

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD**
State of Washington

JOCELYNNE FALLGATTER,)	
)	
Petitioner)	CPSGMHB Case No. 07-3-0017
)	<i>(Fallgatter IX)</i>
v.)	
)	FINAL DECISION and ORDER
CITY OF SULTAN,)	
)	
Respondent)	
_____)	

SYNOPSIS

In December 2006, the City of Sultan adopted Ordinance No. 942-06, which put in place the updated Capital Facilities Element of the City’s Comprehensive Plan, concurrently with the adoption of the City’s Budget for Fiscal year 2007. Petitioner’s challenge alleges that the ordinance did not satisfy the Growth Management Act’s (GMA) requirements for the Capital Facility Elements (CFE) - RCW 36.70A.070(3), and several Goals of the GMA, specifically RCW 36.70A.020(1), (3), (7), and (12).

*The Board found that the Petitioner had carried the burden of proof in demonstrating that the City of Sultan’s CFE did not comply with GMA requirements since it did not include LOS standards to support the needs assessment; it did not demonstrate that there would be adequate public facilities and services, most notably sanitary sewer, available to serve the urban growth area during the planning period; and that the City, admitting a funding shortfall, did not reassess its land use element or take other measures to maintain consistency. The Board found that the City’s action was **clearly erroneous** and that Ordinance 942-06 substantially interfered with the fulfillment of Goal 12; thus the Board invalidated Ordinance 942-06. The Ordinance was remanded to the City, and a compliance schedule was established within which the City was directed to achieve compliance with the Act.*

I. BACKGROUND¹

On February 12, 2007, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Jocelyne Fallgatter (**Petitioner** or

¹ See Appendix A for a full procedural background.

Fallgatter). The matter was assigned Case No. 07-3-0017, and is hereafter referred to as *Fallgatter IX v. City of Sultan*. Board member David O. Earling is the Presiding Officer (**PO**) for this matter. Petitioner challenges the City of Sultan's (**Respondent** or **the City**) adoption of Ordinance 942-06. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA** or **Act**).

No dispositive motion was filed in this matter.

In June and July, the Board received prehearing briefing and exhibits from the parties. The following references are used throughout this Final Decision and Order:

- Petitioner Fallgatter's Prehearing Brief – **Petitioner's PHB**
- Respondent City of Sultan's Prehearing Response Brief – **City's Response**
- Petitioner Fallgatter's Reply Brief – **Petitioner's Reply**

Subsequent to the granting of a settlement extension, on July 26, 2007, the Board convened the Hearing on the Merits at the Board offices. Board member David Earling presided, with Board members Ed McGuire and Margaret Pageler in attendance. Board Law Clerk Julie Taylor, was also in attendance. Petitioner Jocelynn Fallgatter appeared pro se. Respondent City of Sultan was represented by its attorney, Thom Graafstra, accompanied by City Administrator Deborah Knight. Court reporting services were provided by Barbara Castrow of Byers and Anderson. The hearing was adjourned at 11:44 a.m.

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

Comprehensive plans and development regulations, and amendments thereto, adopted by a City pursuant to the GMA, are presumed valid upon adoption. RCW 36.70A.320(1). The burden is on the Petitioner to demonstrate that the action taken by the City is not in compliance with the Act. RCW 36.70A.320(2).

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

The GMA affirms that local jurisdictions have discretion in adapting the requirements of the GMA to local circumstances and that the Board shall grant deference to local decisions that comply with the goals and requirements of the Act. RCW 36.70A.3201. Pursuant to RCW 36.70A.3201, the Board will grant deference to the City in how it plans for growth, provided that its policy choices are consistent 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] 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 Wn2d 1, 15, 57 P.3rd 1156 (2002); *Quadrant*, 154 Wn.2d 224, 240.

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 and PREFATORY NOTE

A. BOARD JURISDICTION

The Board finds that the PFR was timely filed, pursuant to RCW 36.70A.290(2). The Petitioner has standing to appear before the Board, pursuant to RCW 36.70A.280(2), and the Board has subject matter jurisdiction over the challenged action - Ordinance 942-06, adopting an amended and updated capital facilities element of the City’s comprehensive plan, pursuant to RCW 36.70A.020(1), (3), (7) and (12) and RCW 36.70A.070.

B. PREFATORY NOTE

Preliminary Matters

At the Hearing on the Merits, the Board reaffirmed its ruling on the Petitioner’s Motion to Supplement in regard to the City Hearing Examiner’s opining on level-of-service issues. HOM Transcript, at 4. In addition, with her Reply Brief, the Petitioner moved to supplement the Record with an *Everett Herald* newspaper article regarding funding shortfalls for the City. Petitioner’s Reply, at 18. The Board denied admission of this item. *Id.*

Challenged Action

In response to this Board’s Order in *Fallgatter v. Sultan*, CPSGMHB Case No. 06-3-0003 (June 29, 2006), on December 14, 2006, the City amended its Capital Facilities Element by adopting an updated 6-year Capital Facilities Plan (CFP) and incorporating that document as the Capital

Facilities Element of the City's Comprehensive Plan.² Core Document, Sultan Comprehensive Plan, Appendix D. The CFP notes that its purpose is to determine the availability of existing capital facilities, forecast future needs for such facilities based upon land use and population growth statistics and to determine how such facilities will be financed over the next six years and focuses on facilities owned and operated by the City (water, sewer, streets, and stormwater) with separate facility plans prepared and incorporated by reference for some of these facilities (i.e. General Water Plan, General Sewer Plan). The CFP defines a:

“Capital facility is any publicly-owned structure or physical facility. It could be a park, waste treatment facility, waterline, road, public building or similar structure. Services are not considered a capital facility, nor is the maintenance and operation of the facilities described above. Usually it does not include city vehicles. In Sultan, a capital facility improvement represents a major capital investment in a city asset which is not a repair or maintenance item with a value of at least \$10,000 that has a useful life of 5 or more years.”

