The Board finds that the Petitioners’ PFR was timely filed, pursuant to RCW 36.70A.290(2); that Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and that the Board has subject matter jurisdiction over the challenged Ordinance 904-06, abolishing the Planning Commission, and Ordinance 913-06, adopting the Surface Water Quality Management Plan, pursuant to RCW 36.70A.280(1)(a), RCW 36.70A.140, and RCW 36.70A.070(1).

IV. LEGAL ISSUES

A. Ordinance 904-06 and Legal Issues 1 and 2

The PHO states Legal Issues 1 and 2 as follows:

Legal Issue No. 1: Did the City of Sultan substantially interfere with the goals of the GMA, specifically, RCW 36.70A.020(7) & (11) regarding permitting and public participation, by failing to perform its activities in conformity with its Comprehensive Plan, as required by RCW 36.70A.120, when it adopted Ordinance 904-06 abolishing the Planning Commission?

Legal Issue No. 2: 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.035, .130 & .140 in the adoption of Ordinance 904-06?

The Challenged Action and Board Order on Motions

Ordinance 904-06 repealed Sultan Municipal Code (SMC) Chapter 2.17 entitled “Planning Commission” and enacted a new Chapter 2.17 entitled “Department of Community Development.” The newly-enacted SMC 2.17 created a separate administrative department for the City in order to consolidate all planning, environmental, and permitting functions into a single department. *Ordinance No. 904-06*. Section 2.17.020 designated the Sultan City Council itself, on an interim basis, as the planning agency for the City, and gave the City Council specific responsibility for all duties formerly assigned to the Planning Commission and all other duties required by statute of the planning agency of a municipality. *Id.*

In its dispositive motion in May 2006, the City argued that the Board lacked jurisdiction to review the repeal and substitution of SMC Chapter 2.17, because the section was merely administrative and not a comprehensive plan or development regulation. *Citing* RCW 36.70A.280. The Board disagreed.

The Board's Order on Motions explained:

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

Order on Motions, at 4. The Order on Motions thus concluded that the Board has subject matter jurisdiction.

The Board further commented, as a "preliminary observation,"

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

Id. The Order on Motions concluded:

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

Id. at 5 [emphasis supplied].

Subsequently, on June 12, 2006, the City of Sultan adopted Ordinance No. 913-06 creating a five-member Planning Board to perform the functions previously assigned to the Planning Commission. Index #52. However, neither party contacted the Board to request that the challenge to Ordinance No. 904-06 be dismissed as moot.

Applicable Law

RCW 36.70A.140 requires cities and counties to adopt and adhere to public participation processes in adopting and amending comprehensive plans and development regulations.

36.70A.140 Comprehensive plans — Ensure public participation.

Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments. ... Errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed.

Positions of the Parties

Petitioners state, and the City does not dispute, that Ordinance No. 904-06 was adopted without notice and hearing. Fallgatter PHB, at 5. Petitioners challenge not only the abolishment of the Planning Commission but the City's failure to conduct a public hearing as required by the Sultan Municipal Code. Minimum requirements for notice and hearing for city planning and land use enactments are embodied in state law [RCW 35.21.530] and in the Sultan Municipal Code [SMC 16.128.010 and .030]. SMC 16.128.030 requires notice and public hearing prior to an amendment to SMC Title 16, the City's Uniform Development Code, which contained the Planning Commission provisions. Petitioners argue that the City's action amended the public process provisions of its development regulations without the requisite hearing and thus violated RCW 36.70A.130(1)(d) and .020(7) and (11). *Id.*

The City in response reargues its challenge to the Board's jurisdiction. Sultan Response, at 2-3. The City also asserts that the challenge to Ordinance No. 904-06 is moot, as the City through Ordinance No. 924-06 has created a Planning Board to perform all the functions of the former Planning Commission. *Id.* at 4.

Petitioners reply that the mootness doctrine should not be applied here because of the City's pattern of non-compliance with GMA public participation requirements and with its own adopted processes. Fallgatter Reply, at 3-4. Petitioners cite *McVittie V v. Snohomish County*, CPSGMHB Case No. 00-3-0016, Final Decision and Order (April 12, 2001), at 9, 10, for the rule that "the public participation questions posed in this case are a matter of continuing and substantial interest, that if left unresolved, are likely to recur in the future." *Id.*

Board Discussion

On February 12, 2006, by Ordinance 904-06, the City of Sultan abolished its Planning Commission and established the City Council to perform all functions previously assigned to the Commission. On June 12, 2006, by Ordinance 924-06, the City created a Planning Board to perform the previous Planning Commission functions. *At no time did the City lack an adopted public participation process as required by RCW 36.70A.140.*

In its Order on Motions the Board pointed out:

Although Sultan's adoption of Ordinance 904-06 modified its administrative structure and public process for guiding planning and development, the GMA does not mandate a specific process. The Board does not decide what this process should be; this is left to the local jurisdiction's discretion. It is not the Board's role to determine whether local government action constitutes wise policy, or reflects the choice the Board might have made; rather, the Board's role is to discern whether the GMA has been violated. [Citations omitted].... Petitioners have a substantial burden to prove that [Sultan's] choice was clearly erroneous.

