



## I. BACKGROUND<sup>1</sup>

In March of 2006, the City of Woodinville adopted a moratorium banning the receipt or processing of all land use or building permit applications in its low-density residential zones. This moratorium was extended by a subsequent ordinance until March of 2007. At that time, the City adopted Ordinance No. 431<sup>2</sup>, enacting interim regulations for its low-density residential zones. The interim regulations removed a restriction on development of less than 4 dwelling units per acre.

In May of 2007, the Board received two separate petitions for review (**PFR**), one from Phoenix Development LLC and one from Peter Rothschild. Both Petitioners challenged the interim regulations adopted by the City of Woodinville. The Board consolidated the two PFRs into a single case.

During May and June, the Board conducted the prehearing conference, allowed intervention by Concerned Neighbors of Wellington (**CNW**), and issued a prehearing order establishing the final schedule and Legal Issues to be resolved by the Board. In July, the Board addressed objections to intervention of CNW and issued an Order allowing supplementation of the record with seven items. There were no dispositive motions filed in this matter.

The parties filed timely prehearing briefing, noted as follows and as used throughout this Order:

- Phoenix Development's Prehearing Brief – **Phoenix PHB**
- Pre-hearing Brief of Peter Rothschild – **Rothschild PHB**
- City of Woodinville's Prehearing Brief – **Woodinville Response**
- Prehearing Brief of Intervenor Concerned Neighbors of Wellington – **CNW Response**
- Phoenix Development's Prehearing Reply Brief – **Phoenix Reply**
- Prehearing Reply Brief of Petitioner Rothschild – **Rothschild Reply**
- Motion to Amend Petition for Review – **Rothschild Amend PFR**
- City of Woodinville's Opposition to Petitioner Rothschild's Motion to Amend PFR – **Woodinville Response Amend PFR**
- Intervenor Concerned Neighbors of Wellington's Response to Motion to Amend PFR by Peter Rothschild – **CNW Response Amend PFR**

On September 27, 2007, the Board held a Hearing on the Merits (**HOM**) at the Board's offices in Suite 2356, 800 5<sup>th</sup> Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, David Earling and Margaret Pageler were present for the

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<sup>1</sup> For the complete and detailed procedural history of this matter *see* Appendix A.

<sup>2</sup> Ordinance No. 431 expired by its own terms on September 12, 2007. On August 20, 2007, the City adopted Ordinance 447 for the purpose of renewing Ordinance No. 431 for another six months.

Board. Board Attorney Julie Ainsworth-Taylor also attended. Petitioner Phoenix Development was represented by G. Richard Hill and Jessica M. Clawson; Petitioner Peter Rothschild appeared *pro se*. Respondent City of Woodinville was represented by Peter J. Eglick and Jane S. Kiker. Intervenor Concerned Neighbors of Wellington was represented by Richard Aramburu. Also in attendance at the HOM were: Loree Quade, Bob Vick, Ray Sturtz, Hank Stecker, Jan Culpepper, Jesse De Nike, Jeff Glickman and Greg Rubstello. Court reporting services were provided by Katie A. Eskew of Byers and Anderson LLC. The hearing convened at 10:00 a.m. and adjourned at approximately 1:20 p.m. A transcript of the proceeding was ordered. At the HOM, the Presiding Officer directed the parties to provide post-HOM briefing on the status of Ordinance No. 447 by October 4, 2007.

On October 4, 2007, the Board received: 1) “The City of Woodinville’s Response to the Board’s Direction for Submission of Supplemental Briefing Regarding the Status of Ordinance No. 447” (**Woodinville 447**); 2) “Phoenix Development’s Post-hearing Brief Regarding Ordinance 447’s Renewal of Ordinance 431” (**Phoenix 447**); 3) “Ordinance 447 Brief of Petitioner Peter Rothschild” (**Rothschild 447**); 4) “Phoenix Development’s Motion to Supplement the Record” including one attachment [Minutes of August 20, 2007 Council Meeting] (**Phoenix Motion – Supp. 2**); and 5) “City of Woodinville’s 1) Motion to Strike Phoenix Development’s Motion to Supplement the Record; and 2) Motion to Strike Portions of Phoenix Development’s and Rothschild’s Post-hearing Briefs Regarding Ordinance 447” (**Woodinville Motions to Strike**).

On October 5, 2007, the Board received the Hearing on the Merits Transcript (**HOM Transcript**).

On October 10, 2007, the Board received “Phoenix Development’s Response to Motions to Strike” (**Phoenix Response – Motions to Strike**).

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

Upon receipt of a petition challenging a local jurisdiction’s GMA actions, the legislature directed the Boards to hear and determine whether the challenged actions are 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). As articulated most recently by the Supreme Court, “the Board is empowered to determine whether county decisions comply with GMA requirements, to remand noncompliant ordinances to counties, and even to invalidate part or all of a comprehensive plan or development regulation until it is brought into compliance.” *Lewis County v. Western Washington Growth Management Hearings Board (Lewis County)*, 157 Wn.2d 488 at 498, fn. 7, 139 P.3d 1096 (2006).

Legislative enactments adopted by the City of Woodinville pursuant to the Act are presumed valid upon adoption. RCW 36.70A.320(1). The burden is on the Petitioners to demonstrate that the actions taken by the City of Woodinville are not in compliance with the Act. RCW 36.70A.320(2).

