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

ROBERT PLAYFAIR & HARVEY SAVITZ,

Petitioners,

v.

CITY OF CHEWELAH,

Respondent.

Case No. 04-1-0008

FINAL DECISION AND ORDER

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I. SYNOPSIS

The Petition before the Board challenges the failure of the City of Chewelah (City) to have in place a Public Participation Plan (PPP) at the time they adopted their 1997 Comprehensive Plan and their 2001 Amendment to the Plan (Resolution 01-07). Petitioners contend the City's failure to adopt a formal PPP would place the City in noncompliance of the Growth Management Act (GMA) and therefore invalidates the adopted 1997 Comprehensive Plan and subsequent 2001 Amendment, as a matter of law.

The City admits that it did not have a PPP developed for adopting their Comprehensive Plan under the GMA. The City contends that what they have done without a PPP was substantial compliance with the GMA and should not be held out of compliance.

The Board finds, however, that the GMA, specifically RCW 36.70A.140, requires that the City adopt a PPP. The City must adopt and widely distribute a Public Participation Plan for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. Because of this requirement, the City is found out of compliance for failure to use an adopted PPP in the adoption of its 1997 Comprehensive Plan and 2001 Amendment.

1 **II. PROCEDURAL HISTORY**

2 On July 22, 2004, ROBERT PLAYFAIR & HARVEY SAVITZ, by and through their
3 attorney, Steve Graham, filed a Petition for Review.

4 On August 13, 2004, the Board received Notice of Association of Council from Stanley
5 Schwartz.

6 On August 17, 2004, the Board received from Petitioners' attorney, Steve Graham a
7 Motion for Order Prohibiting Multiple Attorneys, and Memorandum in Support thereof, and
8 Petitioners Objections to Respondent's Index and Chronological statement, and Motion to
9 Strike and Motion to Compel.

10 On August 19, 2004, the Board held a telephonic Prehearing conference. Present
11 were Board Members Judy Wall and Dennis Dellwo. D.E. "Skip" Chilberg, Presiding Officer,
12 was unavailable. Present for Petitioners was Steve Graham. Present for Respondent was
13 Patrick Monasmith and Associated council Stanley Schwartz.

14 On August 26, 2004, the Board received Petitioner's Amended Statement of Issues
15 and Statement of Standing.

16 On September 9, 2004, the Board received Respondent City of Chewelah's Revised
17 Index of Record, Respondent City of Chewelah's Motion for Summary Judgment Pursuant to
18 CR 56 and Board Rule, Memorandum of Authorities in Support of Motion for Summary
19 Judgment and Dismissal, and Respondent City of Chewelah's Motion to Submit
20 Supplemental Evidence.

21 On September 16, 2004, the Board received Petitioners' Motion to Allow, and Motion
22 For Dispositive Order Finding Chewelah Out of Compliance and Declaration and
23 Memorandum in Support.

24 On September 24, 2004, the Board received Petitioners' Motion for More Time to
25 Respond to Motion for Summary Judgment.

26 By October 4, 2004, the Board received the parties briefing for the Respondent's
Summary Judgment Motion.

1 On October 4, 2004, the Board held a telephonic motion hearing in this matter.
2 Present were John Roskelley, Presiding Officer and Board Members Judy Wall, and Dennis
3 Dellwo. Present for Petitioners was Steve Graham. Present for Respondent was Patrick
4 Monasmith and Associated council Stanley Schwartz.

5 On October 11, 2004, the Board issued its Order on Motions, dismissing all but Issue
6 2 and 3 leaving issue 1 for Hearing on the Merits.

7 On November 19, 2004, the Board held the Hearing on the Merits. Present were
8 Presiding Officer John Roskelley, and Board Members Judy Wall and Dennis Dellwo. Present
9 for Petitioners was Steve Graham. Present for Respondent was Associated council Stanley
10 Schwartz.

11 **III. PRESUMPTION OF VALIDITY, BURDEN OF PROOF AND STANDARD OF 12 REVIEW**

13 Comprehensive plans and development regulations (and amendments thereto)
14 adopted pursuant to Growth Management Act ("GMA" or "Act") are presumed valid upon
15 adoption by the local government. RCW 36.70A.320. The burden is on the Petitioners to
16 demonstrate that any action taken by the respondent jurisdiction is not in compliance with
17 the Act.

18 The Board will grant deference to counties and cities in how they plan under Growth
19 Management Act (GMA). RCW 36.70A.3201. But, as the Court has stated, "local discretion is
20 bounded, however, by the goals and requirements of the GMA." *King County v. Central*
21 *Puget Sound Growth Management Hearings Board*, 142 Wn.2d 543, 561, 14 P.2d 133
22 (2000). It has been further recognized that "[c]onsistent with *King County*, and
23 notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly
24 when it foregoes deference to a . . . plan that is not 'consistent with the requirements and
25 goals of the GMA." *Thurston County v. Cooper Point Association*, 108 Wn.App. 429, 444, 31
26 P.3d 28 (2001).

