

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

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|-----------------------------|---|---------------------------------|
| PIRIE SECOND FAMILY LIMITED |) | Case No. 06-3-0029 |
| PARTNERSHIP, LP, |) | |
| |) | |
| Petitioner, |) | (Pirie) |
| |) | |
| v. |) | |
| |) | |
| CITY OF LYNNWOOD, |) | FINAL DECISION and ORDER |
| |) | |
| Respondent. |) | |
| |) | |

SYNOPSIS

In March of 2005, the City of Lynnwood adopted a City Center Sub-Area Plan to address the opportunities and constraints the City faced in encouraging redevelopment in its City Center. At the same time, the City adopted zoning to implement the City Center Plan [Ordinance No. 2555]. The effective date of the zoning designations was extended several times and ultimately repealed in February of 2006. The City embarked upon a new process to determine the zoning for the City Center Plan area, that culminated in the City's adoption of new zoning designations and development code provisions in mid-July of 2006. Adopted at that time were Ordinance Nos. 2625, 2626, 2627, 2628, 2629, 2630 and Resolution Nos. 2006-09 and 2006-10.

At the time of the Hearing on the Merits, only four ordinances remained before the Board, the others having been dismissed on motions. After review of the briefing, and hearing argument at the HOM, the Board has determined that Petitioner has abandoned the challenge to two additional ordinances for lack of briefing and argument. In essence, most of Petitioner's argument before the Board focused on just one of the remaining Ordinances – Ordinance No. 2625.¹ This Ordinance identified and located a new street grid, a town square and parks/plaza areas for the City Center Plan area. Petitioner's apparent motivation for filing this PFR was based upon the inclusion of his property in the Town Square area.

*While Petitioner alleged 12 different issues, one was **abandoned**, and six issues were **dismissed with prejudice** since the challenges were either without merit, the Board*

¹ This Ordinance incorporated by reference the City's Street Grid Ordinance – No. 2627 – so that Ordinance also remained challenged.

*lacked jurisdiction, or the cited GMA provisions were not applicable to the challenged Ordinance. Of the five remaining issues, three involved the City of Lynnwood's notice and public participation procedures used in adopting the challenged Ordinance. The Board found and concluded that the City's notice and public participation procedures **complied** with the provisions of RCW 36.70A.020(11), .035, .130(1) and (2) and .140.*

*The remaining two issues challenged whether the new development regulations identifying and locating the new street grid, town square and park/plaza areas were consistent with and implemented the City Center Plan. The Board found and concluded that they did, and found that Ordinance No. 2625 **complied** with RCW 36.70A.040 and .130(d).*

I. BACKGROUND²

In September 2006, Pirie Second Family Limited Partnership (**Petitioner** or **Pirie**) filed a Petition for Review (**PFR**) challenging six ordinances and two resolutions adopted by the City of Lynnwood. The challenged actions were various implementation measures intended to carry out the City's City Center Sub-Area Plan. Prior to the prehearing conference, the parties requested and received a 30-day settlement extension to allow time for them to resolve their dispute. Settlement negotiations failed, and the case proceeded.

In October 2006, Petitioner filed an amended petition for review and prior to issuance of the prehearing order, Petitioner filed a restatement of issues to be resolved by the Board. The Board conducted the prehearing conference in November and issued the Prehearing Order shortly after the conference.

During the Board's motions practice, in late November and December 2006, the City amended its Index of the Record twice, and the Board granted Petitioner's Motion to Supplement the record with several items. Concurrently, the City successfully moved to dismiss several of the ordinances and resolutions from Petitioner's challenge. Following the Board's Order on Dispositive Motions, only four Ordinances allegedly implementing the City Center Sub-Area Plan remained before the Board. The remaining Ordinances pertain to the City's 1) Zoning Map, 2) Street Grid, 3) Interim Mitigation Program, and 4) Underground Electric.

In January and February 2007, the Board received briefing and exhibits from the parties. In this Final Decision and Order (**FDO**) reference to the parties' briefing is as follows: **Pirie PHB, Lynnwood Response, and Pirie Reply.**

On February 15, 2007, the Board held a Hearing on the Merits (**HOM**) at the Board's offices in Suite 2356, 800 5th Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, David Earling and Margaret Pageler were present for the

² See Appendix A for a complete Procedural History in this matter.

Board. Petitioner Pirie was represented by Bill Williamson. Respondent City of Lynnwood was represented by Rod P. Kaseguma. Julie Taylor, Board Law Clerk, and Moani Russell, Board Extern, attended. Also in attendance were James Pirie, Kevin Garrett and Doug Purcell. Court reporting services were provided by Rebecca Mayse of Byers and Anderson. The hearing convened at approximately 10:00 a.m. and adjourned at approximately 11:45 p.m. A hearing transcript was ordered by the Board. [**HOM Transcript**]

II. PRESUMPTION OF VALIDITY, BURDEN OF PROOF and STANDARD OF REVIEW

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 Lewis County v. Western Washington Growth Management Hearings Board*, 139 P.3d 1096 (2006) ("The Growth Management Hearings Board is charged with adjudicating GMA compliance and invalidating noncompliant plans and development regulations").

Petitioner challenges the City of Lynnwood's adoption of four Ordinances [Nos. 2625, 2627, 2628 and 2630] implementing its City Center Sub-Area Plan. Pursuant to RCW 36.70A.320(1), these Ordinances are presumed valid upon adoption.

The burden is on Petitioner Pirie to demonstrate that the actions taken by the city of Lynnwood are not in compliance with the goals and requirements of the GMA. 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 of Lynnwood] 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 Lynnwood'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 Lynnwood in how it plans for growth, provided that its planning actions or policy choices are consistent with, and comply with, the goals and requirements of the GMA. The State Supreme Court's most recent delineation of this required deference states: "We hold that deference to county [and city] 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.” *Quadrant Corporation, et al., v. State of Washington Growth Management Hearings Board*, 154 Wn.2d 224, 248, 110 P.3d 1132 (2005).

The *Quadrant* decision is in accord with prior rulings that “Local discretion is bounded . . . by the goals and requirements of the GMA.” *King County v. Central Puget Sound Growth Management Hearing Board (King County)*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). As the Court of Appeals explained, “Consistent with *King County*, and notwithstanding the ‘deference’ language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not ‘consistent’ with the requirements and goals of the GMA.” *Cooper Point Association v. Thurston County*, 108 Wn. App. 429, 444, 31 P.3d 28 (2001); *affirmed Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn.2d 1, 15, 57 P.3rd 1156 (2002); *Quadrant*, 154 Wn.2d 224, 240 (2005). And *see*, most recently, *Lewis County*, 139 P.3d at fn. 16: “[T]he GMA says that Board deference to county decisions extends only as far as such decisions comply with GMA goals and requirements. In other words, there are bounds.”

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. BOARD JURISDICTION, PREFATORY NOTE and PRELIMINARY MATTERS

A. BOARD JURISDICTION

The Board finds that Petitioner Pirie’s PFR was timely filed, pursuant to RCW 36.70A.290(2); except as otherwise addressed in this FDO, Petitioner Pirie has standing to appear before the Board, pursuant to RCW 36.70A.280(2); and except as otherwise addressed in this FDO, the Board has subject matter jurisdiction over the challenged ordinances, which allegedly implement the City of Lynnwood’s City Center Sub-Area Plan, pursuant to RCW 36.70A.280(1)(a).

B. PRELIMINARY MATTERS

Oral Rulings at the HOM

Motion to Strike:

The Board’s 12/22/06 Order on Dispositive Motions placed a page limit for briefing on both the parties to this matter. The Petitioner and Respondent both stayed within the page limitation when filing their respective prehearing briefs. However, Petitioner’s Reply brief exceeded the 20-page limit by 23 pages. Subsequently, the City of Lynnwood moved to strike Petitioner’s Reply. In response, Petitioner filed a “Redacted Reply” brief, purportedly reducing the pages to 20 pages. At the HOM, the Presiding

Officer **denied** the City's Motion to Strike and admitted the Redacted Reply as an appropriate filing. This Order affirms the decision to deny the City's motion.

Motion to Take Official Notice:

The City of Lynnwood asked the Board to take official notice of a portion of the Lynnwood Municipal Code (LMC), specifically LMC 21.25 pertaining to project design review. The PO orally **granted** the motion and the Board **takes official notice** of LMC 21.25 – as Ex. 149.

Motion to Dismiss and Abandoned Issues:

In the City's response brief, Lynnwood challenged Pirie's GMA participation standing in relation to Ordinance Nos. 2627 (street grid), 2628 (interim mitigation program) and 2630 (underground wires). The City contends that Petitioner clearly participated during the City's consideration of Ordinance No. 2625, but did not participate in relation to the "other ordinances." Lynnwood Response, at 1-2. In the alternative, the City argues that Pirie has abandoned his challenge to the "other ordinances" in briefing, since they are not mentioned, or are only obliquely referenced in Petitioner's briefing on Legal Issues 2, 4, 5, 6 and 10; with respect to Legal Issues 1, 3, 7, 8, 9 and 11, Petitioner fails to discuss substantively in argument how these other Ordinances fail to comply with the GMA. Therefore the City argues Petitioner has abandoned the challenge to these 'other ordinances.' *Id.*

Petitioner counters that the City's motion to dismiss for lack of GMA standing is untimely and that the "flyers" used by the City to provide notice were inadequate and that a public hearing is not an acceptable way to inform Petitioner of the City's plans for his property. Pirie Reply, at 1-3. Pirie also contends that the challenged ordinances are a "linked sequence of implementing ordinances adopted as a package" and that the opening brief repeatedly referred to this linkage in argument. *Id.*

In oral argument at the HOM, the parties offered the same positions and arguments. HOM Transcript, at 6.

The Board turns first to the question of abandonment.

Abandoned Issues

The Board's Rules of Practice and Procedure provide:

A petitioner . . . shall submit a brief on each legal issue it expects a board to determine. *Failure by such a party to brief an issue shall constitute abandonment of the unbriefed issue.* Briefs shall enumerate and set forth the legal issue(s) as specified in the prehearing order if one has been entered.

WAC 242-02-570(1), (emphasis supplied).

Additionally, the Board’s November 20, 2006 PHO in this matter states: “**Legal issues, or portions of legal issues, not briefed in the Prehearing Brief will be deemed to have been abandoned and cannot be resurrected in Reply Briefs or in oral argument at the Hearing on the Merits.**” PHO, at 8 (emphasis in original). *See City of Bremerton, et al., v. Kitsap County*, CPSGMHB Consolidated Case No. 04-3-0009c, Final Decision and Order (Aug. 9, 2004), at 5; *and Tulalip Tribes of Washington v. Snohomish County*, CPSGMHB Case No. 96-3-0029, Final Decision and Order (Jan. 8, 1997), at 7.

Also, the Board has stated, “Inadequately briefed issues would be considered in a manner similar to consideration of unbriefed issues and, therefore, should be deemed abandoned.” *Sky Valley, et al., v. Snohomish County*, CPSGMHB Case No. 95-3-0068c, Order on Motions to Reconsider and Correct (Apr. 15, 1996), at 3.

First, Petitioner withdrew his challenge as posed in Legal Issue 12. Pirie PHB, at 43. Therefore Legal Issue 12, in its entirety, is **abandoned**.

Second, it is undisputed that Petitioner has standing and did not abandon the challenge to Ordinance No. 2625. The Board notes that Section 3.D.1.a explicitly incorporates by reference Ordinance No. 2627, pertaining to the City’s “street grid.” The Board further notes that the provisions of Ordinance No. 2625, especially Section 3.D.1, are referenced in each remaining Legal Issue except 2 and 4. The Board concludes that since Ordinance No. 2627 is an integral part of Ordinance No. 2625, the primary Ordinance challenged, Petitioner has not abandoned his challenge to this Ordinance – No. 2627 pertaining to the street grid.

Finally, the Board finds no explanation in Petitioner’s opening brief as to what Ordinance Nos. 2628 or 2630 do or how specific provisions of those Ordinances fail to comply with the cited provisions of the GMA. Mere reference to these Ordinances in the statement of Legal Issues, without further explanation or argument, constitutes an inadequately briefed or unbriefed issue amounting to abandonment. Therefore, Petitioner’s challenge to Ordinance Nos. 2628 and 2630 is deemed **abandoned** and these Ordinances will not be further discussed in this Order.

GMA Participation Standing

As noted *supra*, it is undisputed that Petitioner has GMA participation standing to challenge Ordinance No. 2625, and that Ordinance 2625 explicitly incorporates by reference Ordinance No. 2627. Therefore, **Petitioner has GMA participation standing to challenge both these enactments.**

Having determined that Petitioner has **abandoned** his challenge to Ordinance Nos. 2628 and Ordinance No. 2630, the Board need not, and will not address, whether Petitioner had GMA standing to pursue a challenge to these implementing development regulations.

Conclusion

The City's motion to strike Petitioner's Reply brief is **denied** and the Board accepts the redacted version. The Board takes **official notice** of LMC 21.25. Petitioner's challenge to Ordinance Nos. 2628 and 2630 is **abandoned**. Petitioner's GMA standing to challenge Ordinance No. 2625 is undisputed. Therefore, **Ordinance Nos. 2625, including its incorporation of Ordinance No. 2627, remains before the Board.**

C. PREFATORY NOTE

Context

On March 14, 2005, the City of Lynnwood adopted its "City Center Sub-Area Plan," via Ordinance No. 2553. At the same time, the City also adopted: 1) Ordinance No. 2554, establishing general development regulations and design guidelines for the City Center Plan area, and 2) Ordinance No. 2555, amending the City's Zoning Map to reclassify the land in the City Center to correspond to the City Center Plan designations – City Center Core, City Center West, and City Center North. The effective date of Ordinance No. 2555 (Zoning Map designations) was delayed until July 14, 2005. This effective date was twice extended to March 6, 2006. On February 13, 2006, the City repealed Ordinance No. 2555. Lynnwood Response, at 18-19.