Pursuant to RCW 36.70A.320(3), the Board “shall find compliance unless it determines that the actions taken by [Woodinville] are clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA].” For the Board to find the action of the City of Woodinville 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, 849 P.2d 646 (1993).<sup>3</sup>

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 Woodinville in how it plans for growth, provided that its policy choices are consistent with the goals and requirements of the GMA. The Supreme Court has stated: “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). In *Lewis County*, the Court reaffirmed and clarified its holding in *Quadrant*, stating that: “. . . the 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.” 157 Wn. 2d at 506, fn. 16.<sup>4</sup>

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<sup>3</sup> The State Supreme Court’s most recent delineation of the clearly erroneous standard is found in *Swinomish Indian Tribal Community v. Western Washington Growth Management Hearings Board*, Docket Number 76339-9 (September 13, 2007), at 20, fn.8:

Without question, the “clearly erroneous” standard requires that the Board give deference to the county, but all standards of review require much in the context of administrative action. The relevant question is the degree of deference to be granted under the “clearly erroneous” standard. The amount is neither unlimited nor does it approximate a rubber stamp. It requires the Board to give the county’s action a “critical review” and is a “more intense standard of review” than the arbitrary and capricious standard. *See, e.g., Cougar Mountain Assocs. v. King County*, 11 Wn.2d 742, 749, 765 P.2d 264 (1988). And even a more deferential “arbitrary and capricious” standard must not be used as a “rubber stamp” of administrative actions. *See Ocean Advocates v. United States Army Corps of Eng’rs*, 361 F.3d 1108, 1118, 1119 (9<sup>th</sup> Cir, 2004).

<sup>4</sup> The *Lewis County* majority 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*, 142 Wn.2d 543, 561, 14 P.3d 133, 142 (2000). *See also, Cooper Point Association v. Thurston County*, 108 Wash. App. 429, 444, 31 P.3d 28 (2001) (“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 scope of the Board's review is limited to determining whether a jurisdiction has achieved compliance with the GMA with respect to only those issues presented in a timely Petition for Review. RCW 36.70A.290(1).

### **III. BOARD JURISDICTION, PREFATORY NOTE, AND PRELIMINARY MATTERS**

#### **A. BOARD JURISDICTION**

The Board finds that the Phoenix Development and Rothschild PFR's were timely filed, pursuant to RCW 36.70A.290(2); both Petitioners have standing to appear before the Board, pursuant to RCW 36.70A.280(2); and the Board has subject matter jurisdiction over the challenged ordinance, which amends the City of Woodinville's GMA Plan implementing development regulations, pursuant to RCW 36.70A.280(1)(a).

#### **B. PREFATORY NOTE**

##### The Action Challenged:

The City of Woodinville's Ordinance No. 431 amended its development regulations [Woodinville Municipal Code – (WMC) – 21.04.080(1)(a)] to delete certain language from its requirements for low-density residential zones. The relevant amendatory section is as follows; deleted language is shown as ~~strikeout~~:

WMC 21.04.080 Residential zones.

- (1) The purpose of the urban residential zone (R) is to implement Comprehensive Plan Goals and Policies for housing quality, diversity and affordability, and to efficiently use residential land, public services and energy. These purposes are accomplished by:
  - a. Providing, in the low density zones (R-1 thorough R-4), for predominantly single-family detached dwelling units. Other development types, such as duplexes and accessory dwelling units, are allowed under special circumstances. ~~Developments with densities of less than R-4 are allowed only if adequate services cannot be provided;~~

Ordinance No. 431, Section 2, at 5. The effect of this deletion is that developments of less than R-4 are permitted without restriction. Petitioners allege that this level of development is not an urban density but rather perpetuates low-density sprawl in violation of various portions of the GMA.

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the requirements and goals of the GMA"); *affirmed Thurston County v. Western Washington Growth Management Hearings Board*, 148 Wn.2d 1, 15, 57 P.3<sup>rd</sup> 1156 (2002).

Order of discussion and analysis:

The Board addresses the Legal Issues posed in this proceeding in the following order: Mootness, Amendment of PFR, Legal Issues 1, 2, 3, and 4 as stated in the PHO.

The Board heard oral argument on Petitioner Rothschild’s Motion to Amend the PFR to include reference to Ordinance No. 447. The Board took the matter under advisement and addresses it in this FDO under Legal Issues. There are several threshold legal matters for the Board to address prior to turning to the Legal Issues presented in the PFRs and PHO. These matters include: The Board’s jurisdiction over “interim ordinances;” the question of whether Ordinance No. 431 is moot; the effect, if any, of Ordinance No. 447; Rothschild’s Motion to Amend the PFR; and the post-HOM motions to strike. These issues are addressed under part IV. “Preliminary Legal Issues and Discussion,” *infra*.

**C. PRELIMINARY MATTERS**

Oral Rulings at the HOM:

There were numerous “proposed exhibits” attached to the briefing of Petitioner Phoenix, Respondent City of Woodinville, and Intervenor CNW that were addressed at the HOM. The following table reflects the Board’s oral rulings at the HOM.