Order on Motions, at 5.

The briefs of the parties on the merits introduce no new facts or arguments from those submitted during the motions period of this matter. Petitioners argue primarily that the City failed to conduct a public hearing, in violation of its own GMA-developed public process requirements. Petitioners contend that the Board should not dismiss the error as moot, because a ruling of noncompliance is necessary in order to halt Sultan's pattern of disregarding its own public participation processes. Fallgatter Reply, at 3-4.

In the present case, whether or not there were flaws of process or substance in Ordinance 904-06, the Ordinance has been superseded and the challenge rendered moot by the City's enactment of Ordinance No. 924-06. In *McVittie V*, cited by Petitioners, the Board ruled that Snohomish County's non-compliant public process was not rendered moot by the City of Arlington's subsequent annexation of the land at issue. Snohomish County had itself taken no corrective action which would render a Board ruling superfluous. Here, by contrast, the City of Sultan has already done what a Board remand would require – that is, it has adopted, presumably with proper notice and hearing,² a new ordinance creating a GMA public process.

In the most recent Supreme Court ruling on a Central Board decision, the Court dismissed as moot an appeal in the case of *Master Builders Assoc. , et al v. Central Puget Sound Growth Management Hearings Board*, Docket No. 79975-0 (Order Granting Motion to Dismiss, May 21,2007); *DOE/CTED, et al v. City of Kent, CPSGMHB Case No, 5-3-0034, Final Decision and Order* (April 19, 2006). This was a case of substantial public interest raising a number of state-wide issues of overriding public importance. The

² There has been no challenge to Ordinance No. 924-06, and no suggestion of a non-compliant public process in its enactment.

case had been certified for direct appellate review by both the Board and the King County Superior Court because of the importance of the issues involved. However, the courts had not stayed the Board's compliance proceedings, and when Kent subsequently enacted a compliant ordinance, the Supreme Court, without comment, dismissed the appeal as moot.³

The Board finds and concludes that the City's enactment of Ordinance No. 924-06 creating a Planning Board renders moot the challenge to Ordinance No. 904-06 abolishing the Planning Commission. Legal Issues 1 and 2 are **dismissed**.

Conclusion

The Board finds and concludes that the challenge to Ordinance 904-06 is **moot**. Legal Issues 1 and 2 are **dismissed**.

B. Ordinance 913-06 and Legal Issues 3 and 4

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**?

Applicable Law

RCW 36.70A.070(1) describes the mandatory land use element in city and county comprehensive plans. The statute provides:

... Where applicable, the land use element shall review drainage, flooding, and storm water run-off in the area and nearby jurisdictions and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state, including Puget Sound or waters entering Puget Sound.

³ The City of Kent has filed a motion for reconsideration of the Court's ruling.

The Challenged Action

Ordinance 913-06, enacted February 25, 2006, adopted the City of Sultan's 2002 Surface Water Quality Management Plan [**Stormwater Plan**]. The Stormwater Plan was developed by consultants, reviewed with public hearings, and submitted to the Department of Ecology [DOE] for approval in 2002. DOE approved the Stormwater Plan on August 18, 2003. Both DOE and the City's consultants recommended that the City create a stormwater utility to ensure a stable source of funding for ongoing maintenance and improvements. Stormwater Plan, at 4-11. Consequently, creation of a stormwater utility has been on the City's work plan for several years, and, according to information provided by the City at the Hearing on the Merits, is anticipated to be adopted in the near future.

The Stormwater Plan was adopted on February 25, 2006, after the abolition of the Planning Commission on February 12, 2006, and before the establishment of the Planning Board on June 12, 2006. The City Council held a hearing on January 25, 2006. Ordinance 913-06, at 3. Previous public meetings were held May 17, 2002 and July 17, 2002. *Id.*

Positions of the Parties

Petitioners argue that the Surface Water Quality Management Plan, adopted in 2006, was in fact, developed in 2002 and, as such, is full of outdated information and assumptions. Further, the Plan lacks funding mechanisms, is inconsistent in project and funding details with the comprehensive plan and/or current reality, and was adopted without Planning Commission review. Fallgatter PHB, at 6-11.