The City then embarked on additional review of the zoning for the City Center area. Between April and July of 2006, the City considered five different alternatives for the zoning for the City Center:

1. Rezone the City Center into three districts – City Center Core, City Center West and City Center North (in essence, prior Ordinance No. 2555);
2. The same as 1, but exclude the park and plaza sites from the rezone; these sites would retain existing zoning designations;
3. The same as 1, but designate the park and plaza sites as "Public Semi-Public" (PI);
4. The same as 1, but amend the development regulations to protect the park and plaza sites from development;
5. The same as 2, but upon completion of a Park Master Plan, rezone the park and plaza sites.

Id. at 19-25. Ultimately, the City adopted alternative 4 as Ordinance No. 2625, the primary focus of the present challenge.

The Challenged Action

In essence, one Ordinance remains squarely before the Board; namely, Ordinance No. 2625, amending the City of Lynnwood's zoning map and zoning development regulations. *See* Ex. 85. Ordinance No. 2625 is entitled:

AN ORDINANCE AMENDING CHAPTER 21.04 OF THE LYNNWOOD MUNICIPAL CODE AND **AMENDING THE OFFICIAL ZONING MAP OF THE CITY OF LYNNWOOD AND ESTABLISHING USE DISTRICTS FOR THE CITY CENTER**; AND AMENDING SECTION 21.60.600 REGARDING **PROTECTION OF PLANNED SITES OF PUBLIC PARKS/PLAZAS IN THE CITY CENTER**; PROVIDING AN EFFECTIVE DATE; AND PROVIDING FOR SUMMARY PUBLICATION.

Ex. 85, (emphasis supplied).

Sections 1 and 2 of this Ordinance amend the Lynnwood Zoning Map for its identified and designated City Center. The City Center is divided into three discrete zoning districts and one study area with no change in zoning. The three primary zones for the City Center (CC) are CC Core, CC North End and CC West End. Petitioner's concern is with a portion of the area within the CC Core.

The Zoning Map also identifies Existing Rights-of-Way (**ROW**) and New Streets. The area of particular concern to Petitioner is bounded on the north by existing ROW [198th Street SW] and by New Streets on the east [new 42nd Avenue W], west [new 43rd Avenue W], and south [new 199th Street SW]. Section 3.D.1.a of this Ordinance identifies the "planned location and design of streets, as shown in the Street Protection Ordinance (Ordinance No. 2627)." The Street Grid Ordinance provides a concise location³ of these proposed new streets.

Just as Ordinance No. 2627 provides a more concise location of new streets, Section 3.D.1.b provides a similar description for the planned location of public parks and plazas. Section 3.D.1 is the focus of Petitioner's challenge. Consequently, the Board sets forth this section, amending Lynnwood Municipal Code 21.60.600 (Design Review), in relevant part, as follows:

D. Compliance with Subarea Plan and Related Documents. For determining compliance with the comprehensive plan (that includes the

³ Rather than a legal metes and bounds survey of new street location, a more generalized location is set forth. For example, *New* "43rd Avenue W would run in a straight line generally aligned parallel to existing 44th Avenue W, from existing Alderwood Mall Boulevard to existing 194th Place SW. The centerline would cross existing 194th Street WW 260 feet east of the centerline of existing 44th Avenue W." *See* Ex. 84, Ordinance No. 2627, Section 1, at 2.

City Center Subarea Plan), as required by LMC 21.25.145.B.2, an application for approval of structures and facilities under this section shall:

1. Demonstrate consistency and compatibility with the following locations and design of public streets and plazas:

- a. Planned location and design of streets, as shown in the Street Protection Ordinance (*Ordinance No. 2627*);
- b. Planned location of public parks/plazas, as follows:

Town Square (Core District)

The rectangular parcel formed by the existing right-of-way of 198th St. SW and the future rights-of-way of 42nd Ave. W, 199th St. SW, and 43rd Ave. W, as those streets are described in *Ordinance No. 2627*, also known as the Street Protection Ordinance.

West End Square

...

North End Park/Plaza

...

West End – North Park Plaza

...

Where any locations and designs in paragraph (a) and (b), above, conflict with the City Center Subarea Plan, such locations and designs shall supercede the conflicting provisions of the City Center Subarea Plan.

Ex. 85, Ordinance No. 2625, Section 3, at 2-3; (emphasis supplied).

Hereafter, when the Board refers to Ordinance No. 2625, such reference includes Ordinance No. 2627 since it is explicitly incorporated by reference into the primary Ordinance challenged – Ordinance No. 2625.

Order of Board Discussion of Legal Issues:

Petitioner has explicitly abandoned Legal Issue 12. Pirie PHB, at 43. Consequently, 11 Legal Issues remain pertaining to Ordinance No. 2625, and by inference 2627, for the Board to decide. The Board first addresses the Notice and Public Participation issues – Legal Issues 3, 4 and 5. The Board then addresses the Consistency/Implementation issues – Legal Issues 1 and 2. Legal Issues 6, 7, 8, 9, 10 and 11 are then discussed in order.

IV. LEGAL ISSUES AND DISCUSSION

A. LEGAL ISSUES NO. 3, 4 and 5 [Notice and Public Participation]

Within Legal Issues 3, 4, and 5, the Petitioner sets forth allegations that the City failed to comply with the GMA's mandate in regard to ensuring public participation in the planning process, specifically RCW 36.70A.140, .020(11), .035, 130(1) and (2) and the City's own procedures for amending its Comprehensive Plan, LMC 18.04.

The Board's PHO set forth Legal Issue No. 3, 4, and 5 as follows:

3. *Do the development regulations at Section 3, D.1 of Ordinance 2625 requiring consistency with the "design of public streets and parks/plazas" in Exhibit A, including implementing Ordinances and Resolutions at Exhibits B through H, provide sufficient notice, broad dissemination of proposals and alternatives, and satisfy public participation, open meeting, and required hearings meet the requirements of RCW 36.70A.130(1) and (2), and RCW 36.70A.140, including compliance with capital facility budgeting requirements and transportation improvement plan concurrency to fund park site acquisitions under 36.70A.070 and RCW 36.70.120?*
4. *Did the City comply with GMA public notice, review, comment, and participation requirements of RCW 36.70A.020(11) and RCW 36.70A.035, implemented in part by LMC 18.04.010 - .060, which first require a recommendation of the City's Planning Commission, before the City Council may consider amendments to City's comprehensive plan and development regulations?*
5. *Did the City comply with the its own provisions for amending comprehensive plans at LMC Chapter 18.04 (and LMC 18.04.040) in adopting Ordinance 2625 and Section 3 D.1, including the requirement that subarea plans may not be adopted for personal gain, or be project-related or site-specific in nature?*

Applicable Law

Goal 11 provides, "Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts." RCW 36.70A.020(11)

RCW 36.70A.035 sets forth the notice requirements for GMA public participation. It provides in relevant part:

The public participation requirements of this chapter shall include notice procedures that are reasonably calculated to provide notice to property

owners and other affected and interested individuals, tribes, government agencies, businesses, school districts, and organizations of proposed amendments to comprehensive plans and development regulations. Examples of reasonable notice provisions include:

- a. Posting the property for site-specific proposals;
- b. Publishing notice in a newspaper of general circulation in the county, city, or general area where the proposal is located or that will be affected by the proposal;
- c. Notifying the public or private groups with known interest in a certain proposal or in the type of proposal being considered;
- d. Placing notices in appropriate regional, neighborhood, ethnic or trade journals; and
- e. Publishing notice in agency newsletters or sending notice to agency mailing lists, including general lists or lists for specific proposals or subject areas.

RCW 36.70A.140, the GMA's public participation requirements, provides in relevant part:

[Each GMA planning jurisdiction, including Lynnwood] 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 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.

RCW 36.70A.130(2) continues the GMA's emphasis on public participation as applied to Plan Updates, annual reviews and amendments to comprehensive plans. These sections provide in relevant part:

[Each GMA planning jurisdiction, including Lynnwood] shall establish and broadly disseminate to the public a public participation program consistent with RCW 36.70A.035 and 36.70A.140 that identifies procedures and schedules whereby updates, proposed amendments or revisions of the comprehensive plan are considered by the governing body of the county or city no more frequently than once every year.

RCW 36.70A.130(2)(a). Note that this annual amendment cycle provision only applies to comprehensive plans, not development regulations.

RCW 36.70A.120 requires GMA planning jurisdictions to “perform its activities and make capital budget decisions in conformity with its comprehensive plan.” Note that this provision does not establish any notice or public participation requirements.

Discussion

Position of the Parties

Petitioner asserts that the City failed to provide “early and continuous public participation in the development and amendment of [its] comprehensive land use plan[s] and development regulations implementing such plan[s]” as required by RCW 36.70A.140. Pirie PHB at 13-14. Petitioner defines .140’s requirement of public participation as being “the broad dissemination of proposals and alternatives, the opportunity for written comments, and ‘effective notice’.” *Id.* at 14.

Petitioner argues that the City’s notices were inadequate because the notices did not include any description of affected parcels, failed to disclose the unequal discriminatory nature of the challenged ordinances, failed to present a variety of alternatives, and failed to indicate that the challenged ordinances represented proposed amendments to the City Center Plan. *Id.* citing to Exs. 3, 34, and 60; *Id.* at 15-16. Specifically, Petitioner argues that:

Ex. 3, Ex. 34, and Ex. 60 do not provide any ‘effective notice’ with a detailed statement which indicates that existing City Center Plan policies ... would be significantly altered or abandoned by restrictive development regulations prohibiting development in the Town Square and other designated park areas.

Id. at 14-15. Petitioner links the allegedly inadequate notices to the .140’s public participation requirement arguing that the inadequate notices resulted in an outcome that was without full and fair consideration amongst the City’s Planning Commission, the Petitioner, and other affected property owners. *Id.* at 16.

Petitioner further asserts that the Planning Commission failed to issue a recommendation on the challenged ordinances to the City Council, as required by LMC 18.04.040 and .060, but instead forwarded their action without a recommendation,. *Id.* at 18-19. According to the Petitioner, without this recommendation, the actions of the City Council in adopting the challenged ordinances were without jurisdiction or authority and, therefore, clearly erroneous. *Id.* at 20.

In response, the City notes that the Petitioner did not allege that the City failed to establish a public participation program that provides for early and continuous participation in the development and amendment of its development regulations as required by .140. Lynnwood Response, at 17. Rather what the Petitioner complains of is that the actual process used by the City when considering and adopting the challenged

ordinances failed to meet the general requirements for public participation under .140. *Id.*

The City then lays out the process that it utilized in adopting the challenged ordinances – starting on March 14, 2005 with the adoption of the City Center Sub-Area Plan and culminating on July 10, 2006, with the adoption of the challenged ordinances. *Id.* at 18-24. According to the City, throughout this process the public and the Petitioner had numerous reasonable opportunities to comment on the proposals and alternatives and that notice of key public hearings, including the June 22, 2006 Planning Commission hearing, was published and mailed to property owners, as was the July 5, 2006 City Council meeting. *Id.* at 24-25, 27.

The City further notes that the five alternatives presented at the June 22, 2006 Planning Commission’s public hearing and the July 5, 2006 City Council’s special meeting were not changed prior to the challenged ordinances adoption on July 20, 2006. *Id.* at 28-29.

In regard to the Petitioner’s assertion that the failure of the Planning Commission to forward a recommendation to the City Council results in invalid ordinances, the City argues that the ordinances were not subject to LMC 18.04 because the ordinances are development regulations, not comprehensive plan amendments and that the Planning Commission’s actions amount to a “neutral recommendation.” *Id.* at 30-31.

In reply, Petitioner, in addition to reiterating the arguments presented in his PHB, argues that the City failed to provide him with specific documentation outlining the effect of the proposed ordinances and that a public hearing was not an acceptable forum for learning of the City’s plans. Pirie Reply, at 2-3. The Petitioner asserts that the City failed to provide a publication including the text of all of the proposed ordinances and that his property, nor that of other affected property owners, was posted as required by 36.70A.035(1)(a)-(b). *Id.* at 3-4, 26-27. The Petitioner further asserts that the language utilized by the City in its notices was not “adequate, accurate, or informative to allow any meaningful study or participation.” *Id.* at 8, 27.

Board Discussion

The Board, from its earliest cases, has always stated the GMA requires an “enhanced public participation” process and that public participation is the “bedrock of GMA planning.” See *McNaughton v. Snohomish County (McNaughton)*, CPSGMHB Case No. 06-3-0027, Final Decision and Order, (Jan. 29, 2007), at 22; *Laurelhurst, et al v. Seattle*, CPSGMHB Case No. 03-3-0016, Final Decision and Order, (Mar. 3, 2004); *McVittie v. Snohomish County*, CPSGMHB Case No. 00-3-0016, Final Decision and Order, (Apr. 12, 2001); *Poulsbo, et al v. Kitsap County (Poulsbo)*, CPSGMHB 92-3-0009c, Final Decision and Order, (Apr. 6, 1993); *Twin Falls, et al v. Snohomish County (Twin Falls)*, CPSGPHB Case No. 93-3-0003c, Final Decision and Order, (Sep. 7, 1993).