<b>Proposed Exhibit: Items and Documents</b>	<b>Ruling</b>
Woodinville’s Response Brief:	
A. Excerpts from King County “draft” Buildable Lands Report	<i>Board takes official notice – HOM Ex. 1</i>
B. “Kent case” – Supreme Court Cause No. 79975-0 – Order Granting Motion to Dismiss	<i>Board takes official notice – HOM Ex. 2</i>
C. Woodinville Ordinance No. 447	<i>Board takes official notice – HOM Ex. 3</i>
D. “Normandy Park case” – King County Superior Court – Final Order and Judgment Granting Relief Under Administrative Procedures Act	<i>Board takes official notice – HOM Ex. 4</i>
E. “Memo on Buildable Lands” (Jones and Stokes) – undated	<i>Admitted – HOM Ex. 5</i>
CNW’s Response Brief	
1. Phoenix “Land Use Petition and Complaint for Damages” with two attachments: A) Montevalla denial of R-4 by Woodinville Council; and B) Woods Trail denial of R-4 by Woodinville Council.	<i>Admitted – HOM Ex 6, 6a and 6b, respectively</i>

Phoenix Response Brief	
1. Spring 2007 Urban Lawyer, “The Role of Statewide Growth Management Legislation in Advancing the Tenets of Smart Growth”	<i>Board takes official notice – HOM Ex. 7</i>

#### **IV. THRESHOLD LEGAL ISSUES AND DISCUSSION**

##### **A. CONTEXT of the CHALLENGE**

The genesis of this challenge appears to have occurred at a Woodinville Council Retreat in the Fall of 2005, where the Council received a report on recent rulings by the State’s various courts regarding Growth Board decisions pertaining to urban densities. A staff white paper prepared for the Council in January of 2006, summarized the retreat discussions and recommended that the City pursue a “Sustainable Development Study” (SDS). One of the purposes of pursuing such a study was to “review GMA compliance strategies and to make appropriate and defensible changes to affirm local control.” Supp. Ex. 1, at 2. Subsequently, the City retained the services of planning and legal consultants to assist in this effort. A Citizens Advisory Panel (CAP) was also created to oversee the work on the SDS. To create time for the SDS review to occur, without having development occur in the meantime, the City undertook a series of legislative actions to restrict development. The City’s relevant moratorium and interim enactments are as follows:

- Ordinance No. 419, adopted March 20, 2006, imposing a *six-month moratorium* “upon the receipt and processing of building permit applications, land use applications, and any other permit application for the development, rezoning or improvement of real property within the R-1 Zoning District as defined by Chapter 21.04 Woodinville Municipal Code (WMC) and further delineated by the City’s Official Zoning Map.” Section 2, Ordinance No. 419, Ex. 6, at 4. [The imposition of this moratorium was not challenged.]
- Ordinance No. 424, adopted July 10, 2006, specifically amending Ordinance No. 419 to add additional findings, exceptions, and interpretive authority during the moratorium period. Ordinance No. 424, Sections 1-4; Ex. 7, at 2-3. [The amendment of the moratorium provisions was not challenged.]
- Ordinance No. 427, adopted September 11, 2006, specifically renewing the terms of the moratorium imposed by Ordinance No. 419, as amended by Ordinance No. 424, for an additional six-month period. Section 2, Ordinance No. 427, Ex. 8. [This extension of the moratorium was not challenged.]

- Ordinance No. 431, adopted March 12, 2007, essentially replaced the moratorium adopted by Ordinance Nos. 419, 424 and 427. However, rather than placing a freeze on development in the R-1 zone to preserve the *status quo* while the SDS work continued, this Ordinance specifically amended a provision of the City's zoning regulations [WMC 21.04.080(1)(a)] to delete a restriction on development of less than 4 dwelling units per acre (du/ac) in the R-1 through R-4 zones. Ordinance No. 431 was also adopted as an interim measure for a six-month period. Section 2 and 6, Ordinance No. 431; Ex. 9, at 5 and 7; *see also* "Challenged Action" Section III B, *supra*.
- Ordinance No. 447, adopted August 20, 2007, was allegedly intended to renew the interim measure [amendment to WMC 21.04.080(1)(a)] for an additional six months, while the SDS work continued. The effect of Ordinance No. 447 is discussed *infra*. HOM Ex. 3.

It is this series of legislative actions that has provided the context and basis for the present challenge.

## **B. INTERIM ORDINANCES, ORDINANCE 431 – MOOTNESS, AND EFFECT OF ORDINANCE NO. 447**

### *Board Authority to Review Moratoria and Interim Regulations:*

Section RCW 36.70A.390 of the GMA provides the authority for local governments to adopt moratoria and interim measures and sets forth specific procedural requirements for such action. On occasion, this Board has been called upon to review a local government's action that adopts moratoria or interim measures. *See: King County v. CPSGMHB (Bear Creek)*, CPSGMHB Case No. 95-3-0008c, Order Finding Partial Noncompliance and Partial Invalidity, (Nov. 3, 2000); *Senior Housing Assistance Group, et al v. City of Lynnwood (SHAG)*, CPSGMHB Case No. 01-3-0014, Order on Motions, (Aug. 3, 2001); *Jack and Pamela Clark, et al. v. City of Covington (Clark)*, CPSGMHB Case No. 02-3-0005, Final Decision and Order, (Sep. 27, 2002); *Camwest Development et al. v. City of Sammamish (MBA/Camwest)*, CPSGMHB Case No. 05-3-0027, Order Segregating Case No. 05-3-0027 from the Consolidated Case No. 05-3-0030 and Final Decision and Order in Case No. 05-3-0027, (Aug. 4, 2005); *Safeway v. City of Seattle (Safeway)*, CPSGMHB Case No. 05-3-0038, Order Granting Motion to Dismiss, (Oct. 20, 2005); *Camwest Development et al. v. City of Sammamish (Camwest III)*, CPSGMHB Case No. 05-3-0041, Final Decision and Order, (Feb. 21, 2006); and *State of Washington Department of Corrections v. City of Lakewood (DOC III/IV)*, CPSGMHB Case No. 05-3-0043c, Final Decision and Order, (Jan. 31, 2006).