Pursuant to RCW 36.70A.320(3) we "shall find compliance unless [we] determine
that the action by [Jefferson County] is clearly erroneous in view of the entire record before

1 the Board and in light of the goals and requirements of [the GMA]." In order to find the
2 County's action clearly erroneous, we must be "left with the firm and definite conviction that
3 a mistake has been made." *Department of Ecology v. Public Utility Dist. 1*, 121 Wn.2d 179,
4 201, 849 P.2d 646 (1993).

5 The Board has jurisdiction over the subject matter of the Petition for Review. RCW
6 36.70A.280(1)(a).

7 **IV. ISSUE PRESENTED**

8 **Issue 1:** Did the City of Chewelah fail to include the public, or fail to have a Public
9 Participation Policy (that complies with RCW 36.70A.140) in effect when all enactments
10 were voted into place, and if so, does that failure invalidate all the enactments?

11 **V. MOTION MADE AT TIME OF HEARING**

12 Before the Respondent argued its case, they moved for a dismissal of the Petitioners'
13 case as is allowed under the rules herein (WAC 242-02-720). The Respondent contended
14 that there was, in fact, a publication of the actions of the City in 1997, when the
15 Comprehensive Plan was adopted. The Chewelah Independence, the City's official
16 newspaper, reported in its newspaper that the City had adopted a comprehensive plan.
17 The Respondent believes this newspaper article fulfilled the City's obligation under RCW
18 36.70A.290(2).

19 The Petitioners and Respondent were allowed additional time to brief this issue and
20 submit additional authority.

21 The Petitioners' brief argued two issues. The first issue concerned whether a
22 newspaper article or any other publication starts the 60-day clock and what constitutes
23 publication. The second issue concerned the timing of the motion, which was presented at
24 the Hearing on the Merits with no notice to the Petitioners and after time for motions had
25 passed.

26 In their brief, the Respondent relied on two RCW's to argue their motion: RCW
36.70A.290 and RCW 35.23.221. RCW 36.70A.290, despite efforts by the Respondent to

1 use this statute on their behalf, clearly indicates the City must publish their own accurate
2 version of what was adopted and strengthens the Petitioners' case.

3 RCW 36.70A.290(a)... Except as provided in (c) of this subsection,
4 the date of publication for a city shall be the date the city
5 publishes the ordinance, or summary of the ordinance, adopting
6 the comprehensive plan or development regulations, or
7 amendment thereto, as is required to be published.

8 There is no indication in RCW 36.70A.290(a) a city may pass their responsibility of
9 publishing what they adopted to an outside source, such as a newspaper.

10 RCW 35.23.221 also strengthens the Petitioners' case. The statute is not suggesting
11 an article written by a reporter hired by the local newspaper substitutes for proper
12 notification, as the Respondent would like us to believe. It is clearly saying the City shall
13 publish a summary of the content of each ordinance in the City's official newspaper, not by
14 the newspaper.

15 The Board, after reading the briefs and examining the issue, find the Respondent's
16 argument without merit. The GMA relies on disseminating accurate public information. Cities
17 and Counties, usually through their City Clerk or Clerk of the Board, provide notices and
18 publication of ordinances adopting comprehensive plans, development regulations, or
19 amendments thereto. This is what the GMA requires and it ensures proper and accurate
20 notice of their actions. Newspaper articles are not substitutes for the requirement that the
21 City publish the actions taken hereunder.

22 The City did not publish these ordinances or a summary of the ordinances,
23 which permitted the Petitioners to file their petition so many years after the passage
24 of the objected to legislation. The motion to dismiss is denied.

25 VI. DISCUSSION AND ANALYSIS

26 The Facts and the Parties' Positions:

The Petitioners argue the Comprehensive Plan and the 2001 Plan Amendment
is not valid unless there is a PPP in effect prior to the Comprehensive Plan and

1 Amendment process and that the PPP is used in such adoption. The Plan must be
2 written and widely disseminated to the public. (RCW 36.70A. 140).

3 The Petitioners cite *FRIENDS OF SKAGIT COUNTY V. SKAGIT COUNTY*, WWGMHB
4 Case #95-2-0075, as an example of what may have been lost to the public if there was no
5 PPP:

6 How many more potential citizen participants were denied the opportunity to
7 comment because of the County's failure to provide adequate notice and a
8 timely set of materials?

9 The Petitioners also cite *McVittie v. Snohomish*, CPSGMHB County Case # 01-3-0016,
10 to emphasize the importance of a PPP.