Core Document, Appendix D, CFP at VIII-1 (Emphasis added).

The Petitioner alleges that the CFP fails to comply with the GMA in several ways, including adequate identification of necessary facilities and services and of levels of service and the exclusion of maintenance. In addition, Petitioner asserts that the City failed to reassess the Land Use Element in light of funding shortfalls identified by the CFP.

IV. LEGAL ISSUES and DISCUSSION

The Board's March 22, 2007 Prehearing Order and the Petitioner's PFR state Legal Issue No. 1 as follows:

1. *Did the City of Sultan substantially interfere with the goals of the Growth Management Act, specifically, RCW 36.70.020 (1), (3), (7), and (12) by adopting a Capital Facilities Plan which is inconsistent with the adopted Comprehensive Plan and which fails to meet the statutory requirements of RCW 36.70.070 by:
 - A) *Failing to identify necessary facilities and services and their estimated costs?*
 - B) *Excluding maintenance items from the definition of a capital facility?*
 - C) *Failing to incorporate adopted levels of service in the CFP?*
 - D) *Failing to concurrently reassess the land use assumptions, funding strategies and/or level of services, triggered by the funding shortfalls?**

² The City has adopted its CFP as its CFE. Hereinafter, the acronym CFP will denote the entire capital facilities document.

Applicable Law

The Petitioner alleges that the City has not been guided by four goals of the GMA:

- 1) Urban Growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.

- 3) Transportation. Encourage efficient multi-modal transportation systems that are based on regional priorities and coordinated with county and city comprehensive plans.

- 7) Permits. Applications for both state and local government permits should be processed in a timely manner to ensure predictability.

- 12) Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use, without decreasing service levels below locally-established minimum standards.

RCW 36.70A.020(1), .020(3), .020(7), .020(12).

The Board notes that the Petitioner focuses her arguments on Goal 12 with only cursory reference to the other cited goals on the next-to-the-last page of the PHB, essentially asserting that if adequate public facilities and services are not provided, then the City has also failed in regard to urban growth, transportation, and a timely permitting process. Petitioner's PHB, at 17. These single statements do not satisfy the burden of proof Petitioner must carry in demonstrating that the City's actions were clearly erroneous and therefore, Petitioner's claims under Goals 1, 3, and 7 are deemed abandoned.

Petitioner asserts that the City's CFP does not meet the mandatory requirements of RCW 36.70A.070(3), which provides:

A capital facilities plan element consisting of: (a) An inventory of existing capital facilities owned by public entities, showing the locations and capacities of the capital facilities; (b) a forecast of the future needs for such capital facilities; (c) the proposed locations and capacities of expanded or new capital facilities; (d) at least a six-year plan that will finance such capital facilities within projected funding capacities and clearly identifies sources of public money for such purposes; and (e) a requirement to reassess the land use element if probable funding falls short of meeting existing needs and to ensure that the land use element, capital facilities plan element, and financing plan within the capital facilities plan element are coordinated and consistent. Park and recreation facilities shall be included in the capital facilities plan element.

Lastly, Petitioner argues that, with the adoption of the CFP, the City has created internal inconsistencies within its Comprehensive Plan in violation of the preamble for RCW 36.70A.070 which reads:

The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally-consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140.

In addition, the Board notes that the GMA does not define “capital facilities” but this Board has previously held that “public facilities,” as defined by RCW 36.70A.030(12), are synonymous with “capital facilities owned by public entities.”³ *West Seattle Defense Fund v. Seattle (WSDF I)*, CPSGMHB Case No. 94-3-0016 (Final Decision and Order, April 4, 1995). RCW 36.70A.030(12) provides:

“Public Facilities” include streets, roads, highways, sidewalks, street and road lighting systems, traffic signals, domestic water systems, storm and sanitary sewer systems, parks and recreational facilities, and schools.”

Discussion

The Petitioner contends the City’s CFP, although improved over the 2004 version, still falls short of meeting the statutory requirements of RCW 36.70A.070(3) and related goals of the GMA, as it has done in the past. Petitioner’s PHB, at 2-3. In essence, Petitioner asks just how the City is going to provide services to the citizens of Sultan and how these services are to be funded. Petitioner’s PHB, at 5; HOM Transcript, at 6. Each of the Petitioner’s allegations is addressed separately below.

Issue A – Failing to identify necessary facilities and services and their estimated costs.

The Petitioner contends that the CFP falls short in identifying the necessary capital facilities and costs in all categories of infrastructure for the City - whether the infrastructure is water, sewer, surface water management, transportation, parks and recreation, general governmental facilities, schools, or solid waste. Petitioner’s PHB, at 7-11. Petitioner asserts that all are deficient in providing the needed information and analysis to meet the requirements of the GMA.