What can be gleaned from a review of these cases are three general observations: 1) The Board will review challenged local government enactments of moratoria and interim

measures for compliance with the *procedural* requirements of RCW 36.70A.390; 2) If a moratorium, interim measure, or combination of such actions, is systematically and continuously extended for a significant period of time, to the extent that the measure takes on attributes of a “permanent” regulation, the Board may exercise its jurisdiction to review the substantive provisions of the enactment for compliance with the goals and requirements of the GMA; and 3) A blatant violation of a GMA requirement (i.e. preclusion of the siting of Essential Public Facility). In other words, **the Board has authority and subject matter jurisdiction to review moratoria, interim measures, or interim regulations.** Nothing presented in the present case dissuades the Board from concluding otherwise.

### Conclusion

Pursuant to RCW 36.70A.280 and prior holdings of the Board, the Board has authority and subject matter jurisdiction to review moratoria, interim measures, or interim regulations.

#### Ordinance No. 431 – Mootness and Ordinance No. 447:

As discussed *supra*, Ordinance No. 431 followed on the heels of a one-year moratorium established by Ordinance Nos. 419, 424, and 427. However, unlike the previous ordinances, Ordinance No. 431 did not “freeze development” or maintain the *status quo*; instead, it amended a specific provision of the City’s zoning code - WMC 21.04.080(1)(a), as set forth *supra*. Whether Ordinance No. 431 complied with the *procedural* requirements of RCW 36.70A.390 is not at issue in this case; rather, the *substance* of Ordinance No. 431 is the focus of Petitioners’ challenge.

Petitioners assert that Ordinance No. 431’s amendment to WMC 21.04.080(1)(a), changing the development landscape in Woodinville’s R-1 zone by allowing development to occur at 1 du/ac on approximately 1100 acres [about 1/3 of the residentially-zoned land within the City], precipitated this challenge. Consequently, Petitioners allege various violations of the GMA. See Legal Issues 1-4 *infra*. Phoenix PHB, at 1-38 and Rothschild PHB, at 1-5.

In response, the City and Intervenor argue that Ordinance No. 431 *expired* on September 11, 2007, prior to the HOM, and is *no longer effective*. The City, however, adopted Ordinance No. 447, based on a different record which is not before the Board. Woodinville Response, at 30, 32, 38, 39, 40 and 41; CNW Response, at 2, 3, 4 and 7. Petitioner. In their reply briefs, both Phoenix and Rothschild argued that Ordinance No. 431 was still in effect in that Ordinance No. 447 renewed and extended the provisions of Ordinance No. 431; consequently, Petitioners assert that the Board should proceed with its review of the challenged Ordinance. Phoenix Reply, at 3, 10, 11, 12, and 20; Rothschild Reply, at 1 and 2. Rothschild then filed a Motion to Amend the PFR to

include Ordinance No. 447 in the present proceeding. Rothschild Motion, at 1-2. Both Respondent and Intervenor objected to the Rothschild Motion. Woodinville Response Amend PFR, at 1-8; CNW Response Amend PFR, at 1-4.

Whether the Board will review the substantive provisions of Ordinance No. 431, specifically the challenged amendment to WMC 21.04.080(1)(a) turns on the question of whether Ordinance No. 447, in fact, renewed the interim measure amending WMC 21.04.080(1)(a) so that the challenge is not moot. The Board questioned the parties at the HOM, asking what, in fact, Ordinance No. 447 accomplished. *See* HOM Transcript, at 123-128. At the conclusion of the HOM, the Board asked the parties to brief the question: What is the effect of Ordinance No. 447? In short, Petitioners Phoenix Development and Rothschild contend that Ordinance No. 447 renewed, and/or amended, the provisions of Ordinance 431; that the matter is not moot; and the Board should proceed with its review of the substance of the amendment to WMC 21.04.08(1)(a) to determine whether it complies with the challenged goals and requirements of the Act. Phoenix 447, at 1-9, Rothschild 447, at 1-5. On the other hand, the City of Woodinville concedes that Ordinance No. 447's operative language pertaining to WMC 21.04.080(1)(a) was not included and is therefore ineffective. Woodinville 447, at 1-8. The Board turns to the question of what, if anything, Ordinance No. 447 did.

