

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

Futurewise,	)	<b>CPSGMHB Case No. 07-3-0014</b>
	)	
Petitioner,	)	<i>(Futurewise V)</i>
	)	
v.	)	<b>Thurston County Superior Court</b>
	)	<b>Case No. 07-2-01744-2</b>
City of Bothell,	)	
	)	<b>ORDER DENYING</b>
Respondent.	)	<b>CERTIFICATE OF</b>
	)	<b>APPEALABILITY</b>
	)	

**I. APPLICATION FOR CERTIFICATE OF APPEALABILITY**

On August 2, 2007, the Central Puget Sound Growth Management Hearings Board (**Board**) issued its Final Decision and Order (**FDO**) in CPSGMHB Case No 07-3-0014. The Petitioner Futurewise appealed the decision to Thurston County Superior Court.

The case arose as follows. Chapter 36.70A RCW – the Growth Management Act (**GMA**) – requires cities and counties to adopt and periodically update comprehensive plans and development regulations to implement those plans. A city’s comprehensive plan must contain a Housing Element (RCW 36.70A.070(2)) and must be guided by planning goals including a housing goal (RCW 36.70A.020(4)). Pursuant to these requirements, on December 12, 2006, the City of Bothell adopted Ordinance No. 1973, an updated version of the Housing Element of its comprehensive plan. As summarized in the FDO:

Bothell’s housing element identifies several targeted affordable housing strategies based on the City’s assessment of local needs:

- Streamlined permitting process for ADUs.
- Retention of mobile home parks, echoing our state’s requirement of protecting mobile home residents from displacement under RCW 59.22.010(2).
- Special zoning designation for Senior Housing, which already is providing 535 units in operation, under construction, or in permit review.
- RAC zoning to encourage the development of housing in the central locations of the city, a traditional location for affordable housing, by providing opportunities

for residential activity centers where the number of units is controlled by site and building envelope regulations rather than a density limit.

In addition, Bothell enlisted the input of ARCH, an organization created to preserve and increase the supply of housing for low and moderate income households in East King County. Reliance on ARCH's involvement is well-founded because of its mission – affordable housing – and regional track record.

FDO, at 8-9, citations to record omitted.

Futurewise filed a timely challenge to the City's Housing Element, alleging that it violated several sections of the Growth Management Act.

On August 2, 2007, the Board issued its Final Decision and Order (**FDO**). The Board found that the GMA does not mandate controls and incentives for the development of affordable housing. The Board found that the record supported the conclusion that Bothell has enough land zoned for residential development at densities asserted by Futurewise to be conducive to the production of affordable housing to accommodate the projected low-income population. The Board determined that Futurewise failed to carry its burden of proving that Bothell's plan does not comply with the GMA.

On October 1, 2007, the Board received Futurewise's Application for Certification of Appealability in Thurston County Superior Court Case No. 07-2-01744-2 (**Futurewise Application**).

## **II. AUTHORITY AND ANALYSIS**

RCW 34.05.518(3) identifies growth management boards as "environmental boards," and establishes the following criteria for certification of appealability:

(b) An environmental board may issue a certificate of appealability if it finds that delay in obtaining a final and prompt determination of the issues would be detrimental to any party or the public interest and either:

(i) Fundamental and urgent statewide or regional issues are raised; or

(ii) The proceeding is likely to have significant precedential value.

RCW 34.05.518(4) requires a board to state in its certificate of appealability “which criteria it applied [and] explain how that criteria was met.”

This Board reviews the present request for certification in light of each of these criteria. Although it is a close question, the Board makes the determination that delay may be detrimental to the public interest. However, neither of the next two criteria – fundamental and urgent statewide or regional issues and significant precedential value – is met in this instance. The Board finds that the case does not raise fundamental regional or state issues and that the proceeding is unlikely to have significant precedential value.

*Would delay in determining the issues be detrimental?*

1. Delay may be detrimental to the public interest.

The Housing Element of the City of Bothell’s comprehensive plan has no mandatory controls and incentives to spur the development of affordable housing. Rather, the plan relies on (1) the four strategies listed above, and (2) zoning of sufficient land at higher densities so that housing could be developed affordably for the target population. The Board’s FDO found this plan compliant with the GMA “housing element” provisions.