³ As the City correctly notes, this Board has never held that “public services,” as defined by RCW 36.70A.030(13), are synonymous with “capital facilities.”

Although the Petitioner cites deficiencies in each of the areas mentioned above, for purposes of illustration, the Board has chosen two examples to demonstrate Petitioner's perceived GMA Capital Facilities shortfall:

1. Sewer:⁴

Petitioner contends that the General Sewer Plan (GSP) shows several large portions of the City which are currently un-served by sewers with the CFP's stated policy being: "[S]ewer extensions are required to fully serve new development within the UGA and will be funded by new development sponsors." Petitioner's PHB, at 9. Petitioner notes that the City has no plan for extending service to areas of the City that are already developed, but lack sewer service. *Id.* Petitioner further contends that while some proposed locations of sewer line extensions exist, these extensions have not been incorporated into the CFP. Petitioner's PHB, at 5.

The City argues that contrary to Petitioner's assertions, the CFP does identify existing and proposed sewer facilities such as a treatment plant, pump stations, the outfall, a proposed pump station, and existing and proposed sewer pipelines. City's Response, at 5 (citing Index 2c, Figure CF-2). The City points out that estimated project costs and revenue sources are also provided. *Id.* (citing Index 2F, Table CF-4). The City also argues future sewer improvements (local distribution lines) will be paid for by developers as development occurs. *Id.* at 5. The City further contends that while Petitioner's assertion that the City should provide a mechanism to serve existing un-sewered development might be laudable, the GMA establishes no requirement that existing properties be connected to the City's sewer system. *Id.* at 5-6.

In reply, Petitioner points to the *Kitsap Citizens for Responsible Planning VI v. Kitsap County (KCRV VI)*, CPSGMHB Case No. 06-3-0007, Order (March 16, 2007), [Legal Issue No. 4, Part B – Capital Facilities element at 9-14], in support of her argument regarding long-term sewer needs for the City. Petitioner asserts, as the Board found in the Kitsap County matter, that:

Sultan has no plan to provide sewer service to undeveloped areas of the UGA apart from whatever developers provide. And, *no plan, whatsoever, for developed areas within the city limits apart from the requirement that septic systems will be replaced over time, if they are within proximity to existing sewer lines ... which guarantees service will not be provided in an efficient manner and perhaps not at all.*

Petitioner's Reply, at 12 (Emphasis added).

2. Parks and Recreation:

⁴ Petitioner presents a similar argument in regard to domestic water service – extensions required to serve new development will be funded by developers and that large portions of the UGA (including properties within the city limits) are not served by domestic water service with no indication that these properties will be served within the planning period. Petitioner's PHB, at 8.

Petitioner contends that the CFP does not provide needed analysis of existing park capacity and recreation facilities, what future facilities will be needed to accommodate future growth, and what the capacity of those proposed facilities will be. *Id.* at 10. In addition, Petitioner asserts that the CFP does not provide an estimate of a 10-year demand or an evaluation of facilities and services needs as required by RCW 36.70A.080(a)-(b). *Id.*

The City maintains that its Parks and Recreation Element (**PRE**) consists of the requirements set forth in .070(3): a) an inventory with locations and capacities, b) the proposed locations and capacities of expanded or new facilities, c) a forecast for future needs, d) a six-year plan for funding, with funding sources and e) a reassessment strategy. *Id.* at 8 (citing Index 2e, Figure CF-5). The City does concede that the PRE fails to contain LOS information but that this information will be included during the upcoming Comprehensive Plan update. *Id.* at 8-9.

In reply, Petitioner argues that the City's defense – LOS information will be reviewed and analyzed at a later date – does not satisfy the GMA's requirement as this information is to be included within the current CFP and PRE. Petitioner's Reply, at 14.

Board Discussion

While the City has made considerable progress in its work on various elements in the Comprehensive Plan in response to repeated challenges brought by the Petitioner and others over the past few years, the City's effort still falls short of the GMA's expectation in regard to its Capital Facilities Plan. Failure to identify necessary facilities and services and their estimated costs makes clear some of the challenges and shortcomings the City still must face.

As noted *supra*, the GMA requires that a CFP provide an inventory of existing capital facilities owned by public entities, a forecast of future needs, and a plan to finance needed facilities. RCW 36.70A.070(3)(a), .070(3)(d). The question for the Board on this portion of this Legal Issue is whether the City's CFP satisfies these requirements. Using the issues identified above, the Board makes the following findings:

Sewer – As the Board sees it, the City has provided an inventory of existing sewer facilities within its CFP (*see* CFP, Figure CF-2, at VIII-5; CFP, Sewer Facilities, at VIII-4 to VIII-8). It is the City's ability to address future needs that is at question. The Board finds that solely relying on future development to provide for major infrastructure, such as sewer, and not planning to have the capacity to provide service to existing development, fails to meet the requirements of the GMA. As the Board stated in *KCRP VI*, Order of Non-Compliance [Re: Kingston Sub-Area Plan], CPSGMHB Case No. 06-03-0007:

Kitsap's comprehensive plan requires developers to pay for the construction of local sewer connections as new projects are built. However, as Petitioners contend, this does not address the currently un-sewered residential areas within

the Kingston UGA. Kitsap's Capital Facilities Plan Population Allocation indicates that the Kingston Sewer Service Area in 2003 had 1,530 sewered and 1,105 unsewered In reviewing the record, the Board finds that the County *has no strategy to ensure that population of the existing UGA is brought up to an urban level of sanitary service.*

Order, at 11 (Emphasis added). The Board recently affirmed the conclusion that a jurisdiction must ensure that within urban areas there will be adequate and available sewer capacity to serve the existing, un-sewered urban population within the 20-year planning period. *See Suquamish Tribe, et al v. Kitsap County*, CPSGMHB Case No. 07-3-0019c, at 26 (Final Decision and Order, Aug. 15, 2007).