On its face, Ordinance 447 does not appear to either amend or renew the operative and substantive provision of Ordinance 431. The operative and substantive provisions of Ordinance No. 431 appear in Section 2, which amends WMC 21.04.080(1)(a). To effectively extend this provision, it must be carried forward, repeated, or amended in Ordinance No. 447. Ordinance No. 447 contains four substantive sections:

- Section 1 incorporates the findings of fact from Section 1 of Ordinance No. 431 and adds 4 additional findings;
- Section 2 is a severability clause;
- Section 3 directs the City Clerk to file a copy of Ordinance No. 447 with the State Department of Community, Trade and Economic Development;
- Section 4 states that “This ordinance shall become effective on September 11, 2007 and shall remain in effect for a period of six months unless terminated either earlier or subsequently extended by the City Council.”

Ordinance No. 447.

The title of the Ordinance does suggest that its purpose was “renewing the term of interim Ordinance No. 431” and one of the findings in Section 1(c) indicates “With a six-month renew of Ordinance No. 431 the City Council will have time to adopt new permanent regulations before Ordinance No. 431 as amended by this Ordinance expires.” Nonetheless, the *substantive provisions*, those following the “NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF WOODINVILLE, WASHINGTON, DO ORDAIN AS FOLLOWS,” do not address the amendments to WMC 21.04.080(1)(a). Thus, **the Board finds and concludes that Ordinance No. 447 did not renew, extend, or amend**

**Ordinance No. 431’s Section 2, which contained the amendatory language for WMC 21.04.080(1)(a). The Board further finds that the amendatory language of Ordinance No. 431, Section 2 is no longer in effect.**

The Board reaches these conclusions not only from review of Ordinance No. 447 itself, but also for the following reasons:

1. The series of moratorium Ordinances, 419, 424 and 427, demonstrate that *the City knows how* to renew, extend, and amend prior Ordinances.
  - The operative section of Ordinance No. 419 is Section 2 “imposing a moratorium upon the receipt and processing of building permit applications, land use applications, and any other permit application for the development, rezoning or improvement of real property within the R-1 Zoning District as defined by WMC 21.04 and further delineated by the City’s own official Zoning Map.” Ordinance No. 419, Section 2, Ex. 6, at 4.
  - Ordinance No. 424, specifically *amends* various sections of Ordinance No. 419; thus, keeping Ordinance No. 419 intact and in effect, as amended. Ordinance No. 424, Sections 1-4; Ex. 7, at 2-3.
  - Ordinance No. 427, specifically, *renews* the moratorium imposed by Ordinance No. 419 – “The moratorium imposed under Ordinance No. 419, as amended by Ordinance No. 424, is hereby renewed for an additional six-month period commencing upon September 20, 2006.” Ordinance No. 427, Section 2; Ex. 8, at 1-2.

Despite this, the City of Woodinville did not take the same clear and unambiguous steps in adopting Ordinance No. 447 to renew or extend the operative provisions of Ordinance No. 431.

2. The adoption of Ordinance No. 447 does not adhere to the requirements of RCW 35A.21.010 which provides in relevant part:

Deficiencies in the form of an ordinance or resolution shall not affect the validity thereof if the following requirements are met:

2. Any regulatory or procedural provisions thereof are expressed in clear and unambiguous terms, or the legislative intent can be determined by usual methods of judicial construction.

...

If the foregoing requirements have been met, brevity or awkwardness of language, or defects of form not going to the substance, or

inadvertent use of an incorrect or inaccurate proper name or term shall not render an ordinance or resolution invalid, if otherwise in compliance with law.

RCW 35A.21.010 (Emphasis added).

Ordinance No. 447 clearly did not express in clear and unambiguous terms that the amendments to WMC 21.04.080(1)(a) contained in Ordinance No. 431 were being extended or renewed. This is an amendment to the regulatory provisions of the City's Zoning Code. The defect in Ordinance No. 447 goes to the substance of the Ordinance, not the form; consequently, the intentions of the City Council, as expressed in the Title are irrelevant.

The Board finds and concludes that Ordinance No. 431 expired on September 11, 2007, and its terms are no longer effective – it has simply ceased to exist. Thus, the operative amendment to WMC 21.04.080(1)(a), has likewise expired and its provisions are no longer effective – it, too, ceases to exist. The original language of WMC 21.04.080(1)(a), prior to the amendment by Ordinance No. 431, remains in effect, as of September 11, 2007. Consequently, the Board further finds and concludes that Ordinance No. 431 is moot and is no longer before the Board. Petitioners' PFRs challenging the provisions of Ordinance No. 431, are dismissed. Further, the Board finds and concludes that while Ordinance No. 447 articulates reasons for continuing its SDS review in hopes of adopting permanent regulations within six months of September 11, 2007, the provisions of WMC 21.04.080(1)(a) prior to the amendment of Ordinance No. 431 are in effect, and the amendatory restriction is inoperative and ineffective.

### Conclusion

The Board finds and concludes that Ordinance No. 431 is **moot, no longer in effect**, and is no longer before the Board. Petitioners' PFRs challenging the provisions of Ordinance No. 431, are **dismissed**.

Additionally, the Board finds and concludes that the operative amendment to WMC 21.04.080(1)(a), has likewise **expired** and its provisions **are no longer effective**. The original un-amended language of WMC 21.04.080(1)(a) is in effect, as of September 11, 2007.

### **C. MOTION TO AMEND PFR**

Based upon the Board discussion, findings, and conclusions noted *supra*, the Board **denies** Rothschild's Motion to Amend the PFR.

