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**State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON**

NEIGHBORS FOR RESPONSIBLE
DEVELOPMENT

Case No. 02-1-0009

SECOND ORDER ON COMPLIANCE

Petitioner,

v.

CITY OF YAKIMA,

Respondent.

CONGDON ORCHARDS INC.

Interenors

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I. PROCEDURAL BACKGROUND

On May 9, 2002, NEIGHBORS FOR RESPONSIBLE DEVELOPMENT, by and through their attorney, James Carmody, filed a Petition for Review.

On May 15, 2002, Respondent City of Yakima filed a Motion to Dismiss Petition for Review.

On June 7, 2002, the Board held a prehearing conference. The Board received a Stipulation and Agreed Order of Dismissal Regarding Respondent Yakima County. The Board dismissed Yakima County as a party and issued its Prehearing Order.

On June 7, 2002, the Board also heard and considered argument on the City of Yakima's Motion to Dismiss the Petition for Review as untimely filed. The Board issued its Order Denying the City of Yakima's Motion to Dismiss Petition for Review on June 18, 2002.

On June 26, 2002, Respondent City of Yakima filed a Motion for Reconsideration of Order Denying Motion to Dismiss Petition for Review.

1 On July 15, 2002, the Board issued its Order Denying Respondent City of Yakima's
2 Motion for Reconsideration of Order Denying Motion to Dismiss Petition for Review.

3 On August 23, 2002, Congdon Orchards, Inc. filed a Motion to Intervene by and
4 through their attorney, Michael Shinn.

5 On September 11, 2002, the Board held a telephonic conference and considered the
6 Motion to Intervene filed by Congdon Orchards. The Board issued its Order Allowing
7 Intervention on September 12, 2002.

8 On September 17, 2002, the City of Yakima and Congdon Orchards filed Motions to
9 Supplement the Record.

10 On October 14, 2002, the Board held a telephonic hearing on Motions to Supplement
11 the Record. On October 25, 2002, the Board issued its Order Regarding Supplementation of
12 Record.

13 On November 6, 2002, the Board held the Hearing on the Merits in Yakima. Present
14 were D.E. "Skip" Chilberg as Presiding Officer, and Board Members Judy Wall and Dennis A.
15 Dellwo. Present for Petitioner was James C. Carmody. Present for Respondent was Terrence
16 I. Danysh and Raymond L. Paoella. Intervenor Congdon Orchards, Inc. ("Congdon") was
17 represented by Terry C. Schmalz.

18 On November 15, 2002, the Board issued a Memorandum Opinion.

19 On December 5, 2002, the Board issued a Final Decision and Order.

20 On April 3, 2003, Respondent, City of Yakima requested that a Compliance Hearing
21 be held in this matter.

22 On April 25, 2003, the Board held a compliance hearing. All parties were present and
23 represented by counsel. The Board continued the compliance hearing to May 9, 2003.

24 On May 9, 2003, the Board heard arguments regarding compliance and invalidity and
25 later received further briefing from the parties.

26 On May 19, 2003, the Board issued its Order on Compliance.

1 On September 30, 2004, the Board sent a letter to the parties scheduling a
2 telephonic status conference in this matter.

3 On October 13, 2004, the Board received a letter from Petitioner's attorney regarding
4 compliance status.

5 On October 14, 2004, the Board held the telephonic status conference. Present were
6 Dennis Dellwo as Presiding Officer, and Board Members Judy Wall and John Roskelley.
7 Present for Petitioner was James C. Carmody. Present for Respondent was Terrence I.
8 Danysh and Raymond L. Paoella. Intervenor Congdon Orchards, Inc. ("Congdon") was
9 represented by Mike Shinn.

10 On November 12, 2004, the Board held a second telephonic status conference.
11 Present were Dennis Dellwo as Presiding Officer, and Board Members Judy Wall and John
12 Roskelley. Present for Petitioner was James C. Carmody. Present for Respondent was
13 Terrence I. Danysh and Raymond L. Paoella. Intervenor Congdon Orchards, Inc.
14 ("Congdon") was represented by Mike Shinn.

14 **II. DISCUSSION**

15 The Board scheduled this hearing one-month after the previous status conference.
16 This was done due to the board's grave concern with the City's delays, which prevented
17 them from coming into compliance with the GMA.

18 On December 5, 2002 a final Decision and Order was entered finding the City of
19 Yakima out of compliance. The actions taken by the City were also found to be invalid. The
20 City was given 180 days to bring them into compliance. The compliance period ended June
21 3, 2003. On April 25, 2003, the Board held a hearing and found the City remained in non-
22 compliance. The Board gave the City of Yakima two separate remedial courses of action: 1.
23 Repeal of Ordinance 2001-56; or 2. Remedy the "fatally flawed" public participation process
24 by subjecting the comprehensive plan amendment to an appropriate public process. The
25 City informed the Board that it chose the second remedy. Twenty-five months have now
26 passed without the City bringing itself into compliance. The City now asks for an additional

1 seven months to bring it into completion. This is unacceptable.

2 The Hearings Board finds it necessary to order the City of Yakima to repeal
3 Ordinance 2001-56. After the repeal of Ordinance 2001-56, the Board will then be able to
4 find the City of Yakima in compliance with the GMA.

5 The Board is aware of *Wildlife Habitat and Justice Prevention v. City of Covington*,
6 CPSGMHB Case No. 00-3-0012 (November 6, 2002) which recognizes the Board's authority
7 to require such a repeal. The Board is further cognizant of a recent Washington State
8 Supreme Court case, *Rural Residents v. Kitsap County*, 141 Wn.2d 185, 192, 4 P.3d 115
9 (2000). The Supreme Court, in this Growth Management Case, found that a failure to take
10 corrective action during the compliance period renders the noncompliant regulation
11 ineffective and void. While the Board believes this decision would apply here, it is
12 unnecessary to make this finding at this time.

12 **III. ORDER**

- 13 1. The Respondent City of Yakima is to repeal Ordinance 2001-56 as quickly as
14 possible, while providing the appropriate public participation required by law.
15 This shall take place no later than 30 days from the date of this Order.
16 2. The City will forward evidence of such repeal to the Board and the parties
17 herein. The Board will shortly thereafter hold a Compliance hearing.

18 **SO ORDERED** this 15th day of November 2004.

19 EASTERN WASHINGTON GROWTH MANAGEMENT
20 HEARINGS BOARD

21 _____
Dennis Dellwo, Board Member

22 _____
Judy Wall, Board Member

23 _____
24 John Roskelley, Board Member