The similarities here with the City of Sultan are evident. Although the Board recognizes the fact that developers are responsible for infrastructure to serve individual units within their proposed development, the City is responsible to provide facilities which adequately serve those units (i.e. treatment plants, trunk lines, pump stations). It is unclear from the language of the CFP that the City has planned for these types of facilities. The CFP notes that sanitary sewer service within the UGA currently serves approximately 1,600 customers with approximately 27 percent of properties located within the city limits on septic systems. Core Document, Comprehensive Plan – CFP, at VIII-4-6. Except for a requirement that all buildings within 120 feet of a city sewer system connect *new* plumbing fixtures to the system (SMC 13.08.020), the City has made no provision for service to the un-sewered population. Nor has the City identified the un-sewered areas or the extent of the needs to make sure capacity will be available and adequate to serve the existing population.

Therefore, the Board finds that, in regard to sanitary sewers, the City has not complied with RCW 36.70A.020(12) and 36.70A.070(3)'s mandate to provide adequate and necessary facilities to support *existing and new* development within the UGAs within the 20-year planning period. The CFP fails to provide an adequate needs assessment (i.e. current needs, future needs, and expected level of service) so as to properly document the needed funding to supply these services, both in regard to the funds required as well as the source of the needed funds.

Parks and Recreation – As was the case for sewer systems, the City's CFP contains an inventory of Park, Recreation, and Open Space Facilities (*see* CFP, Figure CF-5, at VIII-17) but no true analysis in regard to future needs. The City has acknowledged its current work on the PRE for the Comprehensive Plan, in regard to LOS standards, is still being finalized and will be included in the next Comprehensive Plan update. However, as the City correctly notes, the Petitioner's challenge in this matter is to the CFP and not the PRE itself. Therefore, the Board's review must focus on whether the City has properly included park and recreation facilities within its CFP as required by 36.70A.070(3), not the requirements set forth in .070(8).

The CFP does provide the location of existing and proposed parks and recreational facilities (Figure CF-5, at VIII-17) and estimated project costs and funding sources (Table CF-4, at VIII-23), but it fails to provide an analysis of the forecast of future needs – an analysis that is

undoubtedly linked to the LOS standards the City has acknowledged are not yet established. Without this information, the CFP, in regard to parks and recreation facilities, does not fulfill the analysis requirements of .070(3).

As was the case for the provision of sanitary sewers, with parks and recreation, the CFP also fails to provide an adequate needs assessment (i.e. current needs, future needs, and expected level of service) so as to properly document the needed funding to supply these services, both in regard to the funds required as well as the source of the needed funds.

Conclusion

As exhibited in the above examples, the City is lacking in the detail needed for identifying necessary facilities and services and their estimated costs for the CFP. The Board finds and concludes that the City of Sultan's adoption of Ordinance 942-06, adopting an amended and updated CFP, **fails to comply** with RCW 36.70A.070(3) and **was not guided** by RCW 36.70A.020(12).

Issue B -- Excluding maintenance items from the definition of a capital facility.

The Petitioner argues that a capital facilities needs analysis requires more than a review for expansion of existing facilities or the construction of new facilities, but also the maintenance of existing capital facilities as well. Petitioner's PHB, at 12. Petitioner asserts that while the CFP provides that "the maintenance and operation of the facilities described above [is not considered a capital facility]," many of the projects in the CFP are maintenance projects. *Id.* (citing CFP at VIII-1; Table CF-4). Petitioner further contends that the City's policy makes it impossible to ascertain which projects accommodate new growth or address the maintenance of existing facilities and that the City must distinguish in its CFP between projects that are "maintenance-related" and those projects "necessary to accommodate growth." *Id.*

The City agrees with the Petitioner in regard to the definition provided within the CFP. However, the City contends that the "maintenance" required to be included in a capital facilities element (as held by the Board in *WSDF I*, CPSGMHB Case No. 94-3-0016, FDO at 45) is not every day routine maintenance but the replacement or rehabilitation of existing but failing facilities.⁵ City Response, at 10-11.