This is not a case where development is in limbo or is precluded during the pendency of an appeal. Nor is there a risk of noncompliant development vesting in the interim, Rather, Futurewise argues that delay of controls and incentives means that opportunities will be lost: available land in Bothell will be built out without providing affordable housing.

The Board agrees. The public has an interest that may be detrimentally impacted by delay; that is the public’s interest, expressed in RCW 36.70A.020(4), .070(2), and .530, in encouraging the availability of housing affordable to all economic segments of the population. Build-out of available properties during pendency of an appeal may reduce opportunities for low-income housing development. Delay in determining whether controls and incentives are mandatory may detrimentally impact the public interest.

2. Delay *is not* detrimental to other Central Puget Sound cities and counties.

RCW 36.70A.130 required Central Puget Sound counties and cities to update their comprehensive plans and development regulations by no later than December 1, 2004. The City of Bothell’s December 12, 2006, revision to its Housing Element occurred two year’s after the deadline because of a challenge brought by Futurewise to Bothell’s original 2004 plan update. 07314 Futurewise V v. Bothell (October 9, 2007)

07-3-0014 **Order Denying Certificate of Appealability**

Most, if not all, Puget Sound cities and counties have long since completed the updating of their comprehensive plans, and any challenge to the Housing Elements of those plans would be untimely. Thus, other cities and counties should not be awaiting the determination of this case. Any city or county that has complied with the legislative deadline will not be detrimentally affected by delay in determining the City of Bothell's issues, as that city's or county's comprehensive plan and Housing Element have already been updated. Under the GMA, the unchallenged plans of cities and counties are presumed valid; thus other cities and counties face no uncertainty and no detriment from a delay in review of the present case.

**The Board concludes that delay in determining the issues will be detrimental to Petitioners and to the public interest.**

*Are fundamental and urgent statewide or regional issues raised?*

The Growth Management Hearings Boards are set up on a regional basis and are expected to construe and apply the GMA in recognition of regional differences. The Board acknowledges that housing affordability is a significant issue in the Central Puget Sound. However, the issue raised by Petitioner is whether the GMA requires "that Bothell include mandatory incentive programs for affordable housing within its housing element." Futurewise Application, at 5. The Board is not persuaded that mandatory incentive programs are an urgent regional issue. As noted above, most, if not all, the jurisdictions within the Central Puget Sound region have already adopted their updated plan Housing Elements which, if unchallenged, are deemed valid. Some of those jurisdictions have adopted affordable housing controls and incentives;<sup>1</sup> others have not. Even if a Court were to reverse the Board and hold that the GMA makes affordable housing controls and incentives mandatory, Central Puget Sound jurisdictions would not be required to revise the Housing Elements of their comprehensive plans until the next seven-year update.

**The Board concludes that no fundamental and urgent statewide and regional issues are raised.**

*Would the proceeding have significant precedential value?*

The Board adjudicates GMA challenges on a case-by-case basis. Since the Board uses a case-by-case analysis, the Board does not impose a single formulation on every jurisdiction. The Board's ruling in the present case does not create a precedent that requires each jurisdiction to take a

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<sup>1</sup> Futurewise references such programs in Bellevue, Redmond, Kirkland, and Newcastle. Futurewise Application, at 4, fn. 4.

uniform approach to provisions to accommodate low and medium-income households. Rather, the Board's FDO allows a range of strategies, including (but not requiring), the enactment of the controls and incentives authorized by RCW 36.70A.530. So long as there is sufficient land zoned at sufficient densities to produce sufficient units of moderately-priced housing, the Board's FDO does not impose any particular affordable-housing program. Thus, because the Board's review of Housing Element challenges is based on a case-by-case analysis that does not prescribe any particular strategy or regulatory regime for all jurisdictions, there is no significant precedential value in review of the Board's FDO in this case.

**The Board concludes that the proceeding is unlikely to have significant precedential value.**

### **III. CONCLUSION**

Applying the above criteria, the Board denies this Certificate of Appealability of its Final Decision and Order in CPSGMHB Case No. 07-3-0014, a copy of which is attached.

Dated this 9th day of October, 2007

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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David O. Earling  
Board Member

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Edward G. McGuire, AICP  
Board Member

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Margaret A. Pageler  
Board Member