As set forth *supra*, the GMA contains several provisions addressing citizen involvement in comprehensive land use planning – RCW 36.70A.020(11), .035, .140, and .130. With these sections of the GMA, the Legislature has specifically required jurisdictions to develop their comprehensive plans according to procedures that require an enormous degree of public participation. See *1000 Friends of Washington v. McFarland*, 159 Wn.2d 165 (En Banc 2006) (Holding King County’s critical areas ordinance was not subject to referenda due in part to the extensive provisions for public participation found in the GMA).

Notice Exhibits:

The Petitioner specifically points to Exhibits 3, 14, 34, and 61⁴ in support of his claim that the City did not comply with the GMA’s public participation requirements.

Exhibit 3 is the public notice for an April 27, 2006 hearing before the City’s Planning Commission.⁵ The Notice states that the Planning Commission will be:

[C]onsidering a change in zoning under the provisions of the Lynnwood Municipal Code, Chapters 21.22 AND 21.40, for property generally located in the Lynwood City Center (300 +/- acre triangular-shaped area on the north side of I-5 between the Lynwood Transit Center and Alderwood Mall, in the City of Lynwood and generally bounded by the I-5 freeway, 48th Ave W., 194th St. SW, 36th Ave. W, 188th St SW and 33rd Ave. W), as depicted on the map below.

The proposed rezone would change the designations of properties in this area from the existing zoning to the three City Center zoning designations (CC West End, CC Core, and CC North End), with the following exceptions:

- Properties north of the future extension of 194th St. SW would be designated for further study of development standards and existing zoning would remain in effect; and
- Areas planned for public park/plazas would retain existing zoning designations.”

This notice was posted at various locations in the City, including the City Hall, the Administration Building, and the public library, and published in the *Everett Herald* on April 7, 2006. Ex. 3, Affidavit of Posting and Affidavit of Publication.

⁴ Pirie’s PHB points to Exhibit 60, a copy of the Agenda item for the City Council, yet makes reference to published notices; the Board believes that this is a typographical error and the correct Exhibit is 61.

⁵ Also included within this exhibit are the Affidavit of Posting and the Affidavit of Publication.

Exhibit 14 is the public notice for a May 11, 2006 public hearing before the Planning Commission and a May 22, 2006 public hearing before the City Council. The Notice states that subsequent to the mailing of previous notices pertaining to zoning alternatives in regard to future parks/plaza sites, a third alternative had been identified. The Notice states:

[A] third zoning alternative has been identified and may be formally considered. Under this alternative, the future parks/plaza sites would be designated with the Public Semi-Public zone, as are all the existing parks sites in the City . . .

This exhibit was published on May 5, 2006 in the *Everett Herald* and Petitioner is specifically listed among those parties receiving a copy of this notice. Ex. 14, Distribution List; Exhibit 58, Affidavit of Publication.

Exhibit 34 is the public notice for a June 22, 2006 public hearing before the Planning Commission. The Notice states that the City Council and Planning Commission had previously identified three alternatives for zoning of future public parks/plazas in the City Center and that since those notices were issued, two new zoning alternatives had been identified and may be considered. The two new alternatives to be considered were:

Protect Public Park/Plaza Sites Through Development Regulation:

Apply City Center zoning districts throughout the City Center area ...
AND, Amend the City Center Development Regulations in the Zoning Code to protect the public park/plaza sites from development ...

Partial Rezone:

Apply City Center zoning districts only to those blocks ... that do not contain a public park/plaza site; allow existing zoning to remain in effect in blocks with public park/plaza site until the Parks Master Plan is completed ... AND, Amend existing zoning regulations for these blocks ... to protect the public park/plaza sites from development (existing development would not be affected)."

This exhibit was published on June 2, 2006 in the *Everett Herald*. Ex. 61, Affidavit of Publication.

The basis of the Petitioner's complaint with these exhibits is that these "flyer-style" notices did not provide "'effective notice' with a detailed statement" indicating that existing City Center Plan policies would be significantly altered or abandoned by restrictive development regulations nor did these notices provide "any description of the parcels affected" by the City's proposed action. Pirie PHB, at 14-15.

Did the City's notices reasonably apprise the Petitioner of the opportunity to comment on the pending action? – Yes.

In reviewing the adequacy of a notice, the Courts have long stated that it must be determined whether the notice was “reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.” *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (Emphasis provided).

Each of the Exhibits which the Petitioner points to, although not providing a parcel number by parcel number listing of potentially impacted properties, did provide a map with geographical reference points and shading to denote which properties were generally under consideration. In addition, Exhibit 3 specifically lays out the boundaries of the Lynnwood City Center (e.g. “on the north side of I-5 between the Lynnwood Transit Center and Alderwood Mall...”). These exhibits, building on each other, clearly state that the City was proposing to change the zoning designations of properties within the City Center area with subsequent notices showing that, over a period of time, a total of 5 alternatives were developed and that all of the alternatives pertained to the zoning of sites for future public parks/plazas.

The Petitioner's allegations that these “flyer-style” notices fails to apprise the public of the pending action, because the notices fail to set forth the full text of any proposed action, is unfounded. Not only do these notices represent the type of notices commonly utilized by jurisdiction throughout Washington State, but the notices clearly provided contact information if any party required further detailed information.

In addition, these exhibits were posted, published, and at least in one instance (Exhibit 14), mailed to potentially affected and/or interested parties including the Petitioner. These are all methods which are explicitly set forth in 36.70A.035 as ways to provide reasonable notice.⁶ Compliance with an example of reasonable notice is adequate to demonstrate compliance with the explicit notice provisions of the GMA. *Chevron USA, Inc. v. Central Puget Sound Growth Management Hearings Board*, 156 Wn.2d 131, 137 (En Banc, 2005).

Did the City's notices reasonably apprise the Petitioner of an opportunity to present their objections? - Yes.

Each of the Exhibits clearly states that public hearings were to be conducted before either the Planning Commission and/or the City Council with opportunity for interested parties to “be heard.” In addition, each of the notices states that “the public is invited to attend” and provides contact information if further questions or information is required.

⁶ Despite Petitioner's assertion in his Reply Brief, RCW 36.70A.035 does not require that the local government use all of the listed methods for notice. Rather what the statute provides is a listing of potential methods that a city or county may utilize to comply with the GMA's notice provisions.

The Board concludes that the cited exhibits satisfy the GMA’s requirements to provide notice reasonably calculated to apprise interested parties of proposed amendments to comprehensive plans and development regulations.

Did the City give consideration to the public input it received? – Yes.

The GMA requires not only that the City must allow for public participation but that it must consider the results of such participation. The GMA’s requirement that the City consider public input has previously been defined as meaning that the City must *think seriously* about the comments and take them into account during the decision-making process. *Twin Falls*, at 77. However, the Board has previously explained that while the GMA requires the consideration of public comments, this requirement does not equate to ‘citizens decide.’ Rather, the GMA requires that elected officials, not individual citizens, are the ones who ultimately decide on the direction and content of policy documents because the GMA assigns this policy-making authority to city and county elected officials. It is the elected officials who are accountable to their citizens at the ballot box. See *Twin Falls*, at 55; *West Seattle Defense Fund v. Seattle*, CPSGMHB No. 94-3-0016, Final Decision and Order (Apr. 4, 1995), at 51; *Poulsbo*, at 26; *Seattle-King County Assoc. of Realtors v. King County (SK Realtors)*, CPSGMHB Case No. 04-3-0028, Final Decision and Order, (May 31, 2005), at 9; and *Hood Canal Environmental Council, et al v. Kitsap County*, CPSGMHB 06-3-0012c, Final Decision and Order, (Aug. 28, 2006), at 14.

Under the GMA, the City has a duty to provide for the reasonable opportunity for public input but this duty does not mean that the City must adopt and implement the offered comments. As the Board has previously stated: “Citizen disappointment in the final choices made by the local government does not mean that the citizens have not had a chance to express their view” and “not having a decision ‘go your way’ does not equate to a failure of the GMA’s public participation process.” *Sky Valley, et al., v. Snohomish County*, CPSGMHB Case No. 95-3-0068c, Final Decision and Order, (Mar. 12, 1996), at 24; and *SK Realtors*, at 11.

In regard to the Petitioner’s assertion that the City did not give full and fair consideration to the comments of the Petitioner and others (Pirie PHB, at 16), the Record of this matter demonstrates that the City included and considered public input in various phases of the development of their City Center Plan and amendments thereto. This consideration included a broad range of committee and council meetings (Exhibit 1 - Lynnwood Parks & Recreation Board; Exhibits 5, 9, 25, 30, 42 - Lynnwood Planning Commission Minutes; Exhibits 11, 19, 53, 54, 55, 56 - Lynnwood City Council Minutes) in which alternatives were considered and interested parties, including the Petitioner, had the opportunity to voice their opinions to the City’s representatives and elected officials. Both the Petitioner and others testified before the Planning Commission (Exhibits 5, 9, 25, 30, and 42); the City Council (Exhibits 21, 53, 54, 55, and 56); and submitted written comments (Exhibits 6, 7, 13, 15, 22, 23, 35, 44, 45, 46, 47, 48, 49, 50, 51, and 52). The

Record clearly demonstrates that there was not an absence of public input in regard to the City's actions nor does it appear that the City failed to consider it in its deliberations.

The Board concludes that the City provided the opportunity for public comment and considered the comments in its early and continuous public process regarding the adoption of the proposed amendments to its development regulations.

Did the City adhere to its own procedures as adopted in the Lynnwood Municipal Code?
– Yes.

Petitioner argues that the Planning Commission's failure to forward a recommendation on the proposed alternatives, as provided in LMC 18.04, resulted with the City Council possessing "no authority or jurisdiction to proceed with the adoption of the ordinances." Pirie PHB, at 16. According to the Petitioner, the Planning Commission is the "guardian of the gates" and that its failure to issue a recommendation ". . . [Shortchanged] the public participation process." HOM Transcript, at 27-28. The sections which Petitioner points to are:

LMC 18.04.060 Plan amendment process.

(A) ...

(B) Planning Commission Recommendation. *The planning commission*, after studying each proposal on the proposed amendments list, and after holding a public hearing to accept public comments on each, *shall recommend to the city council* that each proposed amendment(s) be denied, approved, or approved with conditions or modifications. The planning commission's recommendation shall be based upon criteria set forth in the implementation element of the comprehensive plan.

(C) City Council Decision. *The city council shall review the recommendations of the planning commission* and any comments offered by other agencies, and shall hold a public hearing to accept any additional public comments prior to the final decisions. The council shall approve, deny, or approve with conditions or revisions to the proposed amendment(s). The council's decision shall be based on criteria set forth in implementation element of the comprehensive plan.

LMC 18.04.060; (emphasis supplied).

The Petitioner reads too much into LMC 18.04.060. While it is true that the GMA requires jurisdictions to establish a public participation program (36.70A.140) and that a jurisdiction's failure to comply with its own established program amounts to a violation of the GMA's public participation requirement (*See McNaughton*), strict compliance with every aspect of the program does not result in GMA violation. Specifically, Petitioner alleges that the Planning Commission's failure to issue a recommendation on the proposed alternatives somehow truncated or eliminated the public's opportunity to participate. The Board fails to agree with this premise.

At the June 22, 2006 meeting of the Planning Commission, the Chair of the Commission after hearing public comments, including those of the Petitioner, moved to refer the City Center zoning proposals to the City Council *without a recommendation*. Ex. 42, at 5-6. The motion passed unanimously. *Id.* at 6. In addition to this motion, a second motion was made to forward a recommendation to the City Council that it consider the interests of both the private and public sector as it works to find a compromise for the City Center project. *Id.* This motion also passed unanimously. It would appear from the Record that the basis for the Planning Commission's failure to formulate a specific recommendation was both due to the fact that 3 of the members were new to the commission and unfamiliar with the subject matter and prior testimony and that the Commission lacked a quorum. Ex. 55, at 2.

Nonetheless, on July 5, 2006, the City Council held a *special meeting* which included a public hearing on the City Center proposals. Ex. 55. Prior hearings had been held on May 8 and May 30, 2006. Exs 53 and 54. Public testimony was received at these hearings as well as numerous questions from Councilmembers in regard to the alternatives presented. Ex. 55, at 4-6. No resolution on the City Center zoning occurred at this hearing. Again on July 10, 2006, the City Council held its regular meeting which included discussions amongst Councilmembers in regard to the City Center project. Ex. 56. With the exception of Ordinance 2625, which passed with a vote of 4 to 3, all of the other challenged ordinances were adopted by unanimous vote. *Id.* at 7-9.

While LMC 18.04.060(B) provides that the Planning Commission issue a recommendation and .060(C) provides that the City Council review the recommendation, this section also provides that the City Council has the ability to exercise complete discretion by permitting it to approve, deny, or approve with conditions or revisions any proposals forwarded to it by the Planning Commission. *See* LMC 18.04.060(C). Although the Board does not dispute the important role a Planning Commission may play in assisting the City Council with land use planning decisions, the Planning Commission is an advisory body that issues recommendations which the City Council is not bound to adopt. From the record in this case, it does not appear to the Board that the decision of the Planning Commission not to issue a recommendation interfered with the public's ability to fully participate in this matter. The City Council, through its own hearings and discussions, was informed on the facts and circumstances surrounding the proposed amendments, and as the ultimate decision-makers, acted accordingly.