Petitioner counters in her reply brief that the City misses the point and contends that the definition of "ordinary maintenance" which the City provides is irrelevant to the issue at hand. The Petitioner asserts that routine daily maintenance is not part of her argument but that the plain language of the CFP, which excludes maintenance, is inconsistent with the listed projects which

⁵ The City uses the example of a culvert cleaning. The City contends simple maintenance would include the cleaning of the culvert, whereas replacing the culvert – if the culvert were collapsing or cracked – would be identified by the City as "replacement" or "rehabilitation." City Response, at 11.

are clearly maintenance as opposed to capacity-related issues. Petitioner’s Reply, at 16-17. Petitioner further argues that the language utilized by the City creates an ambiguity and an inconsistency, in that one can infer from the exclusion of maintenance that all projects in the CFP must, therefore, be new or expanded facilities, which they are not. *Id.* The Petitioner concludes the reader should not be left to decipher that, in spite of the exclusion of maintenance in the definition of capital facilities; some projects are to maintain existing facilities. *Id.*

Board Discussion

The crux of Petitioner’s argument is that the CFP must distinguish between maintenance projects (rehabilitation/replacement) and those necessary to accommodate growth (new or expanded facilities).⁶ In *WSDFI*, the Board concluded that a CFP must not only address the construction of new or expanded facilities but also, as a sound planning principle, the maintenance of existing capital facilities.⁷ *WSDFI*, CPSGMHB Case 94-3-0016, FDO at 32. Although the City has the discretion to separate maintenance projects from new capital facilities projects within its CFP, at no time has the Board held that a CFP must distinguish between maintenance projects and new projects, as both are “necessary to support development” of the community.

Here, the parties argue about the meaning of the word “maintenance” within the City’s CFP – with Petitioner asserting that it effectively precludes the maintenance of existing facilities and the City arguing that it is limited to routine, daily maintenance but not replacement or rehabilitation maintenance. This Board has never held, nor will it now hold, that minor, routine maintenance be included within the CFP and, from the Board’s review, it does not appear from the project list (see Table CF-4) that the stated projects are minor or routine maintenance.

However, the language cited by the Petitioner does create an ambiguity in regard to exactly what types of projects are addressed by the CFP. In fact, the project list contained in Table CF-4, which lists projects solely by various street names (i.e. Date Avenue or Cascade View Drive) without any descriptive verbiage (i.e. widening, resurfacing, etc.), leaves the Board and any reader of the CFP wondering what type of project the City is planning on funding.

Conclusion

The Board finds and concludes that RCW 36.70A.070(3) does not mandate that *major maintenance* projects be distinguished from *new/expanded* facilities projects. Rather, the CFP must incorporate both, and the City has done so. Although the language used by the City in

⁶ The Board notes that often a CFE will distinguish between “capacity” projects – those improvement projects that are needed to meet new growth pressure, and “non-capacity” projects – those improvements that are needed to maintain service to meet existing needs. This is a distinction the City should consider to clarify its funded projects, so as to inform the public of the City’s intentions.

⁷ The Board’s conclusion in *WSDFI* that the maintenance of existing capital facilities should be included within a CFP stems from the phrase “existing needs” found in .070(3)(e), which provides that a jurisdiction must reassess its land use element if funding falls short of meeting existing needs.

defining capital facilities creates some confusion, the City appears to understand that the maintenance of existing capital facilities is a required element of a CFP and has demonstrated this through both the project listing of the CFP and the City's argument set forth in briefing and at the HOM. The Board finds no violation of RCW 36.70A.070(3).

Issue C – Failing to incorporate adopted levels of service for the CFP.

Petitioner asserts the GMA requires the City's CFP to include "locally-established minimum standards"⁸ and the City, contrary to this requirement and despite repeated requests, has chosen to separate these required standards from the CFP. Petitioner's PHB, at 13-14 (citing to *McVittie v. Snohomish County (McVittie I)*, CPSGMHB Case No. 99-3-0016c, at 25 (Final Decision and Order, Feb 9, 2000).

In contrast, the City argues that *McVittie* stands for the proposition that a Level of Service (LOS) must be set only for transportation and that other public facilities require a "locally-established minimum standard." City's Response at 12. The City contends that its urban design standards⁹, the Water System Plan, the General Sewer Plan, and the Surface Water Quality Management Plan provide for the required "locally-established minimum standards." *Id.* at 12-13. At the HOM, the City further argues this point stating that the GMA did not require an LOS requirement for each capital facility in the Capital Facility Element. HOM Transcript, at 57.

In reply, the Petitioner simply stated that cited authority was provided in the PHB that supports her assertion that a CFP must contain LOS standards. Petitioner's Reply, at 17.

Board Discussion

This Board has previously held that the GMA's Goal 12 requires a jurisdiction to establish minimum standards so as to provide the basis for an objective measurement of needs and system performance for those facilities which the jurisdiction has identified as necessary and, read in conjunction with 36.70A.070(3), ***directs that that these standards be contained within the CFP.*** *McVittie v. Snohomish County (McVittie VI)*, CPSGMHB Case No. 01-3-0002, at 11-12 (Final Decision and Order, July 25, 2001); *McVittie I*, CPSGMHB Case No. 99-3-0016c, FDO at 25.

However, the City is correct in that the GMA explicitly requires LOS standards to be included for transportation facilities in the Transportation Element, RCW 36.70A.070(6)(iii)(B), while no such explicit language appears in the requirements for the Capital Facilities Element. *See* RCW 36.70A.070(3).

⁸ From her briefing, Petitioner appears to use "locally-established minimum standards" and "level of service" standards interchangeably.

⁹ The City cites to Attachment 4 of its briefing which is excerpts from SMC, Chapter 16.28, and includes 16.28.180 - .240. The Board is unclear if all of these sections represent the urban design standards the City references or if a single section, i.e. 16.28.230 – Minimum requirements and improvement standards – is the standard referenced.