11 RCW 36.70A is the original and primary public participation requirement of the
12 GMA. This is the public participation bedrock upon which all GMA plans and
13 development regulations in the state are built. It embodies the Act's
14 "enhanced" public participation process that requires early and continuous
15 public participation during the development and amendment of plans and
16 development regulations.

17 The Respondent contends that same statute, RCW 36.70A.140, provides that
18 legislative action is valid as long as it substantively meets the requirements of the Act, even
19 if there have been errors in exact compliance. Despite not having a PPP prior to the City's
20 adoption of their Comprehensive Plan and subsequent Amendment, the Respondent feels
21 they have "substantively" fulfilled their obligation to the spirit of the law and not having a
22 PPP at the time of adoption was a minor error. The City references the following passage
23 from RCW 36.70A.140 and references *Green v. King Co*, CPSBMHB, Case #98-3-0008c FDO,
24 pg. 6.

25 Errors in exact compliance with the established program and procedures shall
26 not render the comprehensive land use plan or development regulations
invalid if the spirit of the program and procedures is observed.

The Respondent also argues in his brief that *Wilma v. Stevens County*, EWGMHB 99-
1-0001, FDO, May 21, 1999, "unequivocally demonstrates that the proper test is substantial
compliance with the spirit of the Act; not strict procedural compliance.

1 This Board takes the issue of invalidity very seriously and finds invalidity only
2 if a county has substantially interfered with the fulfillment of the goals of the
3 Growth Management Act. While the Board holds that public participation is the
4 heart of the Growth Management Act, the Petitioners have not shown that
5 failure to comply with the public participation requirement substantially
6 interfered with the goals of the Act.

7 As the Petitioners pointed out in their brief, this passage in *Wilma* is the
8 standard for a finding of invalidity, not for compliance with the public participation
9 requirements. The Petitioners contend the Respondent (City) overlooked the fact that
10 the Stevens County enactment was found out of compliance in *Wilma v. Stevens Co.*
11 The Petitioners also point out that substantial compliance mentioned by the
12 Respondent refers to substantial compliance with an existing PPP, not with an
13 imaginary one. (RCW 36.70A140).

14 The Respondent agreed with the Petitioners that there was not a PPP in place in
15 1997 and in 2001, but argues the City of Chewelah substantively met the requirements of
16 the GMA. The Respondent claims (and this is substantiated by the record) that the City held
17 a number of public hearings, published notices, put up postings and allowed opportunities
18 for public comment, written and verbal, prior to and throughout the process of adoption of
19 the Comprehensive Plan and the 2001 Amendment. The Respondent feels the City of
20 Chewelah followed the intent and spirit of the law and shouldn't be held to a strict
21 interpretation of a Public Participation Plan.

22 Citing RCW 36.70A.035, the Respondent compares the public participation programs
23 the City of Chewelah had prior to the adoption of the 1997 Comprehensive Plan and 2001
24 Amendment to those suggested by the GMA and concludes the City fulfilled its obligation.
25 The Respondent's brief details the City's efforts in this regard. According to the Respondent,
26 "all due process was met."

Discussion and Analysis:

RCW 36.70A.140 requires the City to adopt a Public Participation Plan. That statute
reads in part:

1 Each county and city that is required or chooses to plan under RCW
2 36.70A.040 shall establish and broadly disseminate to the public a public
3 participation program identifying procedures providing for early and
4 continuous public participation in the development and amendment of
comprehensive land use plans and development regulations implementing
such plans.... (Emphasis supplied).

5 It is clear that the City is required to adopt a Public Participation Program and use it
6 in the adoption of the Comprehensive Plan and amendments to it.

7 The question before the Board is clear. Did the City of Chewelah, according to RCW
8 36.70A.140, "...establish and broadly disseminate to the public a public participation plan
9 identifying procedures providing for early and continuous public participation in the
10 development and amendment..." of their 1997 Comprehensive Plan and 2001 Amendment?

11 The answer is no. The Petitioners allege there was not a written PPP in place, as
12 required by RCW 36.70A.140, and the Respondent agrees. Despite the substantial efforts to
13 include the public, as shown by the record, the City of Chewelah is in noncompliance with
14 one of the most fundamental policies of the GMA – public participation. The Board finds that
15 a written plan for public participation prior to the process is required for the adoption of the
16 Comprehensive Plan and amendments to it. The language cited by the City, contending that
17 substantial compliance is sufficient, is misplaced. The language quoted relates to the
18 substantial compliance of an existing PPP. The reference found in the *Wilma* case dealt with
19 a finding of Invalidity. The County had already been found out of compliance for their
failure to have a written PPP.