The City argues that the Board lacks jurisdiction because the GMA does not create a consistency requirement for surface water quality management plans and the Plan was adopted under RCW 90.48.555, not under the GMA. Sultan Response, at 5. The City moves to dismiss for lack of jurisdiction.

In the event the Board finds jurisdiction, the City argues that Petitioners haven't met their burden of proof. *Id.* at 6-8. The City points out that the 2002 Stormwater Plan assesses the existing drainage system and then generally addresses anticipated future conditions in terms of changes in impervious surface with increased residential development. *Id.* at 7. The City argues that the analysis performed in 2002 and approved by DOE in 2003 remains valid. Future development is required to comply with the DOE Stormwater Manual.⁴ The City acknowledges that cost information and funding projections from 2002 will have been superseded by more recently adopted CFP's, but that's just in the nature of planning, according to the City, and doesn't make a functional plan invalid or noncompliant. *Id.* at 8.

Finally, the City argues that Petitioners' public participation issue fails because, although the Planning Commission had been dissolved when the Stormwater Plan was enacted,

⁴ Department of Ecology, 2001, *Stormwater Management Manual for Western Washington*, Vols. 1-5.

Petitioners haven't proved any lack of notice or opportunity to be heard. In fact, public hearings were held May 17, 2002, July 17, 2002, and January 25, 2006. *Id.* at 9.

Petitioners reply that the Board has ruled that Level of Service [LOS] standards are required for all GMA "public facilities." Citing *McVittie VI v. Snohomish County*, CPSGMHB Case No. 01-3-00002, Final Decision and Order (July 25, 2001), at 17. Sultan has not adopted an LOS for stormwater. Fallgatter Reply, at 7. Further, stormwater development regulations should have been reviewed and revised in the December 2004 cycle, and enactment of the outdated 2002 program was clearly non-compliant with this requirement. *Id.* Finally, Petitioners attack Section 3 of the Ordinance that states:

Section 3. In the event there is any inconsistency between the Surface Water Quality Management Plan as accepted and the City of Sultan 2004 Comprehensive Plan, the City shall undertake a public participation process and update the utility element of its comprehensive plan.

Petitioners assert that Sultan's pattern of revising its Comprehensive Plan to match its functional plans, rather than vice versa, is backwards. *Id.* at 8.

Board Discussion

The GMA requires, as part of the mandatory land use element, that city and county comprehensive plans, "where applicable," must "review drainage, flooding and storm water runoff in the area ... and provide guidance for corrective actions to mitigate or cleanse those discharges that pollute waters of the state, including Puget Sound or waters entering Puget Sound." RCW 36.70A.070(1). The Board takes official notice of the "notorious fact"⁵ that the City of Sultan, at the confluence of several rivers and creeks, is prone to flooding and has experienced wash-outs and overflows of its sewer treatment plant.

The Board plainly has jurisdiction with respect to mandatory elements of a city's land use plan. The Board notes that the Stormwater Plan itself describes the GMA requirement to incorporate the stormwater program into the City's comprehensive plan and development regulations. Stormwater Plan, at 2-12, 2-14. The Board's review does not determine compliance with RCW 90.48.555, but rather whether the City's reliance on the Stormwater Plan, as part of its Comprehensive Plan, meets the requirements of the GMA. The City's motion to dismiss for lack of subject-matter jurisdiction is **denied**.

The Sultan Stormwater Plan assesses the existing piped drainage facilities in Sultan's downtown center, which is largely built out. In the City's residential areas and UGA, the analysis is based on river and stream basins. Stormwater Plan at 2-8, 3-1, 3-4. By focusing on basins, rather than on city boundary lines, the City's plan retains flexibility to respond to future growth. Sultan Response, at 7. To deal with increased impervious surface and runoff from future residential construction, the City relies, first, on the requirement that developers comply with the DOE 2001 Stormwater Manual and, second,

⁵ WAC 242-02-670(2).

on the expectation of required developer funding of capital improvements needed for extending the stormwater system. Stormwater Plan at 3-1. 3-4. The Board is not persuaded that such a plan violates GMA requirements or is clearly erroneous.