Conclusion – Legal Issues 3, 4, and 5

In regard to the Petitioner's assertion within Legal Issue No. 3, 4, and 5 that the City failed to comply with the GMA's notice and public participation requirements, the Board finds that the City **complied** with the GMA's notice and public participation requirements [RCW 36.70A.020(11), .035, .130(1) and (2), and .140] when it enacted the challenged ordinances.

B. LEGAL ISSUES NO. 1 AND 2
[Consistency and Implementation]

The Board's PHO set forth Legal Issues No. 1 and 2 as follows:

1. *Did City in adopting Ordinance 2625 at Exhibit A⁷, and through its implementing and funding ordinances and resolutions identified in Petitioner's Exhibits B through H⁸, follow comprehensive plan amendment procedures, and satisfy substantive internal consistency requirements of RCW 36.70A.040(4), RCW 36.70A.130(1)(d), WAC 365-195-500, and WAC 365-195-630 by its requirement at Section 3, D.1 that the Petitioner, and other owners of property within the "Town Square (Core District)," "demonstrate consistency and compatibility" with the "design of public streets and parks/plazas?"*
2. *Does Section 3, D. 1 of Ordinance 2625 development regulations conflict with, and discriminate against the Petitioner in its application, contrary to City Center Sub-Area Plan Policies, by impermissibly changing such Sub-Area Planning Policies, including but not limited to: Planning and Urban Design Principal 15 (Use Carrots More than Sticks), CCLU 4 and CCUD 12 Incentives for Public Amenities; CCUD (all development to contribute public places, plazas, and parks); CCPS 11, 12 and 14 (preparation of a study to examine designs, costs, and financing strategies for three major open spaces); and City Center Plan "Coordination and Collaboration" provisions beginning at Page 75 of the City Center Plan, and incorporation of City's capital improvement program with the acquisition of parcels to create major public spaces?*

Applicable Law

RCW 36.70A.040(4)(d) provides:

[GMA planning jurisdictions, including Lynnwood] shall adopt a comprehensive plan and development regulations that are consistent with and implement the comprehensive plan. . .

RCW 36.70A.130(1)(d) provides:

Any amendment of or revision to development regulations shall be consistent with and implement the comprehensive plan.

WAC 365-195-500 and -630, the Department of Community, Trade and Economic Development's "Procedural Guidelines" reiterate the internal consistency and implementation requirements of the GMA sections noted *supra*.

⁷ Respondent City Index, Exhibit 85.

⁸ Respondent City Index, Exhibits 78 (Ord. 2626); 80 (Ord. 2628); 81 (Res. 2006-09); 82 (Res. 2006-10); 83 (Ord. 2630); 84 (Ord. 2627); and 86 (Ord. 2629).

In one of its earlier cases, the Board defined “consistency” to mean that:

[Plan] provisions are compatible with each other – that they fit together properly. In other words, one provision may not thwart another. However, the Board also finds that consistency can also mean more than one policy not being a road block for another; it can also mean that policies of a comprehensive plan, for instance, must work together in a coordinated fashion to achieve a common goal.

West Seattle Defense Fund v. City of Seattle (WSDF I), CPSGMHB Case No 94-3-0016, Final Decision and Order, (Apr. 4, 1995), at 27. The Board continues to abide by this definition.

The crux of Petitioner’s argument in Legal Issues 1 and 2⁹ is that Section 3.D.1 of Ordinance No. 2625, set forth *supra*, is inconsistent with, and does not implement Lynnwood’s City Center Sub-Area Plan (hereafter, **City Center Plan**). Therefore, the Board has listed the referenced provisions of the Lynnwood City Center Sub-Area Plan in Appendix B.

Discussion

The simple question before the Board on these two Legal Issues is whether the provisions of the City’s design review process, as set forth in 3.D.1, are consistent with, and implement, the City Center Plan.

Although Petitioner’s brief makes numerous arguments unrelated to this question before the Board, Petitioner does assert that the provisions of Ordinance No. 2625 are inconsistent with, and do not implement, various provisions and Policies of Lynnwood’s City Center Plan. Petitioner lists provisions [Key Concepts #4 and #8] and Policies [CCUD 4, 12 and 13; CCPS 3, 11, 12 and 14; CCLU 2, 3, 4] that generally describe the approaches the City intends to employ to redevelop its City Center with a new street grid, a commercial core with parks, plazas and open spaces linked together.

The Policies of concern to Petitioner are those that speak to incentives, purchase and acquisition, and a parks’ study, rather than regulatory approaches to implement the Plan. See Pirie PHB, at 1-13; Pirie Reply, at 11-33 [redacted version]; and Appendix B. The City likewise refers to various City Center Plan provisions [Background and History, Key Concept #1, Character of the Core] and Policies [A Town Square Core, CCPS 2 and CCT 6] to demonstrate how the design review regulations are consistent with and implement the City Center Plan. Lynnwood Response, at 3-15.

⁹ The Board notes that Petitioner fails to list any Plan Policies or provisions in the statement of Legal Issue 1, but does reference them in briefing that issue. By contrast, in Legal Issue 2 numerous Plan Policies and provisions are listed, but only one is mentioned in briefing.

The Board has previously concluded, *supra*, that the notice and public participation procedures used by the City in adopting Ordinance No. 2625 were **compliant** with the GMA. However, it is important for Petitioner to understand that the challenged Ordinance is an *implementing development regulation*.¹⁰ Its adoption is not a *de facto* amendment to the City Center Plan; it merely is one of the means the City has chosen to implement its Plan. Nonetheless, implementing development regulations must be consistent with [it must work together to achieve a common goal and cannot thwart, or work against achieving a common goal], and implement, the City Center Plan.

As the Board has most recently stated, “Plans provide policy direction to land use decision-making by providing guidance and direction to development regulations, which must be consistent with and implement the Comprehensive Plan.” *City of Bremerton, et al., v. Kitsap County (Bremerton II)*, CPSGMHB Consolidated Case No. 04-3-0009c, Final Decision and Order, (Aug. 9, 2004), at 15. However, the guidance provided by Plans is not limited to providing direction to development regulations. Plans can also be implemented through direct public investment in public infrastructure, such as roads, sewer and water systems. Tax incentives or other incentive-based approaches can also be instrumental in implementing a Plan. Land use plans can be implemented through public acquisition or outright purchase of land, or partially through purchase of development rights. In short, each of these implementation approaches can contribute to carrying out the common goals set forth in a Plan. Often multiple approaches are set out in Plans to allow flexibility in achieving common goals.

In the present matter, it appears that Petitioner believes the GMA requires the City to immediately acquire land, conduct additional studies, or use an incentive based strategy, to accomplish its City Center Plan, instead of the “regulatory” approach the City adopted in identifying the “street grid” and “parks and plazas” and establishing a design review process to help preserve these identified lands.

Review of the noted City Center Plan provisions reveals that Key Concept #1, Descriptive Text on the Character of the Core, the “Sub-Area Street Class Map” Map, and CCT 6 *direct* the development of the Street Grid Ordinance No. 2627, referenced in Ordinance No. 2625, Section 3.D.1.a.

Key Concept #1 provides:

Key Concept 1. New, Secondary Streets

Better circulation is the most important element for the City Center. An additional secondary street network should be introduced throughout the area to supplement the existing street pattern. This will add more east-west and north-south connections and reduce the length of city blocks, make the City Center more walkable and pedestrian friendly, disperse the

¹⁰ See the Title of Ordinance No. 2625 set forth *supra*.

traffic from major arterials and provide more choices for circulating through the area.

The Descriptive Text on the Character of the Core states,

This area will be the location of the most intensive commercial development, along with the new convention center, housing and hotels. Retail shops, services and restaurants will be encouraged on the ground floors of new buildings. The convention center area is envisioned to expand over time, incorporating a variety of complimentary uses. In addition, within this area could be one or more major concentrations of retail centers offering home furnishings. These might be separate, consolidated into a “design center” complex, integrated into a larger mixed use development, or all three. Many buildings within the Core will be of sufficient height to create a skyline visible from the freeway. One or more buildings may have unique forms or heights that will reinforce the sense of a City Center. *The present “super-blocks” in this area will be altered by adding new streets to create smaller blocks.*

This area will contain unique public spaces that will help organize new development and be available to the general public and nearby employees and residents. The nature of these spaces will evolve but will include both a promenade and parks of various sizes, including a large town square with underground parking.

The promenade will be a pedestrian corridor that links the Core with the transit center, Alderwood Mall and surrounding districts, and will include features such as specimen trees, special paving, lighting, public art, graphics and special furnishings. *The town square could include a paved area for festivals and activities, lawn areas for relaxing and gathering, a band shell, concessions, restrooms and a water feature. The square will also be connected to the Interurban Trail.*

(Emphasis supplied). The Street Class Map generally locates “new collector” streets, and Transportation Policy CCT 6 provides:

CCT 6: Develop a Finer Street Grid System. *Develop a finer program and regulations to develop a finer street grid system within the City Center. The grid system should improve access within the City Center and continuously connect the arterials, where feasible.*

City Plan, at 15-16, 31, 42 and 54, respectively; (emphasis supplied).

Ordinance No. 2627 – the Street Grid Ordinance – does exactly what these City Center Plan provisions direct. It refines the locations and identifies the new streets in the Core Area. Rather than relying upon generalized small-scale maps to identify and locate the

new streets, Ordinance No. 2627 locates the centerlines of the new streets and gives dimensions on each side to more clearly refine where these streets are to be located. The Street Grid Ordinance is incorporated by reference into Ordinance No. 2625. **The Board concludes that Section 3.D.1.a of Ordinance No. 2625 is consistent with, and implements, these Policies of the City Center Plan.**

The City took the same approach in identifying and locating the Town Square, Parks and Plazas referenced in the City Center when it adopted Ordinance No. 2625, 3.D.1.b. *See supra.* Lynnwood notes that maps that appear on pages 28, 29, 35, 58 and 90 of the City Center Plan all indicate the general location of the Town Square, Parks and Plazas that the City anticipates developing in the City Center Core.

Additionally, review of the noted City Center Plan provisions and Policies also suggest the need for establishing the locations of these squares, parks and plazas so that development does not thwart the City's goal of revitalizing and redeveloping the Core. The following City Center Plan provisions and Policies provide the needed support and guidance for Section 3.D.1.b of Ordinance No. 2625:

Key Concepts #4 and #8:

Key Concept 4. Commercial Core with a Major Attraction

Although the entire Sub-Area would be developed as a City Center, one central area would be developed as the "Core." Office and commercial uses would be concentrated in this area. More street level uses including storefront retail would be incorporated to animate the pedestrian environment. A central attraction feature, such as a major cultural, public or recreational destination, would further enhance the activities of the Core.

Key Concept 8. Chain of Parks and Plazas

The City Center should contain a series of parks and public spaces that are visible and accessible to the public. They should eventually be connected together by a "promenade," that focuses and connects different activities, uses and parks throughout the City Center. While all major public facilities should provide parks or plazas accessible to the public, private development should also contribute public spaces.

See also The Descriptive Text on the Character of the Core, *supra*.

Plan Policies and provisions related to Urban Design (CCUD) and Public Spaces (CCPS) provide;

CCUD 4: Achieve a Variety of Public Spaces. The City should contain a range of public spaces, from larger to smaller, both green and hard-surfaced, and both publicly and privately provided.

CCUD 13: Variety of Public Space. *All new public or private development shall contribute to an array of public spaces including plazas, squares, courtyards and parks. These public spaces should include benches, lighting and other pedestrian amenities necessary for the public's safe use and enjoyment.*

(CCPS) A Town Square in the Core: *A fundamental aspect of this plan is that the City Center Core should be anchored by a large public space. It should be roughly in the center, but also adjacent to several existing or future streets so that it is perceived as not being connected to any specific development, but rather available to the residents, employees, and visitors as a truly public space. The size of this Town Square should be in the range of 3-5 acres.*

CCPS 2: Future City Center development will bring a number of recreational opportunities such as bookstores, coffee shops, wider sidewalks with an attractive walking environment, health clubs, theaters, and plazas or small parks that are provided by private property owners. While these amenities do not replace the need for traditional parks and open space, they can support reducing the amount of these facilities that are provided by the City.

If they used the current Level of Service standard in the City Center, the Preferred Alternative 2020 population would require 52.5 acres of new parks. *The Preferred Alternative shows four parks and one public plaza totaling approximately 9.5 acres.* In addition, the central promenade, which connects two of these public spaces, is in itself a significant public space totaling approximately 2.4 acres.

CCPS 3: *The four parks that are part of the Preferred Alternative, and the central promenade, are necessary to support development in the City Center. These parks and public spaces, or their special and functional equivalent, shall be provided as new development occurs in the City Center.*

Provision of 41 more acres of parks to meet the City's current Level of Service standard within the City Center would be difficult to achieve and very expensive. It is clear, however, that at least one additional and significant traditional park, outside, but adjacent to the City Center boundary, should be provided.

City Center Plan, at 16, 17, 31, 63, 64, 66 and 67; (emphasis supplied).