## D. MOTIONS TO SUPPLEMENT AND STRIKE

Based upon the Board discussion, findings, and conclusions noted *supra*, the Board **denies** the Phoenix Motion to Supplement the Record<sup>5</sup> and **denies** the City's Motions to Strike.

## V. LEGAL ISSUES AND DISCUSSION

### A. LEGAL ISSUE NO'S. 1, 2, 3 and 4 – Urban Density, Internal Consistency, Housing and Compliance with Prior Board Decision

The Board's PHO set forth Legal Issue No's. 1, 2, 3 and 4 as follows:

1. *Did the City of Woodinville (the City) fail to comply with the urban density requirements of RCW 36.70A.110 and fail to be guided by the goals of RCW 36.70A.020(1) and (2), when it adopted Interim Ordinance No. 431 (the Ordinance)? [Intended to reflect Phoenix PFR issue 1 and Rothschild PFR issues A and C.]*
2. *Did the City fail to comply with the internal consistency requirements of RCW 36.70A.070(preamble) and RCW 36.70A.040(3), when it adopted the Ordinance, because provisions of the Ordinance [WMC 21.04.080(1)(a)<sup>6</sup>] are inconsistent with Woodinville Comprehensive Plan Policies LU- 1.2(1), LU-3, LU-3.6, LU-3.7, LU-3.9, H-1.2, H-1.3, H-1.4, H-1.10, Urban Growth Area 2 and 3, and Table 4.3.2? [Intended to reflect Phoenix PFR issue 3 and 4 and Rothschild PFR issue B.]*
3. *Did the City fail to be guided by the goal of RCW 36.70A.020(4), and violate RCW 36.70A.070(2) when it adopted the Ordinance? [Intended to reflect Phoenix issue 2 and 4]*
4. *Did the City fail to comply with this Board's February 25, 1997 Final Decision and Order in Hensley v. Woodinville, CPSGMHB Case No. 96-3-0031? [Intended to reflect Rothschild PFR issue D].*

### Conclusion

Having dismissed Petitioners' challenge as discussed *supra*, the Board need not and will not address the substantive Legal Issues posed in this PFR. As stated previously, CPSGMHB Case No. 07-3-0029c is **dismissed**.

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<sup>5</sup> The Board specifically said it did not want the minutes or a transcript of the August 20, 2007 meeting where Ordinance No. 447 was adopted. See HOM Transcript, at 136.

<sup>6</sup> Interim Ordinance No. 431 repealed WMC 21.04.080(1)(a) which provided: "Developments with densities less than R-4 are allowed only if adequate services cannot be provided."

## V. ORDER

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

The matter of *Phoenix Development LLC and Peter Rothschild v. City of Woodinville*, CPSGMHB Case No. 07-3-0029, is **dismissed**.

So ORDERED this 12<sup>th</sup> day of October, 2007.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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David Earling  
Board Member

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Edward G. McGuire, AICP  
Board Member

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Margaret A. Pageler  
Board Member, [Board Member Pageler files a  
separate dissenting opinion]

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.<sup>7</sup>

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<sup>7</sup> 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

## Dissenting Opinion of Board Member Pageler

I respectfully dissent from the technical conclusion dismissing this case reached by my fellow Board Members. I dissent for the following reasons:

1. The conclusion of the *Hensley III* case that a *low density* of one dwelling unit per acre is an inappropriate urban density for Woodinville still stands. That decision was not based upon a “bright-line” rule.
2. The City of Woodinville had a one-year moratorium on all development and then proceeded to adopt an “interim” regulation for at least an additional six months, and arguably intended to extend it for another six-month period – two years in total. The City’s action demonstrates a systematic and continuous expression of delay.
3. Several members of the Citizens Advisory Panel resigned when they perceived that the intent of the Sustainable Development Study was to perpetuate low density development in the City, contrary to the GMA. The remaining members of the CAP and members of the Council seemed intent on finding a way to justify and defend low-density development for a large portion of the City.
4. The Sustainable Development Study was virtually completed at the time the Council acted to adopt the interim measure – Ordinance No. 431. Based on the completed analysis, the Planning Commission recommended that the one dwelling unit per acre be adopted as a permanent regulation.
5. The Sustainable Development Study, particularly the environmental analysis (Litowitz test) did not support the need for low density plan designations and zoning because of environmental factors. In fact, the one area where the SDS suggested low density may be appropriate – the Lake Leota area – would benefit by being sewered to prevent further degradation and eutrophication of the lake.
6. Provisions of urban services, particularly sanitary sewer services, in the area is necessary in order to solve environmental concerns and to comply with the GMA’s mandate to permit urban development in urban areas. RCW 36.70A.020(10); .110(12).
7. The Neighborhood Characteristics portion of the SDS articulated vague and subjective factors that emphasized commonality as the desired characteristic, not diversity in housing densities and housing types as is articulated by the Act.
8. RCW 36.70A.110(2) mandates: Each urban growth area shall permit urban densities.

For all of the above reasons, I would have found the City of Woodinville noncompliant with the challenged provisions of the GMA and would have invalidated the amendment

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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)

to WMC 21.04.080(1)(a), thereby saving the City the trouble of having to defend it when it is challenged in the future.