Petitioners point out that the City's tardy adoption of the 2002 plan in 2006 meant that some studies listed in the Plan as underway were already completed at the time of adoption. Fallgatter PHB, at 8. Similarly, action has already been taken on some of the capital projects listed in the plan for future consideration. Stormwater Plan, Tables 3-1 and 4-4. In response, the City asserts that these are minor discrepancies and that its capital facilities plan, when updated later this year, will provide the necessary adjustments. The Board concurs with the City: while there is not perfect parallelism between the 2002 Stormwater Plan and the 2004 Comprehensive Plan, the discrepancies do not rise to the level of a "clearly erroneous" action by the City. The project lists can be reconciled in the annual CFP process.

With respect to the lack of an established Level of Service,⁶ Petitioners' opening brief says only: "No established level of service is discussed or identified." Fallgatter PHB, at 10. This argument is so cursory that the issue must be deemed abandoned. *See* WAC 242-02-570(1). Therefore the Board will not consider it. The LOS issue is argued for the first time – and persuasively – in Petitioners' rebuttal brief. Fallgatter Reply, at 7. The City would be well-advised to review the *McVittie VI* decision cited by Petitioners and incorporate adoption of a LOS for stormwater in its Stormwater Utility or in its CFP process.

Petitioners' criticism of Section 3 of the Ordinance is well taken: generally, functional plans should be revised when necessary to make them consistent with the Comprehensive Plan,⁷ not vice versa, but that is a case-by-case determination. However, Petitioners do not allege that this reversed process has actually happened with respect to the Stormwater Plan, and there is no basis for a finding of noncompliance.

Petitioners argue that the Stormwater Plan is deficient because it lacks a long-term funding plan, relying merely on developer contributions and state grants in the short term. DOE, having reviewed and approved Sultan's Stormwater Plan in 2002-2003, recommended that the City create a Stormwater Utility to ensure a stable source of funding for surface water management. Ordinance 913-06, at 2. The City's consultants made the same recommendation. Stormwater Plan, at 4-11 to 4-12. The Stormwater Utility has not yet been established. The Board notes the City's progress toward creating the Utility and is not persuaded that the City's action in adopting the Stormwater Plan before creation of the Utility was clearly erroneous.

⁶ Searching the Stormwater Plan for any indication of "existing level of service," the Board finds reference to a previous County requirement that basins less than 50 acres be designed for a ten-year storm and larger basins be designed for a 25-year storm. Stormwater Plan at 3-1.

⁷ This is what the Board required in *Fallgatter V*, where non-compliant water and sewer plans were remanded to be revised to reflect the population targets in the comprehensive plan. *Fallgatter V v. City of Sultan*, CPSGMHB Case No. 06-3-0003, Final Decision and Order (July 29, 2006).

The Board finds as follows:

- The Stormwater Plan meets the GMA land use element requirement of “review[ing] drainage, flooding and storm water run-off in the area” and “provid[ing] guidance for corrective actions to mitigate or cleanse those discharges.” RCW 36.70A.070(1).
- The Stormwater Plan, as incorporated by reference in the Capital Facilities Element of the Comprehensive Plan, is at least minimally consistent, subject to the 2008 CFP update later this year.
- The City’s reliance on its anticipated creation of a Stormwater Utility, together with developer exactions and state grants, for funding the Stormwater Plan, is not clearly erroneous.

Conclusion

The Board finds and concludes that Petitioners have **failed to carry their burden of proof** in demonstrating that City of Sultan Ordinance 913-06 does not comply with the Growth Management Act. The Board is not persuaded that the City’s action in adopting the Ordinance was clearly erroneous. Legal Issues 3 and 4 are **dismissed**.

V. ORDER

Based upon review of the Petition for Review, the briefs and exhibits submitted by the parties, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

- The City of Sultan’s action in adopting Ordinance 924-06 renders moot the Petitioners’ challenge to Ordinance 904-06. Petitioners’ challenge to Ordinance 904-06 is **dismissed as moot**.
- Petitioners have **failed to carry their burden of proof** in demonstrating that City of Sultan Ordinance 913-06 does not comply with the Growth Management Act. The Board was not persuaded that the City’s actions in adopting Ordinance 913-06 were clearly erroneous. Petitioners’ challenge to Ordinance 913-06 is **dismissed**.
- The petition for review is **dismissed**.

So ORDERED this 9th day of July, 2007.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

David O. Earling
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 242-02-832.⁸

⁸ 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)

APPENDIX A

Chronology of Procedures in CPSGMHB Case No. 06-3-0017

On March 27, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Jocelyne 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 March 29, 2006, the Board received a Notice of Appearance from Thom H. Graafstra of Weed, Graafstra and Benson, Inc., P.S. on behalf of Respondent City of Sultan.