Nonetheless, the parallels between these two GMA requirements are significant and striking, as illustrated in the following chart:

Comparison of CFE and TE Requirements

Requirement	Capital Facilities Element RCW 36.70A.070(3)	Transportation Element RCW 36.70A.070(6)
Inventory	.070(3)(a)	.070(6)(iii)(A)
LOS standards	Implied, but not called out	.070(6)(3)(B)
Future needs assessment	.070(3)(b)	.070(6)(iii)(F)
Financing plan – 6 years	.070(3)(d)	.070(6)(iv)(A) and (B)
Reassessment	.070(3)(ea)	.070(6)(iv)(C)

The LOS standards are the basis for the needs analysis, which identifies future needed facilities and capacity. Absent an LOS standard, the future projects become a “wish list” with no needs assessment to support them. This is why the Board required, in the *McVittie* series of cases, that “locally-established minimum” standards of Goal 12 – or “LOS standards” – must be contained in the CFE.

And it is from these standards - whether they be termed “locally established minimum” standards or “LOS” standards - that a jurisdiction is able to analyze whether or not the capital facilities it has identified as “necessary to support development” are, in fact, adequate. Additionally, the inclusion of LOS standards in the CFE means that they are formally adopted by the City (as part of the Comprehensive Plan) and may not be revised without direct approval of the elected officials of the City. These LOS standards have meaning and impact upon what the City intends for its future.

Within its CFP, the City has identified the following “capital” facilities:

- Water Facilities
- Sewer Facilities
- Surface Water Management Facilities
- Transportation Facilities
- Parks and Recreation Facilities
- General Government Facilities (which include the following buildings – City Hall, Public Works, Police Department, Community Center, Post Office, Museum, Tourist Center)

Review of the CFE reveals that only an LOS standard for the City’s transportation facilities is identified.¹⁰ CFP, at VIII-13. Reference is made to LOS levels for Parks and Recreation, but this reference simply states that the LOS for parks will be reviewed as part of the Comprehensive Plan update; a specific LOS standard is not identified. CFP, VIII-16. No other LOS standards

¹⁰ The CFE assigns a LOS “B” for its arterial and local access streets.

are identified in the CFE. Further, there is no reference made to where, either within the Comprehensive Plan or related documents (i.e. General Water Plan), a reader could find this information.¹¹ Without the standards being clearly provided, the Board questions just how the City could have conducted the required future needs analysis so as to satisfy the requirement of .070(3)(b) and Goal 12's requirement not to decrease current levels of service below minimum standards.

The Board finds and concludes that the City's CFP does not furnish adequate information identifying its established and adopted minimum standards – LOS standards. As became clear in the Hearing on the Merits, the City needs to specify its LOS standards in the CFE and furnish more analysis, or the location of such analysis of how its future needs were determined. *See* HOM Transcript, pgs. 44-67.

One of the most important audiences for reading a local GMA plan is an average citizen who may desire additional information on the City's future intentions and the quality of life it is committing to provide. A reading of the City's CFP does not provide adequate information to allow the reader to determine whether the City intends to improve upon its current levels of service, merely maintain them, or allow them to decline. Each jurisdiction owes this type of explicit honesty to its citizenry.

Conclusion

The Board finds and concludes that the City of Sultan's adoption of Ordinance 942-06 **fails to comply** with RCW 36.70A.070(3)(b) and **was not guided** by RCW 36.70A.020(12).

Issue D – Failing to concurrently reassess the land use assumptions, funding strategies, and/or level of services, triggered by funding shortfalls.

Petitioner argues the City has failed to take action to address funding shortfalls related to capital facilities. In particular, Petitioner notes that transportation, parks and recreation, and police have clear financial shortfalls and the City fails to provide a strategy to meet the current level of service requirements. Petitioner's PHB, at 14.

Petitioner notes that while the CFP mentions the LOS failures, no attempt has been made to reassess land use assumptions, find additional funding, or lower the established LOS to reach a more attainable standard. Petitioner's PHB, at 15. Petitioner asserts that the current LOS for parks is 42.6 acres per 1,000 people and the LOS for police is 12 police officers, with the

¹¹ While the City claims it has LOS standards established in other documents, they need to be included in the CFE. However, the needs analysis may be referenced in a Technical Appendix or another document that is incorporated by reference into the CFE. If the needs analysis is contained in another document, it must be specifically located to guide the reader to its location.

minimum standard, as established by the Sultan City Council, not being met, violating Goal 12. *Id.*

The City argues that while the Petitioner asserts the City has existing shortfalls, the issue presented by the Petitioner questions whether the City's CFE contains a reassessment strategy that satisfies the GMA, which it does.¹² City's Response, at 14.

In reply, the Petitioner argues that the City misreads the issues in this case. Petitioner's Reply, at 17. According to the Petitioner, the issue does not question whether or not the City has an assessment strategy, but rather that the City has not performed the reassessment in light of clear and indisputable funding shortfalls. *Id.* at 17-18.

Board Discussion

The City contends that it has satisfied the requirements of RCW 36.70A.070(3) because its CFP provides a reassessment strategy. The Board acknowledges that the City has made great strides in updating its CPF, and its Comprehensive Plan in general. The Board notes that the City has adopted a reassessment strategy (CFP, at VIII-26) and has developed goals and policies to address land use and financing issues (CFP, at VIII-27 through VIII-33).