The Board concludes that just as the City refined the locations of its anticipated new street grid system for the City Center Core, it more clearly identified and refined the

locations of the City Center's parks and plazas in Ordinance No. 2625, 3.D.1.b. The Ordinance sets forth a general metes and bounds description of the areas for the Town Square, West End Square, North End Park/Plaza and the West End- North Park/Plaza. *See supra.* **The Board concludes that Section 3.D.1.b of Ordinance No. 2625 is consistent with, and implements, these provisions and Policies of the City Center Plan.**

While in briefing Petitioner references some of the same City Center Plan provisions and Policies discussed *supra*, Petitioner also alleges that Section 3.D.1 of the Ordinance is inconsistent with, and does not implement other Policies. These include:

Urban Design Principle 15. *“Use More Carrots Than Sticks – Development regulations should make use of an ‘incentive’ approach, along with setting forth a baseline of standards.”*

CCLU 2: Concentration and Intensity. The City Center will be the focus of high concentrations of development, containing multi-story buildings, multiple residential development, parking structures, and a variety of civic buildings and spaces.

CCLU 3: Establish Maximum Floor Area Ratios to Direct Intensity. Maximum Floor Area Ratio (amount of floor space as a multiple of site area) could range as high as 8 in the Core and 3-5 outside the Core.

CCLU 4: Incentives for Public Amenities. *Regulations should be established that grant additional development intensity in return for including specified public amenities.*

CCUD 12: Incentives for Public Amenities. *The Land Use Code for the City Center should offer additional development intensity in return for providing accessible and well-maintained public amenities.*

CCPS 11: Secure Property for Public Spaces. *In order to prevent the development of land identified for public spaces, the City should secure options that would allow for eventual purchase of property for public spaces in the City Center. This would require a study of parcel size and configuration, ownership, property valuation, and availability. In some cases, there may be buildings on the property which will need to be phased out.*

CCPS 12: Analysis of Concepts, Feasibility and Financing. *The City should prepare a study examining the preliminary designs, costs and financing strategies for the three major public spaces indicated in this Sub-Area Plan. This work will be important to determine the form and timing of implementation. It can also provide the data and information*

necessary for grant applications. Such a study should examine the issues and implications of parking on-site versus elsewhere. The study should provide a conceptual level design for each major public space identifying the key components. Financing options should also be examined, including the notion of contributions from private development.

CCPS 14: Include City Center Public Spaces in the City's CIP. In order to implement the directions of the Sub-Area Plan, *the City's Capital Improvement Program [CIP] should incorporate line items for property acquisition, design, and development of the three identified public spaces.*

City Center Plan, at 12, 38, 64, 71 and 72, respectively (emphasis supplied).

Petitioner argues that Lynnwood has not prepared the public space study called for by CCPS 12, has not secured options [at least pertaining to Petitioner's property] as called for in CCPS 11, has not included funding for acquisition of his property in the City's CIP, and is relying upon a regulatory approach, rather than incentives or "carrots," to implement the City Center Plan. Pirie PHB, at 1-13.

As the Board noted *supra*, Plans may be implemented through various approaches including regulations, public investment, incentives and direct acquisition and purchase, to name a few. Most Plans the Board has seen incorporate most of these techniques as implementation measures. Lynnwood's City Center Plan is no different.

It appears that because of Petitioner's situation (owning a building(s) and business(es) on a parcel identified as the Town Square in the City Center Core), and the fact that, to date, the City has not acquired the property, Petitioner contends that the City is relying primarily upon regulations, specifically Ordinance No. 2625, 3.D.1, to implement the City Center Plan to the exclusion of other implementation measures. However, as the City argues,

The Ordinance [Ordinance No. 2625, Section 3.D.1] is very limited in scope in that it merely designates the location of streets and four parks/plazas in the City Center. Budget decisions and other financing activities that affect and implement the Plan and that provide for the design and construction of new streets and four parks/plazas, will be, and in some cases have already been, addressed in other City Ordinances.

Lynnwood Response, at 25-26. Additionally, at the HOM, the City stated,

Mr. Kaseguma: Mr. Williamson says, well, they didn't comply with all these other comprehensive plan policies.

And in our brief we pointed out those policies are either not relevant or they're policies that call for the City to do something else in furtherance of the development of the City's inner area at some future point in time or, in

some cases here, through previous ordinances that have already been adopted.

As the Board noticed by looking at the documents and exhibits, the city has already passed an ordinance that provides for incentives for developers to provide public spaces, retail spaces, and additional amenities in the City Center area.

HOM Transcript, at 34.

The Board agrees with the City. Petitioner is mistaken in contending that the challenged regulatory Ordinance, or a regulatory approach alone, is the primary means by which the City will implement its ambitious City Center Plans.¹¹ It is reasonable to expect there will be numerous regulatory changes, studies, incentive programs and acquisitions, funded by various means over substantial periods of time, to accomplish the City Center Plan goals. There is nothing in the Policies that Petitioner refers to that compels the City to act within Petitioner's desired timeframe. **The Board concludes that Ordinance 2625, Section 3.D.1(a) and (b), is consistent with, and implements the City Center Plan Policies.**

Finally, the Board addresses the "supercede" language of 3.D.1, which states,

Where any locations and designs in paragraph (a) and (b), above [the street locations in 3.D.1(a) and park/plaza locations in 3.D.1(b)], conflict with the City Center Subarea Plan, such locations and designs shall supercede the conflicting provisions of the City Center Subarea Plan.

Ex. 85, Ordinance No. 2625, Section 3, at 3. It appears that this language provided fodder for Petitioner's contention that Ordinance No. 2625 amended the City Center Plan, which it did not. The Board concurs with the City's interpretation of this language as being refinements and more concise locations of the streets and parks/plazas noted in the City Center Plan. It is apparent that the locations identified and located in Ordinance Nos. 2627 and 2615 are more concise than those depicted on the maps in the City Center Plan and offer better information to proceed with Plan implementation. Consequently, this language is not fatal to finding consistency or implementation of the generalized Plan.

The focus of Petitioner's concern was the identification and location of the Town Square in the Core, which coincides with Petitioner's property. The Board notes that the Town

¹¹ Petitioner must recognize that the City has a lot of work to do to achieve the goals it has set for itself in the City Center Plan. The Board notes that even Petitioner's PFR set forth 12 issues and challenged *six implementing ordinances and two resolutions*, some of which have been dismissed from this proceeding for various reasons. The Board notes that Petitioner acknowledges that the City's capital budget authorizes "seed" money for the study, and that the City's capital budget "acknowledges that the City Center Parks Master Plan, and financial plan, will be completed in 2007." Pirie PHB, at 17-18.

Square appears to be consistently identified on the City Center Plan Maps and in Ordinance No. 2625. Petitioner's challenge focused on whether the provisions of 3.D.1 were consistent with various City Center Plan Policies – not the map designations.¹²

Conclusion – Legal Issues 1 and 2

Regarding Legal Issues 1 and 2, the Board concludes that Ordinance No. 2625, Section 3.D.1(a) and (b), is **consistent with and implements** the City Center Plan Policies and provisions, and **complies** with RCW 36.70A.040(4) and .130(d).

C. LEGAL ISSUE NO. 6

The Board's PHO set forth Legal Issue No. 6 as follows:

6. *Assuming that the City can adopt development regulations at Section 3 D. 1 of Ordinance 2625, can the City treat the Petitioner's Property differently from similarly situated commercial properties in the City's City Center Sub-Area where the City has not first shown any change in circumstances, any development being proposed by the Petitioner, or differences between commercial parcels in the City Center warranting different treatment for purposes of providing bonuses for development or restrictions on development through the application Section 3. D.1?*

Applicable Law

RCW 36.70A.020(6), the property rights goal, provides:

Private property shall not be taken for public use without just compensation having been made. The property rights of landowners shall be protected from arbitrary and discriminatory actions.

Discussion

The Board notes that Petitioner fails to allege noncompliance with Goal 6 – RCW 36.70A.020(6) in: 1) Petitioner's September 8, 2006 PFR; 2) Petitioner's October 5, 2006

¹² Although not raised or argued by Petitioner in the PFR, the Board notes that the City Center Plan Maps, at 28, 29, 35, 42 and 90 show *two* (2) new north-south streets between 40th Avenue and 44th Avenue, while Ordinance No. 2627 describes *three* (3) new streets and the Zoning Map, Exhibit A to Ordinance No. 2625 also shows *three* (3) new streets. At Lynnwood's next annual Plan review cycle, to maintain consistency between its Plan and implementing regulations, the City should revise the noted maps to reflect the more concise locations of the new streets identified in Ordinance No. 2627 and referenced in Ordinance No. 2625. Likewise, any differences in the park/plaza locations between the Plan and Ordinance No. 2625 should be reconciled.

First Amended PFR; 3) Petitioner's Restated Issues, filed on November 20, 2006; or 4) the Board's November 20, 2006 Prehearing Order. See the relevant, cited, filings and Orders. At the HOM, the Board also asked Petitioner whether compliance with RCW 36.70A.020(6) was being challenged, and where in any of the issue statements it was referenced. Petitioner could not point to it in any statement of the Legal Issues, but commented,

[W]e've cited 'takings' and 'discrimination' over eight times in the opening statement [*i.e.* PHB], 25 times dealing with discriminatory treatment. So it is sprinkled throughout. In the reply brief it's over 10 times for 'takings' and seven times on the 'discriminatory treatment.

HOM Transcript, at 53. Petitioner went on to acknowledge that the Board does not have authority to award just compensation, but thought they were arguing .020(6) noncompliance. *Id.* at 54.

RCW 36.70A.290(1) provides, "The Board shall not issue advisory opinions on issues not presented to the board in the statement of the issues, as modified by any prehearing order." This provision of the GMA strictly limits the issues the Board can address in issuing its Order. It is undisputed that Petitioner did not allege noncompliance with RCW 36.70A.020(6) in any of the statement of the issues in the PFRs, the restatement of the issues, nor is it posed in the Board's PHO. Therefore, since Petitioner did not allege noncompliance with RCW 36.70A.020(6), the Board cannot address it. Legal Issue 6 is dismissed with prejudice. (See Concurring Opinion of Board Member McGuire.)

Conclusion – Legal Issue 6

The Board finds and concludes that Petitioner has **failed to allege noncompliance with a provision of the GMA** [*i.e.* Goal 6 – RCW 36.70A.020(6)]. Therefore, Legal Issue 6 is **dismissed with prejudice**.

D. LEGAL ISSUE NO. 7

The Board's PHO set forth Legal Issue No. 7 as follows:

- 7. Do the development regulations at Section 3, D.1 of Ordinance 2625 which require consistency with the "design of public streets and parks/plazas," in Exhibit A, including implementing Ordinances and Resolutions at Exhibits B through H which purportedly fund the acquisition of parks and right-of-ways, violate the provisions of RCW 36.70A.150?*

Applicable Law

RCW 36.70A.150 provides:

Each county and city that is required or chooses to prepare a comprehensive land use plan under RCW 36.70A.040 shall identify lands useful for public purposes such as utility corridors, transportation corridors, landfills, sewage treatment facilities, storm water management facilities, recreation, schools, and other public uses. The county shall work with the state and the cities within its borders to identify areas of shared need for public facilities. The jurisdictions within a county shall prepare a prioritized list of lands necessary for the identified public uses including an estimated date by which the acquisition will be needed.

The respective capital facilities acquisition budgets for each jurisdiction shall reflect the jointly agreed upon priorities and time schedule.

Discussion

Position of the Parties:

Petitioner argues, “RCW 36.70A.150 requires Lynnwood to not only identify lands for public purposes but to prepare a prioritized list of lands ‘including an estimated date by which the acquisition will be needed.’ Under this statute, Lynnwood’s capital facilities plan must ‘reflect the jointly agreed-upon priorities and time schedule.’” Pirie PHB, at 32. Petitioner asserts that the City has not included any monies in its capital facilities plan to purchase any of the Town Square properties. *Id.* In lieu of purchasing the identified Town Square properties, Petitioner contends that the City plans to obtain the parcels through “private development and restrictive development regulations.” *Id.*

The City contends that RCW 36.70A.150 is not applicable to the challenged Ordinance, for the following reasons: 1) RCW 36.70A.150 requires lands useful for public purposes (LUPP) be identified in the comprehensive plan, while the challenged ordinance is a development regulation; 2) Even if .150 applies to development regulations, Ordinance 2625 meets this requirement since it identifies parks/plazas and new streets in the City Center – these are lands useful for public purposes; 3) If .150 applies to development regulations, a deadline for preparing such a prioritized list of needed public lands and the estimated date by which they will be needed is not specified. Therefore, the City can still prepare such a list. However, Petitioner is challenging Ordinance No. 2625, not that the City does not have a prioritized list of LUPP; and 4) The “capital acquisition budgets for each jurisdiction” provision applies to lands that are jointly needed, or shared need public facilities, [*i.e.* jointly needed by the State and/or County and/or cities]; however, the challenged Ordinance only deals with City projects. Lynnwood Response, at 32-33.

In reply, Petitioner suggests that the City’s adoption of the challenged development regulations, including Ordinance No. 2625, as a means of providing for parks and roads is not the process required by RCW 36.70A.150. Pirie Reply, at 34.

Board Discussion:

As noted *supra*, Comprehensive Plans can be implemented by a variety of techniques, including development regulations, directed capital investments, purchase and acquisition of land, or through incentives [e.g. tax, regulatory or spending]. Therefore, the Board agrees with the City's reading of .150, that the requirement to identify LUPPs must be included in a jurisdiction's comprehensive plan, thereby allowing jurisdictions to use a variety of techniques to secure the needed lands.