## APPENDIX A

### Procedural Background

#### A. General

On May 7, 2007, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from (**Petitioner I** or **Phoenix**). The matter was assigned Case No. 07-3-0028, and is hereafter referred to as *Phoenix Development v. City of Woodinville*. Board member Edward G. McGuire is the Presiding Officer (**PO**) for this matter. Petitioner I challenges the City of Woodinville's (**Respondent, City** or **Woodinville**) adoption of Interim Ordinance No. 431 amending the City's development regulations. The basis for the challenge is noncompliance with the Growth Management Act (**GMA** or **Act**).

On May 9, 2007, the Board received a PFR from Peter Rothschild (**Petitioner II** or **Rothschild**). The matter was assigned Case No. 07-3-0029, and is hereafter referred to as *Rothschild v. City of Woodinville*. Board member Edward G. McGuire is the PO for this matter also. Petitioner II also challenges the City of Woodinville's adoption of Ordinance No. 431. The basis for the challenge is noncompliance with the GMA.

On May 10, 2007, the Board issued a "Notice of Hearing and Order of Consolidation" in the above-captioned case. The Order set a date for a prehearing conference (**PHC**) and established a tentative schedule for the case.

On May 21, 2007, and again on May 29, 2007, the Board issued "Orders Amending the Schedule [Prehearing Conference]. Due to scheduling conflicts with the Board and the parties, a new PHC date had to be established. The PHC was ultimately set for June 13, 2007, at 10:00 a.m.

On May 21, 2007, the Board received Phoenix Development's "Amended Petition for Review" (**Amended PFR**). The Amended PFR was timely filed and added a fourth issue for the Board to resolve.

On June 15, 2007, the Board received: 1) Phoenix's proposed revisions to the Legal Issues (**Phoenix Restatement**); and 3) City of Woodinville's Response to Petitioners' Restatement of Issues" (**Woodinville Comment**).

On June 18, 2007, the Board issued its "Prehearing Order and Order on Intervention" (**PHO**). The PHO set forth the final schedule for this matter and the Legal Issues to be decided by the Board.

## B. Intervention

On June 13, 2007, at the PHC, the Board received a “Motion to Intervene by Concerned Neighbors of Wellington” (**CNW Motion**). The City of Woodinville filed a “Response by City of Woodinville to Motion to Intervene by Concerned Neighbors of Wellington” (Woodinville Response), indicating the City did not oppose the motion. *Id.* at 1.

The Board discussed intervention as its first matter of business. Petitioners Phoenix and Rothschild asked for, and were granted, time to respond to the CNW Motion. The Board set the deadline as June 15, 2007. The PO indicated that the CNW Motion would be addressed in the PHO.

On June 15, 2007, the Board received “Phoenix Development’s Response to Motion to Intervene,” which objected to intervention by CNW.

On June 18, 2007, the Board issued its PHO which granted Intervener status to CNW. However, in granting intervention, the Board stated:

*[T]he Board reminds CNW that the challenge is to City’s removal of a restriction on development in the City’s “Low Density Residential zones [R-1 through R-4] throughout the City”<sup>8</sup> – it is not solely about one neighborhood or any proposed project. CNW’s “local perspective” should focus on this City-wide decision.*

PHO, at 3.

On June 19, 2007, the Board received “City of Woodinville’s Objection to Phoenix Development’s Response to Motion to Intervene.” The City objected to Phoenix’s “Statement of Facts” in their Motion to Intervene, related to the extent of R-1 zoning in Woodinville.

On June 20, 2007, the Board received “Phoenix Development’s Clarification on R-1 Zoning Dominance in Woodinville.” Phoenix clarified that 70% of the land (2,041 acres) in Woodinville is residentially zoned, not zoned R-1. The R-1 zoned land accounts for 1,291 acres, or 63% of the residentially-zoned land and 35% of the land in the City.

On June 25, 2007, the Board received a “Motion to Dismiss Intervenor” filed by Petitioner Rothschild.

On June 26, the Board received “City of Woodinville’s Response to Petitioner Rothschild’s Motion to Dismiss Intervenor.”

On June 29, 2007, the Board received “Response of Concerned Neighbors of Wellington to Rothschild’s Motion to Dismiss Intervenor.”

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<sup>8</sup> See Interim Ordinance No. 431, Section 2, at 5.

On July 3, 2007, the Board issued its “Order Denying Motion to Dismiss Intervenor and Revising Filing Schedule for Motions.”

### **C. Motions to Supplement the Record and Amend the Index**

On June 13, 2007, at the PHC, the Board received “Woodinville’s Index to the Record.”

On June 22, 2007, the Board received “Phoenix Development’s Motion for Leave to File a Motion to Supplement Record after Deadline.” The basis of the motion was the pendency of two public disclosure requests filed by Phoenix with the City of Woodinville.

On June 26, 2007, the Board received “City of Woodinville’s Response to Phoenix Development’s Motion for Leave to File Motion to Supplement Record after Deadline.” The City did not object to a limited extension of the filing deadline for supplementing the record.

On July 3, 2007, the Board issued its “Order Denying Motion to Dismiss Intervenor and Revising Filing Schedule for Motions.”

On July 9, 2007, the Board received “Phoenix Development’s Motion to Supplement the Record.” Phoenix moved to add eight (8) items to the Record and asked the Board to direct the City of Woodinville to disclose and produce 11 documents in their “un-redacted” form.

On July 16, 2007, the Board received “City of Woodinville’s Response to Phoenix Development’s Motion to Supplement the Record after Deadline.”