However, as the Petitioner correctly notes, the issue presented for resolution by the Board asked if the City failed "to concurrently reassess the land use assumptions, funding strategies and/or level or services, triggered by funding shortfalls." PFR, at 3. The phrasing used by Petitioner in her issue statement clearly questions, and her argument supports, whether the City has performed the act of "reassessment," not whether it has adopted a strategy for such reassessment.

The Board has consistently held that land use assumptions, capital facilities, and funding are interrelated and must move together. (See *McVittie I*, CPSGMHB Case No. 99-3-0016c). The GMA is clear in RCW 36.70A.070(3) that reassessment of the land use element is required "if probable funding falls short of meeting existing needs to ensure that land use element, capital facilities element, and financing plan within the capital facilities element are coordinated and consistent." The reason that the GMA has included a requirement for a reassessment strategy is for cities and counties to implement that strategy upon identification of funding shortfalls which may create inconsistencies within a comprehensive plan. Its inclusion is not simply to fill space within the CFE. The City does not deny that these shortfalls exist especially in regard to transportation and parks facilities. But, no where does the City demonstrate that it has performed one of the three actions set forth in its Reassessment Strategy to address the funding shortfall issue.

The Board finds that Petitioner has carried the burden of proof that the City has not complied with its obligation to implement its reassessment strategy, once it has determined that a funding

¹² While the City does not provide a citation for where in its CFE the reassessment strategy is located, the Board located it at Page VIII-26 of the CFP.

shortfall has occurred. The GMA requires more than simply the adoption of a strategy. It requires that a jurisdiction actually use the strategy it has adopted.

Conclusion

The Board finds and concludes that the City of Sultan's adoption of Ordinance 942-06 **fails to comply** with RCW 36.70A.070(3)(e) and **was not guided** by RCW 36.70A.020(12).

Conclusion

Pursuant to RCW 36.70A.320(3), the Board finds that the Petitioner has carried the burden of proof in demonstrating that the City of Sultan's adoption of Ordinance 942-06, in regard to Legal Issues 1(A), 1(C), and 1(D), was **clearly erroneous** in view of the entire record before the Board and does not comply with the requirements of RCW 36.70A.070(3) nor has the City's action been guided by Goal 12 – RCW 36.70A.020(12).

V. INVALIDITY

The Board has previously held that a request for an order of invalidity is a prayer for relief and, as such, does not need to be framed in the PFR as a legal issue. *See King County v. Snohomish County*, CPSGMHB Case No. 03-3-0011, Final Decision and Order, (Oct. 13, 2003) at 18. Petitioner here has requested that the Board find Ordinance 942-06 – City of Sultan Capital Facilities Plan – invalid and that the Board request the Governor to apply appropriate sanctions, either now, or if compliance is not achieved during the allotted compliance period. PFR, at 3.

Applicable Law

The GMA's Invalidity Provision, RCW 36.70A.302, provides:

- (1) A board may determine that part or all of a comprehensive plan or development regulation are invalid if the board:
 - (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
 - (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
 - (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.
- (2) A determination of invalidity is prospective in effect and does not extinguish rights that vested under state or local law before receipt of the board's order by the city or county. The determination of invalidity does not apply to a completed development permit

application for a project that vested under state or local law before receipt of the board's order by the county or city or to related construction permits for that project.

Discussion and Analysis

This is the ninth PFR filed by Jocelynn Fallgatter since 2004. Four of the petitions have alleged inadequacies in the City of Sultan's CFP/CFE and transportation plans. Petitioner asserts that:

“[T]he City's CFP does not manage future growth; it perpetuates the deficient planning scheme in place since the first PFR was filed ... [it is a] paradoxical planning scheme whereby one plan precludes another part of the plan from meeting the statutory requirements of the [GMA], the contradicting policies and statements and the as yet un-reconciled UGA mapping, guarantees that the City's CFP not only fails to meet the specific requirements of the GMA, but that it substantially thwarts fulfillment of the goals of the Act.”

Petitioner's Reply at 18.

In the discussion of the Legal Issue in this case, the Board found and concluded that the City of Sultan's adoption of Ordinance 942-06, City of Sultan Capital Facilities Plan, was **clearly erroneous** and **non-compliant** with the requirements of RCW 36.70A.070(3). The Board further found and concluded that the City's action **was not guided by the goals** of the Act, specifically Goal 12 – regarding available and adequate public facilities.¹³ Further, the Board is **remanding** the Capital Facilities Plan with direction to the City to take legislative action to comply with the goals and requirements of the GMA as set forth in this Order.

In light of these deficiencies, the Board further finds and concludes that the continued validity of the CFP [Ordinance 942-06] substantially interferes with Goal 12 – RCW 36.70A.020(12), because the CFP does not demonstrate that adequate public facilities and services, in particular domestic water and sanitary sewer, will be available within the planning period for the population with the UGA. Therefore, the Board enters a **determination of invalidity** with respect to the CFP – Ordinance 942-06, as discussed *supra*.

Accordingly, the Board enters a **determination of invalidity and remands Ordinance 942-06** to the City of Sultan to take legislative action consistent with this Order.

¹³Although Petitioner's Legal Issue relied on Goals 1, 3, 7, and 12, as noted *supra*, argument presented was supported by Goal 12 and therefore any allegation that the City violated the other cited goals was deemed abandoned.