The Board notes that the City Center Area Plan includes maps identifying parks/plazas and new ROW, *i.e.* LUPP. *See* Core Document 1, City Center Area Plan, at 28, 35, 42 and 90. Although not challenged by Petitioner, the Board additionally notes that the City Center Plan speaks to "Priorities for Public Investment" and contains a section on "Proposed Strategic Projects and Programs" that require capital investment. *Id.* at 77, and 87-90, respectively. Additionally, a Comprehensive Plan (as well as subarea plans – the City Center Area Plan) covers a twenty-year planning horizon; consequently, any investments or acquisitions must occur within that timeframe.

Further, as the City points out, Ordinance No. 2625 *also* identifies more concisely the desired new ROW and parks and plazas for the Core Area – *i.e.* Ordinance No. 2625 is consistent with and implements provisions of the City Center Area Plan. And the Board agrees with the City that the "capital facilities acquisition budget" requirement only applies to shared, or jointly agreed to, public facilities, and is not applicable to projects wholly within a jurisdiction.

In brief, RCW 36.70A.150's requirements to identify lands useful for public purposes and develop a prioritized list and general timetable for acquisition, *is a comprehensive plan requirement, not a requirement for implementing development regulations.* Petitioner's challenge is not to the City Center Area Plan, but rather to a development regulation intended to implement that Plan. The Board notes that this Ordinance is not likely the sole means for the City to implement its City Center Area Plan. Consequently, Petitioner's challenged is misplaced and without merit. Petitioner's challenge to Ordinance No. 2625, as stated in Legal Issue 7, is dismissed with prejudice.

Conclusion – Legal Issue 7

The Board concludes that Petitioner's challenge to Ordinance No. 2625, as stated in Legal Issue 7, is misplaced and without merit. Legal Issue 7 is **dismissed with prejudice.**

E. LEGAL ISSUE NO. 8

The Board's PHO set forth Legal Issue No. 8 as follows:

8. *Do the development regulations at Section 3, D.1 of Ordinance 2625 which require consistency with the "design of public streets and parks/plazas," in Exhibit A, including implementing Ordinances and Resolutions at Exhibits B through H, operate as a de facto development moratorium not authorized under RCW 36.70A.390 to prevent the Petitioner from enjoying the same densities and bonuses under City Center Zoning development regulations within the Town Square (Core District) through cooperation, incentives, and bonuses with the "private sector" for all property owners as the method to be employed in implementing City Center Plan policies for the later acquisition of park sites?*

Applicable Law

RCW 36.70A.390 governs the procedures to be used by jurisdictions if they choose to adopt moratoria or interim zoning controls. Generally, it allows a jurisdiction to enact a moratorium or interim control for up to six months without a public hearing, so long as a public hearing is held within 60 days of adoption. Additionally, the jurisdiction must adopt findings of fact justifying the action. *See* RCW 36.70A.390.

Discussion

On its face, Ordinance No. 2625 was not adopted as a moratorium or interim zoning measure. It is a permanent development regulation applying to all properties within the City Center. It does not appear that RCW 36.70A.390 is applicable to the challenged Ordinance.

Nonetheless, Petitioner suggests that Ordinance 2625, specifically Section 3, is a *de facto* moratorium, *as applied* to Petitioner's property, among others. Also, Petitioner contends that the Ordinance "precludes commercial development or freeze[s] existing commercial development to preserve the status quo, the Board should find as it has in *Master Builders v. Sammamish*, Case No. 05-3-0041, (2006), that these circumstances warrant a finding of invalidity and noncompliance of RCW 36.70A.390 and planning goals 1 and 12 under RCW 36.70A.020." Pirie PHB, at 35.

The City contends that Ordinance No. 2625 does not impose a moratorium. Rather it provides that "any application for design review for development shall demonstrate consistency with the planned location and design of streets and the planned location of parks and plazas, as described in the Ordinance. The Ordinance does not preclude all development." Lynnwood Response, at 34. The City also *properly corrects* Petitioner's characterization of the *MBA v. Sammamish* case, noting that the Board *did not find that the challenged ordinance in that matter was a "de facto moratorium."* *Id.* Again, the City emphasizes that Ordinance No. 2625 does not freeze development, nor preserve the *status quo*, since development that complies with the provisions of Ordinance No. 2625 may proceed. *Id.* at 35. The Board agrees with the City.

In reply, Pirie continued that “submitting an application as suggested by the City would be a meaningless application as the Pirie property and other parcels within the “rectangle” are designated for ‘determining compliance with the comprehensive plan.’” Pirie Reply, at 35.

The Board notes that Petitioner’s argument in reply is based upon the *application* of the Ordinance to a particular property and the potential submittal of an application to the City by the Petitioner, and its subsequent rejection. This scenario, although speculative, could occur. However, the Board reminds the parties that it has no jurisdiction to resolve project permit disputes. *See Citizens for Mount Vernon v. City of Mount Vernon*, 133 Wn.2d 861, 868 (1997) and *Wenatchee Sportsmen Ass’n v. Chelan County*, 141 Wn.2d 169, 179 (2000).

This leaves the Board with the question of whether Ordinance No. 2625 complies with RCW 36.70A.390, as Petitioner has alleged in Legal Issue 8. As the Board noted above, Ordinance No. 2625 does not adopt a moratorium, *de facto* or otherwise. It permits development within the City Center Area, but imposes conditions and requirements for such development to proceed. Therefore, the Board concludes that RCW 36.70A.390 is not applicable to Ordinance No. 2625 and Petitioner’s challenge is misplaced and without merit. Petitioner’s challenge as stated in Legal Issue No. 8 is dismissed with prejudice.

Conclusion – Legal Issue 8

The Board concludes that Petitioner’s challenge, as stated in Legal Issue No. 8, is misplaced and without merit. Legal Issue 8 is **dismissed with prejudice**.

F. LEGAL ISSUE NO. 9

The Board’s PHO set forth Legal Issue No. 9 as follows:

9. *Do the development regulations at Section 3, D.1 of Ordinance 2625 requiring consistency with the "design of public streets and parks/plazas," in Exhibit A, including implementing Ordinances and Resolutions at Exhibits B through H, operate as a de facto and unlawful "spot zone," that operate as a downzone and are intended to devalue Petitioner's Property within a limited geographic area within the City Center Zoning District; or that operates as an impermissible adjudicative rezone, which misuse GMA comprehensive plan amendment and development regulation requirements to unfairly assist the City's acquisition of public parks properties?*

Applicable Law

Petitioner’s framing of Legal Issue 9 does not allege noncompliance with any stated GMA provision. Instead, Petitioner asserts that the City of Lynnwood’s adoption of Ordinance No. 2625 constitutes a “de facto” and unlawful “spot zone.”

Discussion

Petitioner contends that the City has undertaken an illegal “spot zone” in adopting Ordinance No. 2625, as it applies to the Town Center properties. Pirie PHB, at 35-38. To support this assertion, Petitioner partially refers to a footnote, without citation, in one of the Board’s earlier cases where the Board described the concept of “spot zoning.” *Id.* referring to either *Twin Falls, et al., v. Snohomish County [WRECO¹³ – Intervener]*, CPSGMHB Case No. 93-3-0003, Final Decision and Order, (Sep. 7, 1993), at 40-41; **OR** *Twin Falls, et al., v. Snohomish County [WRECO – Intervener]*, CPSGMHB Case No. 93-3-0003, Order Granting WRECO’s Petition for Reconsideration and Modifying Final Decision and Order and Denying SNOCO PRA’s Petition for Reconsideration, (Oct. 6, 1993), at 6-7.

While quoting a footnote in these cases, *Petitioner neglected to discuss how the Board addressed the alleged “spot zoning” in either of these decisions.* In the *Twin Falls* FDO, the Board stated,

WRECO claims that the County singled out its property, the Bosworth Block, and illegally spot zoned it to Commercial Forest Land. (Citation omitted.) *The Board rejects the claim that the County’s action constituted spot zoning.* The Board does not agree that the County has rezoned any parcel, let alone spot zoned it. [Footnote on spot zoning omitted].

Twin Falls, FDO, at 40; (emphasis supplied). WRECO requested reconsideration of the FDO asserting that the Board did not have jurisdiction to address the spot zone question, and the Board agreed. On reconsideration the Board stated,

Although *the Board* may consider the common law, other statutes and processes in determining GMA claims, it *does not have jurisdiction to decide whether* these “other statutes” and *the common law, which are not specifically referenced in RCW 36.70A.280(1), have been violated.*

Twin Falls, 10/6/93 Order on Reconsideration, at 5; (emphasis supplied). In the Order on Reconsideration the Board modified its FDO as follows [new language shown in underlining and deleted language in ~~strikeout~~]:

WRECO claims that the County singled out its property, the Bosworth Block, and illegally spot zoned it to Commercial Forest Land. (Citation omitted.) WRECO claims that by singling out its property, the County violated the GMA. Spot zoning is a common law doctrine that has been frequently discussed by Washington’s appellate courts [footnote on spot zoning is inserted here, but omitted for brevity]. However, the Board does not have jurisdiction to determine whether the common law doctrine has

¹³ WRECO is the acronym the Board used for Weyerhaeuser Real Estate Company.

~~been violated since its jurisdiction is limited to matters listed in RCW 36.70A.280(10). The Board rejects the claim that the County's action constituted spot zoning. The Board does not agree that the County has rezoned any parcel, let alone spot zoned it.~~

Id. at 6-7.

Apparently not having fully read the Board's conclusions in these cases, Petitioner still asserts that the County's action constituted spot zoning and the Board should address it. Petitioner is simply wrong. The Board continues to adhere to its conclusion in the 10/6/93 Order on Reconsideration – "it does not have jurisdiction to determine whether a common law doctrine has been violated." The Board does not have jurisdiction to address Legal Issue 9, both given the fact that Legal Issue 9 does not allege any violation of the GMA, and it alleges an issue – spot zoning – that the Board has previously stated it does not have any subject matter jurisdiction over.¹⁴ Therefore, Petitioner's challenge to Ordinance No. 2625, as stated in Legal Issue No. 9, is misplaced and without merit. Legal Issue 9 is dismissed with prejudice.

Conclusion – Legal Issue 9

The Board concludes that Petitioner's challenge as stated in Legal Issue No. 9 is misplaced and without merit. Legal Issue 9 is **dismissed with prejudice**.

G. LEGAL ISSUE NO. 10

The Board's PHO set forth Legal Issue No. 10 as follows:

10. Does the use of comprehensive planning procedures and adoption of development regulations to apply Section 3, D. 1 restrictions in a limited geographic area of the City Center constitute project level action under the State Environmental Policy Act ("SEPA") at RCW 43.21C.240 not permitted under RCW 36.70A.470, and which failed to meet the integration at RCW 36.70A.130(2)(a), WAC 365-195-760(3), and WAC 365-195-610 as part of an updated planned action required under RCW 43.21C.031(2), provided that amendments are considered in accordance with the public participation program requiring an examination of alternatives, which examines impacts and mitigation measure for significant adverse and probable impacts to the built-environment, and issuance of a threshold determination under WAC 197-11-300 through WAC 197-11-640?

¹⁴ The Board notes that in briefing, Petitioner offers the *conclusory* statement that since the County's action is an illegal spot zone, the City has violated GMA Goals 1, 6 and 12. The Board also notes that none of these GMA Goals were included in the PFR or PHO for Legal Issue 9. As such, they are beyond the Board's scope of review. See RCW 36.70A.290(1). The Board also questions whether, in a GMA jurisdiction where implementing regulations must implement Plans, the notion of spot zoning is relevant any more.

Applicable Law

RCW 36.70A.470(1) pertains to project review procedures, stating “Project review, which shall be conducted pursuant to the provisions of chapter 36.70B RCW, shall be used to make individual project decisions, *not land use planning decisions.*” (Emphasis supplied.)

Similarly, the Legal Issue statement cites to two provisions of the State Environmental Policy Act (SEPA) which both relate to project review procedures. RCW 43.21C.240 deals specifically with *project review procedures*; and RCW 43.21C.031(2) addresses planned action procedures for various *project actions*.

The SEPA rules cited by Petitioner are: WAC 197-11-300 through WAC 197-11-640, which includes 46 sections of regulations – Categorical Exemptions and Threshold Determinations = 197-11-300 to -390 [11 sections], Environmental Impact Statements = 197-11-400 to -460 [18 sections], Commenting = 197-11-500 to 197-11-570 [10 sections], Using Existing Environmental Documents = 197-11-600 to -640 [7 sections]. However, since Petitioner does not refer to, or argue about, the SEPA rules in briefing Legal Issue 10, the Board will not recite them here.

Discussion

It appears to the Board that the crux of Petitioner’s complaint on this issue is that the in adopting Ordinance No. 2625, the City of Lynnwood did not conduct environmental review as if the Ordinance was a project level action. Pirie PHB, at 37-42. Additionally, Petitioner asserts, “no SEPA threshold determination or environmental review preceded adoption of the subject ordinances (and Section 3.D.1 restrictions) required for major actions affecting the quality of the built environment (including uses of the constructed Pirie Property) and the natural environment. . .” *Id.* at 39.

The City counters that the adoption of the challenged Ordinance was not a project action or a planned action; therefore the provisions of RCW 36.70A.470, RCW 43.21C.031(2) and RCW 43.21C.240 do not apply. Lynnwood Response, at 37-40. Rather, the City asserts adoption of the amendments to its zoning code was a non-project action. *Id.* Additionally, the City claims that appropriate “SEPA review of the Ordinance [is contained in the] Supplemental Environmental Impact Statement that was prepared for the Plan, together with an Addendum.” *Id.* at 40, *citing* Ex. 2. Lynnwood also notes that “Petitioner does not identify any *environmental* impact resulting to its property from the adoption of the Ordinance.” *Id.* at 41, (underlining emphasis in original, *italicized* emphasis supplied).