On March 29, 2006, the Board issued a "Notice of Hearing" (**NOH**) in the above-captioned case. The NOH set a date for a prehearing conference (**PHC**) and established a tentative schedule for the case.

On May 1, 2006, the Board conducted the PHC at the Board's offices in Seattle.⁹ Presiding Officer Margaret Pageler conducted the conference. Board member Bruce Laing and law clerk Julie Taylor were also present. Petitioners Jocelyne Fallgatter and Jeff Kirkman were present *pro se*. Thom Graafstra represented the Respondent. Rick Cesar, City of Sultan Director of Community Development, also attended the PHC.

The Board discussed with the parties the possibility of settling or mediating their dispute to eliminate or narrow the issues. The Board encourages such efforts and, if the parties are pursuing settlement, with or without Board assistance, they may so stipulate in the request for a settlement extension. The Board is empowered to grant settlement extensions for up to ninety days.

The Board then reviewed its procedures for the hearing, including the composition of the Index to the Record below; filing of core documents, exhibit lists, and supplemental exhibits; possible dispositive motions; the Legal Issues to be decided; and a Final Schedule.

On May 1, 2006, the Board issued its Prehearing Order.

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 9, 2007, the Board received the City of Sultan's 2004 Comprehensive Plan.

⁹ The Board's offices were then located at 900 Fourth Avenue, Suite 2470, Seattle, WA 98164-1012

Motions

On May 17, 2006, the Board received Petitioner's "Motion to Supplement the Index of the Record and to Take Official Notice." Petitioners asked 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)."

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)."

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

On June 29, 2006, the Board issued its Order on Motions and Order Amending Schedule. The Board granted the City's motion to dismiss the challenge to Task Order 2006-1 and denied the motion to dismiss the challenge to Ordinance 904-06. The Board noted in its Order that the City was considering action that might make the challenge to Ordinance 904-06 moot. In a concurring opinion, Presiding Officer Margaret Pageler suggested that the parties might use the extended compliance period simultaneously established in *Fallgatter V v. City of Sultan*, CPSGMHB Case No. 06-3-0003, to address the matters raised in the *Fallgatter VI* PFR.

Settlement Extensions

On July 6, 2006, the Board received a letter from the City of Sultan requesting, on behalf of all parties, a 30-day settlement extension.

On July 10, 2006, the Board issued its Order Granting Settlement Extension and Amending Case Schedule.

On August 4, 2006, the Board received a letter from both parties requesting a 90-day extension for continued settlement negotiations.

On August 7, 2006, the Board issued its Order Granting Second Settlement Extension and Amending Case Schedule.

On October 27, 2006, the Board received a letter from both parties requesting an additional 90-day settlement extension.

On October 27, 2006, the Board issued its Order Granting Third Settlement Extension and Amending Case Schedule.

On January 26, 2007, the Board received a Stipulated Request for 4th Settlement Extension.

On January 30, 2007, the Board issued its Order Granting Fourth Settlement Extension and Amending Case Schedule.

Briefing and Hearing on the Merits

On April 30, 2007, the Board received a letter from Petitioner Jocelyne Fallgatter stating that further settlement extensions would not be requested and that the matter would proceed to hearing on the merits.

On May 10, 2007, the Board received Petitioners' Prehearing Brief [**Fallgatter PHB**].

On May 24, 2007, the Board received Respondent City of Sultan's Prehearing Brief [**Sultan Response**] and the City of Sultan Surface Water Management Plan [**Stormwater Plan**] as a Core Document.

On May 31, 2007, the Board received Petitioner's Reply to Respondent City of Sultan's Prehearing Brief [**Fallgatter Reply**].

The Hearing on the Merits was convened on June 7, 2007, at 2:00 p.m. in the Board's offices.¹⁰ Present for the Board were Margaret Pageler, Presiding Officer, Board members Ed McGuire and Dave Earling, law clerk Julie Taylor, and extern Linda Jenkins. Thom Graafstra represented the City of Sultan, with City Administrator Deborah Knight also in attendance. Petitioners Jocelyne Fallgatter and Jeff Kirkman appeared *pro se*. The hearing was adjourned at 3:00 p.m. Court reporting services were provided by Barbara Hayden of Byers and Anderson. The Board did not order a transcript of the proceedings.

¹⁰ The Board's offices are at 800 Fifth Avenue, Suite 2356, Seattle 98104. The HOM was held in the Sealth Training Room, Suite 2010.