VI. ORDER

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

1. As discussed *supra*, the City of Sultan's adoption of Ordinance 942-06 [Capital Facilities Element/Plan] was **clearly erroneous**.
2. As discussed *supra*, Ordinance 942-06 does not comply with the requirements of RCW 36.70A.070(3) and .020(12), since it does not demonstrate that adequate public facilities and services [i.e. sanitary sewer, domestic water, parks and recreation] will be available within the planning period for the population within the urban growth area.
3. As discussed *supra*, Ordinance 942-06 does not comply with the requirements of RCW 36.70A.070(3) and .020(12), because it fails to incorporate adopted locally-established minimum service standards or "Levels of Services" within the Capital Facilities Plan.
4. As discussed *supra*, Ordinance 942-06 does not comply with the requirements of RCW 36.70A.070(3) and .020(12), because based on identified funding shortfalls, the City failed to implement reassessment strategies set forth in its Capital Facilities Plan to address such shortfalls.
5. Additionally, as discussed *supra*, the Board has found that the continued validity of the Capital Facilities Plan substantially interferes with the fulfillment of Goal 12 – RCW 36.70A.020(12). Consequently, the Board has entered a determination of invalidity with respect to Ordinance 942-06.
6. The Board **remands** Ordinance 942-06 to the City of Sultan with direction to take the necessary legislative actions to comply with the requirements of RCW 36.70A.070(3) and RCW 36.70A.020(12), as set forth and interpreted in this Order.
 - **The Board establishes January 31, 2008, as the deadline for the City of Sultan to take appropriate legislative action to comply with the GMA as interpreted and set forth in this Order.**
 - By no later than **February 14, 2008**, the City of Sultan shall file with the Board an original and four copies of the legislative enactment described above, along with a statement of how the enactment complies with the GMA and this Order (**Statement of Actions Taken to Comply – SATC**). The City shall simultaneously serve a copy of the legislative enactment(s) and compliance statement, with attachments, on the Petitioner. By this same date, the City shall also file a **Compliance Index** listing the procedures (meetings, hearings, etc.) occurring during the compliance period and materials (documents, reports,

analysis, testimony, etc.) considered during the compliance period in taking the compliance action.

- By no later than **February 28, 2008**, the Petitioner may file with the Board an original and four copies of a **Response to the City's SATC**. The Petitioner shall simultaneously serve a copy of her Response to the City's SATC on the City.
- By no later than **March 6, 2008**, the City may file with the Board an original and four copies of the City's **Reply to Petitioner's Response**. The City shall simultaneously serve a copy of its Reply on the Petitioner.
- Pursuant to RCW 36.70A.330(1), the Board hereby schedules the **Compliance Hearing** in this matter for **10:00 a.m. on March 13, 2008**, at the Board's offices. If the parties so stipulate, the Board will consider conducting the Compliance Hearing telephonically. If the City takes the required legislative action prior to the January 31, 2008, deadline set forth in this Order, the City may file a motion with the Board requesting an adjustment to this compliance schedule.

So ORDERED this 5th day of September, 2007.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

David O. Earling
Presiding Officer

Edward G. McGuire, AICP
Board Member

Margaret A. Pageler
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.¹⁴

¹⁴ 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.

APPENDIX A

On February 22, 2007, the Board issued a Notice of Hearing (**NOH**) which scheduled a Prehearing Conference (**PHC**) for March 12, 2007, identified August 6, 2007 as the deadline for a Final Decision and Order (**FDO**), and proposed a tentative schedule for the conduct of the case that included a Hearing on the Merits of the Petition (**HOM**) on June 25, 2007.

On March 12, 2007, the Board received the City of Sultan's Index of Record (**Index**).

On March 12, 2007, a Prehearing Conference was held. The Petitioner and Respondent agreed to try to reach an agreement for a Settlement Extension and report back to the Board.

On March 21, 2007, the Board received a Joint Motion for Extension of Case Schedule (**Request for Settlement Extension**) from Petitioner and Respondent requesting a 30-day settlement extension, and a revised tentative case schedule.

On March 22, 2007, the Board issued its Prehearing Order and Granting of Settlement Extension.

On April 30, 2007, the Board received correspondence from the Petitioner requesting that the briefing schedule in this matter be resumed.

On May 2, 2007, the Board received Petitioner's Motion to Supplement the Index of Record and/or Take Office Notice with eight attachments (**Motion to Supplement**).

On May 4, 2007, the Board received the City's Supplemental Index of Record (**Amended Index**).

On May 8, 2007, the Board received the City's Response and Objection to the Petitioner's Motion to Supplement (**City's Response to Motion to Supplement**).

On May 22, 2007, the Board received the Petitioner's Rebuttal to the City's Response to Motion to Supplement (**Petitioner's Rebuttal to Motion**).

On June 5, 2007, the Board issued its Order on Motion to Supplement the Record (**Order on Motion**).

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)

On June 25, 2007, the Board received the Petitioner's Prehearing Brief with seven exhibits (**Petitioner's PHB**).

On July 10, 2007, the Board received the City's Prehearing Brief with 18 exhibits (**City's Response**).

On July 16, 2007, the Board received the Petitioner's Reply to the City's Response (**Petitioner's Reply**).

On July 26, 2007, the Board held the Hearing on the Merits in the matter of *Fallgatter IX v. City of Sultan*, CPSGMHB Case No. 07-3-0017.