In reply, Petitioner reasserts the contention that the adoption of Ordinance No. 2625 was a project action and that the SEIS and Addendum did not examine the impacts of Section 3.D.1 because the environmental review occurred before adoption of the Ordinance. Pirie Reply, at 37-38.

The Board’s analysis of this issue begins, and ends, with whether the adoption of the Ordinance was a project or non-project action.

WAC 197-11-704 defines various “actions.” WAC 197-11-704(a) defines “Project Actions” as follows:

A project action involves *a decision on a specific project*, such as a construction or management activity located in a defined geographic area.

Projects include and are limited to agency decisions to:

- i. License,¹⁵ fund or undertake any activity that will directly modify the environment, whether the activity will be conducted by the agency, an applicant, or under contract.
- ii. Purchase, sell, lease, transfer, or exchange natural resources, including publicly-owned land, whether or not the environment is directly modified.

WAC 197-11-704(b) defines “Non-project Actions” as follows:

Non-project actions involve decisions on policies, plans or programs.

- i. The adoption or amendment of legislation, ordinances, rules or regulations that contain standards controlling use or modification of the environment
- ii. *The adoption or amendment of comprehensive land use plans or zoning ordinances.*

...

(Emphasis supplied).

Although Petitioner believes SEPA’s provisions for project actions or planned actions should apply to the City’s adoption of Ordinance No. 2625, Petitioner’s view is clearly in error. It is beyond question that Ordinance No. 2625 *amends the City of Lynnwood’s zoning code*. As such, it fits squarely within the definition of a non-project action as defined in WAC 197-11-704(b)(ii). The City’s action of reviewing Ordinance No. 2625 as a non-project action for purposes of SEPA was correct, and Petitioner’s argument on this point is without merit.

Petitioner also asserts that “no SEPA threshold determination or environmental review preceded adoption of [Ordinance No. 2625].” Pirie PHB, at 39. However, the City relied

¹⁵ WAC 107-11-760 defines “License” as,

[A]ny form of written permission given to any person, organization, or agency to engage in any activity, as required by law or agency rule. A license includes all or part of an agency permit, certificate, approval, registration, charter, or plat approval or rezone to facilitate a particular proposal. The term does not include a license solely for revenue purposes.

upon its existing “Supplemental Environmental Impact Statement” (SEIS) for the Lynnwood City Center Sub-area Plan” and “Addendum” to satisfy the relevant SEPA requirements. Lynnwood Response, at 40; and Ex. 2.

The April 5, 2006 Notice of Adoption of these documents (SEIS and Addendum) describes the “current proposal” [amendment to the zoning code] as follows:

The City Council has referred the zoning designations (zoning map) for the City Center area to the Planning Commission and Parks Board for a new recommendation. The intent of this action is to re-adopt the City Center zoning. The current proposal is substantially similar to the zoning adopted in March 2005, with one exception. Re-adoption will include review of a minor change to the location of the Town Square park/plaza. The location of the Town Square park/plaza would be moved slightly to the west in order to allow future construction of one additional new north-south “grid” street in the block between 44th Ave. W and 40th Ave. W.

Ex. 2, at 2.

The Board notes that the location of the Town Square park/plaza is contained in Ordinance No. 2625, Section 3.D.1(b), and the focus of Petitioner’s challenge. The adoption of the SEIS and Addendum is permissible under SEPA for purposes of Ordinance No. 2625. See RCW 43.21C.034, WAC 197-11-600, and WAC 197-11-625. The Board notes also that adoption of the environmental documents occurred in April of 2006, prior to the Ordinance’s adoption in July of 2006. Petitioner’s challenge as set forth in Legal Issue 10 is dismissed with prejudice.

Conclusion – Legal Issue 10

The Board concludes that Petitioner has **failed to carry the burden of proof** in demonstrating noncompliance with the challenged provisions of chapter 43.21C RCW. Legal Issue 10 is **dismissed with prejudice**.

H. LEGAL ISSUE NO. 11

The Board’s PHO set forth Legal Issue No. 11 as follows:

11. Did the City "jump the gun" in adopting development regulations at Section 3, D.1 of Ordinance 2625 requiring consistency with the "design of public streets and parks/plazas," in Exhibit A, including implementing Ordinances and Resolutions at Exhibits B through H, before it completed parks studies and its capital facilities plan to fund park sites acquisitions?

Discussion

Petitioner asserts “The legal analysis for this Issue is addressed in Issues 1, 2, 3, 4, 5 and 10.” Pirie PHB, at 43. The City states that its “response to this issue is contained in its response to Legal Issues 1 and 2.” Lynnwood Response, at 42.

The Board has already addressed Legal Issues 1, 2, 3, 4, and 5 – finding compliance, *supra*. Since Petitioner offers no additional argument specifically on this issue, Legal Issue 11 is **dismissed with prejudice**.

Conclusion – Legal Issue 11

The Board concludes that Petitioner’s challenge as set forth in Legal Issue 11 is **dismissed with prejudice**.

I. INVALIDITY

Having reviewed Petitioner’s 12 Legal Issues and having found that they were abandoned, or having dismissed them, or having found compliance, **there is no basis for the Board to consider a determination of invalidity**.

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:

- Petitioner Pirie’s challenge to Ordinance Nos. 2628 and 2630 is **abandoned**.
- Petitioner has **abandoned** Legal Issue 12.
- Legal Issues 6, 7, 8, 9, 10, and 11 are **dismissed with prejudice**.
- Regarding Legal Issues 1 and 2, pertaining to whether Lynnwood’s development regulation is consistent with and implements the City Center Plan, the Board finds and concludes that Ordinance No. 2625, Section 3.D.1(a) and (b), is **consistent with and implements** the City Center Plan’s Policies and provisions, and **complies** with RCW 36.70A.040(4) and .130(d).
- Regarding Legal Issue No. 3, 4, and 5, pertaining to Lynnwood’s notice and public participation procedures, the Board finds and concludes that the notice and public participation procedures used by the City in adopting Ordinance No. 2625, Section 3.D.1(a) and (b), **complied** with the GMA’s notice, public participation requirements [RCW 36.70A.020(11), .035, .130(1) and (2), and .140].

- CPSGMHB Case No. 06-3-0029, *Pirie Second Family Limited Partnership, LP v. The City of Lynnwood*, is **closed**.

So ORDERED this 9th day of April, 2007.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

David Earling
Board Member

Edward G. McGuire, AICP
Board Member (Board Member McGuire files a
separate Concurring Opinion)

Margaret A. Pageler
Board Member

Note: 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)

CONCURRING OPINION OF BOARD MEMBER McGUIRE

I concur in all respects with the conclusions drawn by my colleagues in this matter. I write separately to address Legal Issue 6. Had Petitioner alleged noncompliance with RCW 36.70A.020(6), I would have drawn the following conclusions.

The Board analysis for a Goal 6 challenge asks three questions:¹⁶

1. Did the local government take the landowner rights into consideration in its procedure?
2. Was the challenged action arbitrary?
3. Was the challenged action discriminatory? Petitioner must demonstrate both arbitrary *and* discriminatory action to prevail on this issue.

See Keesling v. King County, CPSGMHB Case No. 05-3-0001, Final Decision and Order, (Jul. 5, 2005), at 28-33.

The present record verifies that numerous times Petitioner and others commented, both orally and in writing, that the actions the City was considering would have impacts on the property rights of landowners in the City Center Core. *See* Ex. 7, 9, 13, 15, 22, 23, 35, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, and 56.

Additionally, the record documents that the City considered the facts and circumstances and weighed various alternatives to the present challenged Ordinance – No. 2625 – before it was adopted. *See* Ex. 1, 2, 5, 10, 11, 14, 19, 24, 25, 26, 27, 30, 33, 34, 42, 43, 54, 55, 56, 59, 84, 85, 91, 95, and 118. Consequently, I conclude that the City of Lynnwood took landowner rights into consideration during the process of adopting Ordinance No. 2625.

Given the extensive record and deliberations the City undertook during its review and adoption of Ordinance No. 2625, it is not plausible to categorize Lynnwood’s action as *arbitrary*, *i.e.* “[A] willful and unreasoning action taken without regard to or consideration of the facts and circumstances surrounding the action.” *See LMI/Chevron v. Town of Woodway*, CPSGMHB Case No. 98-3-0012, Final Decision and Order, (Jan. 8, 1999), at 16. Lynnwood held extensive public hearings on the zoning of the City Center, had numerous discussions where it considered the facts and circumstances surrounding the City Center zoning, considered various zoning configurations and alternatives, and finally after many months, acted to adopt Ordinance No. 2625. I conclude that Lynnwood’s action was not arbitrary.

Likewise, I note that Ordinance No. 2625 identifies *several* new streets and parks and plazas *throughout the City Center Plan area*. *Many property owners* are affected by the

¹⁶ The test is a conjectural one, requiring satisfaction of two key elements. Petitioner must demonstrate both arbitrary *and* discriminatory actions to prevail on this issue.

new street and parks/plazas locations identified in the challenged Ordinance. Granted, all properties within the City Center Plan area are not zoned the same. Some may not be directly affected by either the new street or parks/plaza locations. The City Center Plan sets out a new and ambitious strategy for reconfiguring the City Center – a City Center which is largely developed with existing buildings and structures owned by many property owners. The Plan envisions *significant changes* to this existing City Center area and the success of its implementation will require significant cooperation between the City and all owners in the City Center Core. Implementation of the Plan will not be quick, inexpensive, or an easy process, but this is the City's chosen direction. Nonetheless, I conclude that the City of Lynnwood's action was not discriminatory.

I conclude that the City has been guided by, and complied with, the provisions of RCW 36.70A.020(6) – Goal 6, the property rights goal.

APPENDIX A

Procedural Background

A. General

On September 8, 2006, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Pirie Second Family Limited Partnership (**Petitioner** or **Pirie**).¹⁷ The matter was assigned Case No. 06-3-0029, and is hereafter referred to as *Pirie v. City of Lynnwood*. Board member Edward G. McGuire is the Presiding Officer (**PO**) for this matter. Petitioner challenges the City of Lynnwood's (**Respondent, City, or Lynnwood**) adoption of Ordinance No. 2625¹⁸ amending the Lynnwood zoning map related to the City Center Sub-Area Plan and GMA Comprehensive Plan. Petitioners contend that the actions taken by the City are noncompliant with the notice and public participation requirements, consistency provisions and several goals of the Growth Management Act (**GMA** or **Act**).

On September 12, 2006 the Board issued a Notice of Hearing establishing October 16, 2006 as the date for the prehearing conference (**PHC**).

On October 5, 2006, the Board received Petitioner's "First Amended Petition for Review."

On October 13, 2006, the Board received "Stipulation and Joint Request to Extend Time" signed by representatives of Petitioner and Respondent. The parties sought and received a 30-day settlement extension in order to pursue settlement discussions. *See* October 16, 2006 "Order Granting Settlement Extension." The 10/16/06 Order set a new date for the prehearing conference and revised the tentative schedule.

On November 16, 2006, the Board conducted the PHC. After discussing the Board's procedures, the schedule and Legal Issues to be decided, Petitioner was given until 12:00 noon, November 20, 2006 to reorganize, combine and otherwise restate the Legal Issues to be decided by the Board.

On November 20, 2006, the Board received "Petitioner's Restated Issues." These Restated Issues and the final schedule were included in the Board's November 20, 2006 "Prehearing Order" (**PHO**).

¹⁷ The Board notes that on the same date – September 8, 2006 – the Board received a PFR "Corrected" from Petitioner. The "Correction" was for the mailing address of the City's representative, in the Declaration of Service.

¹⁸ In the PFR, Petitioner lists six ordinances and two resolutions, but it is not clear to the Board whether Petitioner is bringing those matters to this Board for resolution. *See* PFR, at 2-3.

B. Motions to Supplement the Record and Amend the Index

On November 16, 2006, the City of Lynnwood presented the “City’s Index” (**Index**). The Index identified 86 items and documents as part of the City’s record.

On November 22, 2006, the Board received a copy of “City of Lynnwood City Center Sub-Area Plan,” a core document.

On November 28, 2006, the Board received “City’s Amended Index” (**Amended Index**). The Amended Index listed 108 items by Index number.

On November 29, 2006, the Board received “Petitioner’s Motion to Supplement the Record” and “Petitioner’s Supplemental Records,” listing 28 proposed exhibits. Also attached to the Pirie Motion were: 1) copies of the 28 proposed exhibits, numbered 121-148; 2) James M. Pirie Declaration in Support of Supplementing the Record; 3) Jon Potter Declaration; and 4) Bill H. Williamson Declaration in Support of Supplementing the Record.

The City of Lynnwood did not file a response to the Pirie Motion. However, the Board notes that 18 of the proposed exhibits included an asterisk (*) which indicated “Supplemental Exhibits accepted by Rod Kaseguma, City of Lynnwood City Attorney.”

On November 30, 2006, the Board received “City’s Second Amended Index” (**2nd Amended Index**). The 2nd Amended Index listed 120 items by Index number. Many, but not all, of the Petitioner’s proposed exhibits denoted with an asterisk in the Pirie Motion were included in the City’s 2nd Amended Index.

All briefing was timely filed. The Board did not hold a hearing on the Motions to Supplement.