No reply briefing was authorized and no hearing was held on the motion to supplement.

On July 23, 2007, the Board issued its “Order on Motions to Supplement the Record.” The Order **admitted 7** supplemental exhibits and summarized the items comprising the record in this case. The Board declined to direct the City to produce documents in their un-redacted form

### **D. Dispositive Motions**

No dispositive motions were filed in this matter.

### **E. Briefing and Hearing on the Merits**

On August 13, 2007, the Board received: 1) “Phoenix Development’s Prehearing Brief” (**Phoenix PHB**), with a table of exhibits and 36 attached exhibits; and 2) “Pre-hearing Brief of Petitioner Peter Rothschild” (**Rothschild PHB**); no exhibits were attached.

On September 10, 2007, after consultation with the parties, the Board issued an “Order Amending the Schedule – HOM” which shifted the HOM from September 20, 2007 to September 27, 2007.

On September 10, 2007, the Board received: “Motion to Amend Petition for Review” from Petitioner Rothschild (**Rothschild Amend PFR**). Petitioner Rothschild moved to amend his PFR to challenge Ordinance No. 447, which renewed Ordinance No. 431, the Ordinance challenged in the original PFR.

On September 12, 2007, the Board received: 1) “City of Woodinville’s Prehearing Brief” (**Woodinville Response**), with 31 attached exhibits; and 2) “Prehearing Brief of Intervenor Concerned Neighbors of Wellington” (**CNW Response**), with two attached exhibits.

On September 14, 2007 the Board received an “Errata” submittal from Respondent City of Woodinville, correcting several typographical errors in its prior submittal.

On September 18, 2007, the Board received: 1) “Phoenix Development’s Prehearing Reply Brief” (**Phoenix Reply**), with nine referenced exhibits; and 2) “Prehearing Reply Brief of Petitioner Rothschild” (**Rothschild Reply**), with no attached exhibits.

On September 19, 2007, the Board contacted Respondent City of Woodinville, via e-mail, and requested two copies of the City’s GMA Comprehensive Plan and four color copies of the City’s Future Land Use Map (**FLUM**) and zoning map for the Board. The Board also asked the City to bring display-sized color maps of the FLUM and zoning map to the HOM.

On September 20, 2007, the Board received: 1) “The City of Woodinville’s Opposition to Petitioner Rothschild’s Motion to Amend Petition for Review” (**Woodinville Response Amend PFR**); and 2) “Intervenor Concerned Neighbors of Wellington’s Response to Motion to Amend Petition by Peter Rothschild” (**CNW Response Amend PFR**).

On September 24, 2007, the Board received the requested Comprehensive Plan and copies of the FLUM and zoning maps from the City.

Also on September 24, 2007, the Board received “Phoenix Development’s Citation of Additional Authority” (**Phoenix Authority**), with one attachment.

On September 25, 2007, the Board received “City of Woodinville’s Objection to Phoenix Development’s Citation to Additional Authority” (**Woodinville Response – Authority**).

On September 27, 2007, the Board held a Hearing on the Merits at the Board’s offices in Suite 2356, 800 5<sup>th</sup> Avenue, Seattle, Washington. Board members Edward G. McGuire, Presiding Officer, David Earling and Margaret Pageler were present for the Board. Board Attorney Julie Ainsworth-Taylor also attended. Petitioner Phoenix Development

was represented by G. Richard Hill and Jessica M. Clawson; Petitioner Peter Rothschild appeared *pro se*. Respondent City of Woodinville was represented by Peter J. Eglick and Jane S. Kiker. Intervenor Concerned Neighbors of Wellington was represented by Richard Aramburu. Also in attendance at the HOM were: Loree Quade, Bob Vick, Ray Sturtz, Hank Stecker, Jan Culpepper, Jesse De Nike, Jeff Glickman and Greg Rubstello. Court reporting services were provided by Katie A. Eskew of Byers and Anderson LLC. The hearing convened at 10:00 a.m. and adjourned at approximately 1:20 p.m. A transcript of the proceeding was ordered. At the HOM, the Presiding Officer directed the parties to provide post-HOM briefing on the status of Ordinance No. 447 by October 4, 2007.

On October 4, 2007, the Board received: 1) “The City of Woodinville’s Response to the Board’s Direction for Submission of Supplemental Briefing Regarding the Status of Ordinance No. 447” (**Woodinville 447**); 2) “Phoenix Development’s Post-hearing Brief Regarding Ordinance 447’s Renewal of Ordinance 431” (**Phoenix 447**); 3) “Ordinance 447 Brief of Petitioner Peter Rothschild” (**Rothschild 447**); 4) “Phoenix Development’s Motion to Supplement the Record” including one attachment [Minutes of August 20, 2007 Council Meeting] (**Phoenix Motion – Supp. 2**); and 5) “City of Woodinville’s 1) Motion to Strike Phoenix Development’s Motion to Supplement the Record; and 2) Motion to Strike Portions of Phoenix Development’s and Rothschild’s Post-hearing Briefs Regarding Ordinance 447” (**Woodinville Motions to Strike**).

On October 5, 2007, the Board received the Hearing on the Merits Transcript (**HOM Transcript**).

On October 10, 2007, the Board received “Phoenix Development’s Response to Motions to Strike” (**Phoenix Response – Motions to Strike**).