On December 22, 2006, the Board issued its “Order on Motion to Supplement the Record.” Many items were “already in the record;” however, an additional 13 exhibits were **admitted** by the Board. Index Nos. were assigned to those exhibits.

C. Dispositive Motions

On November 29, 2006, the Board received “City’s Motion to Dismiss.” The City moved to dismiss three of the six challenged Ordinances and the two challenged Resolutions. Petitioner’s PFR challenged the following Lynnwood Ordinances and Resolutions:

- Ordinance No. 2625 – Amending the City’s Zoning Map [City Center Subarea]
- **Ordinance No. 2626 – Authorizing Agreements for the Development of Real Property and Establishing Processing Requirements**
- Ordinance No. 2627 – Establishing a Street Grid [City Center Subarea]

- **Ordinance No. 2628 – Establishing an Interim Mitigation Program [City Center Subarea]**
- **Ordinance No. 2629 – Amending the City’s Reimbursement [Latecomer] Agreement Code Provisions**
- Ordinance No. 2630 – Relating to Undergrounding of Overhead Electric Wires [City Center Subarea]
- **Resolution No.2006-09 – Approving Voluntary Interim Mitigation Fees [City Center Subarea]**
- **Resolution No. 2006-10 – Approving an Agreement Template for No Protest LIDs**

See Attachments A-H to PFR, and Index Exs. 85, 78, 84, 80, 86, 83, 81 and 82, respectively. The City moved to dismiss those Ordinances and Resolutions noted in **bold** type.

On December 6, 2006, the Board received “Petitioner’s Response to City’s Motion to Dismiss,” with 21 attached exhibits.

The City of Lynnwood did not file a reply brief. All briefing was timely filed. The Board did not hold a hearing on the City’s Motion to Dismiss.

On December 22, 2006, the Board issued its “Order on Dispositive Motions.” The Order **granted** the City’s Motion to **dismiss** Ordinance Nos. 2626, 2629 and Resolution Nos. 2006-09 and 2006-10. The remaining challenged Ordinances in this proceeding are Ordinance Nos. 2625 [Zoning Map], 2627 [Street Grid], 2628 [Interim Mitigation Program], and 2630 [Undergrounding of Overhead Electric Wires].

D. Briefing and Hearing on the Merits

The Board’s 12/22/06 Order imposed a page limitation on Petitioner’s prehearing brief (50 pages), the City’s response brief (50 pages), and Petitioner’s reply brief (20 pages).

On January 18, 2007, the Board received “Petitioner’s Hearing Brief” (**Pirie PHB**), with a Table of Exhibits and 60 attached exhibits. The Pirie PHB contained 46 pages.

On February 1, 2007, the Board received “Respondent’s Hearing Brief” (**Lynnwood Response**), with a Table of Exhibits, and 39 attached exhibits [30 duplicates and 9 new exhibits]. The Lynnwood Response contained 43 pages.

On February 8, 2007, the Board received “Petitioner’s Reply Brief” (**Pirie Reply**), with a Table of Exhibits, and 41 attached exhibits [40 duplicates and 1 new exhibit]. The Pirie Reply contained 43 pages.

On February 9, 2007, the Board received “City’s Motion to Strike Petitioner’s Reply Brief.” Lynnwood noted that 12/22/06 Order imposed a 20 page limit on Petitioner’s Reply, yet the Pirie Reply contained 23 pages more than the limit. Therefore, the City moved to strike the Pirie Reply.

On February 12, 2007, the Board received “Petitioner’s Reply to City’s Motion to Strike.” Petitioner acknowledged exceeding the page limit set in the Board’s 12/22/07 Order and redacted portions of the Pirie Reply to reduce its length to 20 pages.

On February 15, 2007, the Board held a hearing on the merits (**HOM**) at the Board’s offices in Suite 2356, 800 5th Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, David Earling and Margaret Pageler were present for the Board. Petitioner Pirie was represented by Bill Williamson. Respondent City of Lynnwood was represented by Rod P. Kaseguma. Julie Taylor, Board Law Clerk, and Moani Russell, Board Extern, attended. Also in attendance were James Pirie, Kevin Garrett and Doug Purcell. Court reporting services were provided by Rebecca Mayse of Byers and Anderson. The hearing convened at approximately 10:00 a.m. and adjourned at approximately 11:45 p.m. A transcript of the Hearing was ordered (**HOM Transcript**).

On March 15, 2007, the Board received the HOM Transcript.

APPENDIX B

Lynnwood City Center Sub-Area Plan

Petitioner notes various provisions of the City Center Plan in stating his Legal Issues, several of them were briefed and argued at the HOM. The City of Lynnwood also relied upon provisions of its City Center Plan to counter Petitioner's claims. Noted below are the provisions of the Plan that have been noted in briefing and argument.

Background and History:

The City points to this section of the City Center Plan for understanding the context of the City's present efforts. This section explains:

This plan builds on the community's vision and establishes more specific components of the City Center, illustrating the location, intensity, type and character of new development. The plan provides the legal and policy underpinnings for revisions to the City's codes, its CFP [capital facilities plan], and its administrative structure and any related marketing efforts. It also provides a clear message to the development community that the City welcomes new commercial and residential development within the City Center.

City Center Plan, at 3-4.

Urban Design Principles:

The "Planning and Urban Design" principles used by the City in developing the City Center Plan are listed under 15 "Key Principles." Petitioner points to Urban Design Principle 15, which states "Use More Carrots Than Sticks – Development regulations should make use of an 'incentive' approach, along with setting forth a baseline of standards." City Center Plan, at 12.

Key Concepts:

The City Center Plan lists 10 "Key Concepts" that represent the "important building blocks to achieve the goal and objectives of the plan." Plan, at 15. Petitioner takes issue with two of these "Key Concepts" – Number 4 and 8. The City includes Key Concept number 1.

Key Concept 1. New, Secondary Streets

Better circulation is the most important element for the City Center. An additional secondary street network should be introduced throughout the area to supplement the existing street pattern. This will add more east-west and north-south connections and reduce the length of city blocks,

make the City Center more walkable and pedestrian-friendly, disperse the traffic from major arterials and provide more choices for circulating through the area.

Key Concept 4. Commercial Core with a Major Attraction

Although the entire Sub-Area would be developed as a City Center, one central area would be developed as the “Core.” Office and commercial uses would be concentrated in this area. More street-level uses including storefront retail would be incorporated to animate the pedestrian environment. A central attraction feature, such as a major cultural, public or recreational destination, would further enhance the activities of the Core.

Key Concept 8. Chain of Parks and Plazas

The City Center should contain a series of parks and public spaces that are visible and accessible to the public. They should eventually be connected together by a “promenade,” that focuses and connects different activities, uses and parks throughout the City Center. While all major public facilities should provide parks or plazas accessible to the public, private development should also contribute public spaces.

City Center Plan, at 15, 16 and 17, respectively.

Descriptive Text on the Character of the Core:

The City Center Plan, at 31, describes the City’s view of the “Character of the Core” as follows:

This area will be the location of the most intensive commercial development, along with the new convention center, housing and hotels. Retail shops, services and restaurants will be encouraged on the ground floors of new buildings. The convention center area is envisioned to expand over time, incorporating a variety of complimentary uses. In addition, within this area could be one or more major concentrations of retail centers offering home furnishings. These might be separate, consolidated into a “design center” complex, integrated into a larger mixed-use development, or all three. Many buildings within the Core will be of sufficient height to create a skyline visible from the freeway. One or more buildings may have unique forms or heights that will reinforce the sense of a City Center. *The present “super-blocks” in this area will be altered by adding new streets to create smaller blocks.*

This area will contain unique public spaces that will help organize new development and be available to the general public and nearby employees and residents. *The nature of these spaces will evolve but will include both*

a promenade and parks of various sizes, including a large town square with underground parking.

The promenade will be a pedestrian corridor that links the Core with the transit center, Alderwood Mall and surrounding districts, and will include features such as specimen trees, special paving, lighting, public art, graphics and special furnishings. *The town square could include a paved area for festivals and activities, lawn areas for relaxing and gathering, a band shell, concessions, restrooms and a water feature. The square will also be connected to the Interurban Trail.*

City Center Plan, at 31; (emphasis supplied).

Land Use Policies:

Petitioner takes issue with certain City Center Plan Land Use Policies (CCLU), as follows:

CCLU 2: Concentration and Intensity. The City Center will be the focus of high concentrations of development, containing multi-story buildings, multiple residential developments, parking structures, and a variety of civic buildings and spaces.

CCLU 3: Establish Maximum Floor Area Ratios to Direct Intensity. Maximum Floor Area Ratio (amount of floor space as a multiple of site area) could range as high as 8 in the Core and 3-5 outside the Core.

CCLU 4: Incentives for Public Amenities. Regulations should be established that grant additional development intensity in return for including specified public amenities.

City Center Plan, at 38.

Urban Design Policies:

Petitioner challenges several of the City Center Plan Urban Design (CCUD) Policies, as follows:

CCUD 4: Achieve a Variety of Public Spaces. The City should contain a range of public spaces, from larger to smaller, both green and hard-surfaced, and both publicly and privately provided.

CCUD 12: Incentives for Public Amenities. The Land Use Code for the City Center should offer additional development intensity in return for providing accessible and well-maintained public amenities.

CCUD 13: Variety of Public Space. All new public or private development shall contribute to an array of public spaces including plazas, squares, courtyards and parks. These public spaces should include benches, lighting and other pedestrian amenities necessary for the public's safe use and enjoyment.

City Center Plan, at 63 and 64, respectively.

Public Space Policies:

For context, the City refers to its description of A Town Square in the Core, and like Petitioner, points to several City Center Plan Public Space Policies (CCPS):

A Town Square in the Core: A fundamental aspect of this plan is that the City Center Core should be anchored by a large public space. It should be roughly in the center, but also adjacent to several existing or future streets so that it is perceived as not being connected to any specific development, but rather available to the residents, employees, and visitors as a truly public space. The size of this Town Square should be in the range of 3-5 acres.

CCPS 2: Future City Center development will bring a number of recreational opportunities such as bookstores, coffee shops, wider sidewalks with an attractive walking environment, health clubs, theaters, and plazas or small parks that are provided by private property owners. While these amenities do not replace the need for traditional parks and open space, they can support reducing the amount of these facilities that are provided by the City.

If they used the current Level of Service standard in the City Center, the Preferred Alternative 2020 population would require 52.5 acres of new parks. The Preferred Alternative shows four parks and one public plaza totaling approximately 9.5 acres. In addition, the central promenade, which connects two of these public spaces, is in itself a significant public space totaling approximately 2.4 acres.

CCPS 3: The four parks that are part of the Preferred Alternative, and the central promenade, are necessary to support development in the City Center. These parks and public spaces, or their special and functional equivalent, shall be provided as new development occurs in the City Center.

Provision of 41 more acres of parks to meet the City's current Level of Service standard within the City Center would be difficult to achieve and

very expensive. It is clear, however, that at least one additional and significant traditional park, outside, but adjacent to the City Center boundary, should be provided.

CCPS 11: Secure Property for Public Spaces. In order to prevent the development of land identified for public spaces, the City should secure options that would allow for eventual purchase of property for public spaces in the City Center. This would require a study of parcel size and configuration, ownership, property valuation, and availability. In some cases, there may be buildings on the property which will need to be phased out.

CCPS 12: Analysis of Concepts, Feasibility and Financing. The City should prepare a study examining the preliminary designs, costs and financing strategies for the three major public spaces indicated in this Sub-Area Plan. This work will be important to determine the form and timing of implementation. It can also provide the data and information necessary for grant applications. Such a study should examine the issues and implications of parking on-site versus elsewhere. The study should provide a conceptual level design for each major public space identifying the key components. Financing options should also be examined, including the notion of contributions from private development.

CCPS 14: Include City Center Public Spaces in the City's CIP. In order to implement the directions of the Sub-Area Plan, the City's Capital Improvement Program [CIP] should incorporate line items for property acquisition, design, and development of the three identified public spaces.

City Center Plan, at 66, 67, 69, 71 and 72, respectively.

Transportation Policies:

The City refers to City Center Plan Transportation Policies (CCT) in its defense.

CCT 6: Develop a Finer Street Grid System. Develop a finer program and regulations to develop a finer street-grid system within the City Center. The grid system should improve access within the City Center and continuously connect the arterials, where feasible.

City Center Plan, at 54. Additionally, the City refers to the generalized "Sub-Area Street Class Map," at 42.

Coordination and Collaboration:

Petitioner also notes that the City Center Plan includes discussion of the need for “Coordination and Collaboration.” This broad and general discussion does include the following candid statement: “There needs to be a spirit of cooperation between government and the private sector. While there might not always be complete agreement on every course of action, the idea of being joint participants, rather than adversaries, is essential. Without this “partnership,” the plan will fail.” City Center Plan, at 75.

Mapping – Plan Maps and Zoning Map:

Finally, the Board notes that Exhibit A, to Ordinance No. 2625 is the “City Center Zoning.” Comparing this zoning map with the mapping in the Plan reveals no inconsistencies. See Plan, at 28, 29, 35 and 90. Additionally, the Board notes that the planned location for the Town Square – Core – park and plaza, described in Ordinance No. 2625, Section 3.D.1.b corresponds to the “Town Square Park and Plaza” shown on the same Plan Maps. Compare Ordinance No. 2625, Section 3.D.1.b to Plan maps at 28, 29, 35 and 90. There is no inconsistency in the mapping between the Plan and the implementing development regulations.