20 While the Board may be hesitant to find the City in noncompliance due to the time
21 that has transpired and the effort by the City to adopt a comprehensive plan and
22 amendment, it must do so. The law is clear. The Board must base its decision on the over-
riding principal that public participation is the cornerstone of the GMA.

23 The Board feels the City of Chewelah can comply with this order without duplicating
24 their efforts. The City is required to update their Comprehensive Plan on or before 2007. If
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1 they begin this process early, they would be able to perform both obligations using a
2 compliant written PPP.

3 The Courts have made it very clear that the burden of proof in proceedings before
4 this Board is on the Petitioners. The Petitioners have shown by clear and convincing
5 evidence that the actions of the City were wrong. The Petitioners have, in fact, shown that
6 the City of Chewelah failed in their duty, required by the GMA, to provide a written Public
7 Participation Program prior to initiating their Comprehensive Plan and Amendment process.
8 In so ruling, the Board notes the Respondent also agrees that a PPP document was not
9 available, thus substantiating the claim.

9 **Conclusions:**

10 The Board finds that the Petitioners carried their burden of proof and the Board is
11 left with a firm and definite conviction that a mistake has been made. The City failed to
12 have a public participation program, which it followed in its adoption of their
13 Comprehensive Plan and the 2001 Amendment thereto.

14 **VII. FINDINGS OF FACT**

- 15 1. The City of Chewelah passed its Comprehensive Plan on August 6,
16 1997, by Resolution #97-03 and amended the Plan on January 5, 2001,
17 by Resolution #00-01.
- 18 2. On November 29, 2001, the Chewelah City Council passed Resolution
19 No. 01-07, amending the City of Chewelah's Comprehensive Plan.
- 20 3. The City of Chewelah did not publish their action in the 1997 adoption
21 of the Comprehensive Plan or the 2001 Amendment to the Plan. (RCW
22 36.70A.290(2).
- 23 4. At the time both the Comprehensive Plan and the 2001 Amendment
24 were adopted, the City had not adopted a Public Participation Plan.

1 **VIII. CONCLUSIONS OF LAW**

- 2 A. This Board has jurisdiction over the parties and subject matter of this
3 proceeding.
- 4 B. Petitioners have standing to challenge the City's actions to achieve
5 compliance in this case.
- 6 C. RCW 36.70A.140 requires the City of Chewelah to adopt a public
7 participation program to be used in its development and adoption of
8 their Comprehensive Plan, amendments and development regulations
9 to implement the Plan.
- 10 D. Failure to adopt such a program prior to the adoption of their
11 Comprehensive Plan and the 2001 Amendment to the Plan causes the
12 City to be out of compliance.

11 **Invalidity:**

12 The Petitioners have sought a finding of invalidity. This is a very serious remedy and
13 is rarely granted. The Petitioners did not argue this issue adequately at the time of the
14 hearing or in their brief. The City did not have a chance to respond to such a request. The
15 Board does not find that this error on the part of the City rises to the level necessary for a
16 finding of invalidity. Based upon the Petitioners' failure to brief or argue this issue, the
17 Board will not make a finding of invalidity.

17 **IX. ORDER**

18 Based on the foregoing discussion and history, the Board finds the City of Chewelah
19 in noncompliance with RCW 36.70A.140 in the Growth Management Act and has
20 determined the adopted Plan and its Amendment was improperly adopted. The Board
21 remands this matter back to the City of Chewelah and the City is directed to readopt their
22 Comprehensive Plan and any amendments found necessary while properly using a
23 compliant Public Participation Plan. Because of the unusual scope and complexity, the Board
24 will allow more than the normal period of time to comply with the requirements of this
25 order and the GMA. The City will prepare a schedule, which will allow the adoption of the
26 Comprehensive Plan with the use of a compliant PPP, and the update of the Plan as

1 required by the GMA under RCW 36.70A.130. Upon the submission of the schedule, this
2 Board will set a deadline.

3 The City of Chewelah will provide the Board and parties a written schedule within 30
4 days from the date of this Order, **January 27, 2005**. Upon receipt of the City's proposed
5 schedule, the Board will determine the date on which the City of Chewelah must take the
6 appropriate legislative action to bring themselves into compliance with this Order.

7 **Pursuant to RCW 36.70A.300(5), this is a Final Order for purposes of**
8 **appeal. Pursuant to WAC 242-02-832, a Motion for Reconsideration may**
9 **be filed within ten (10) days of service of this Final Decision and Order.**

10 **SO ORDERED** this 27th day of December 2004.

11 EASTERN WASHINGTON GROWTH MANAGEMENT
12 HEARINGS BOARD

13 _____
14 John Roskelley, Board Member

15 _____
16 Judy Wall, Board Member

17 _____
18 Dennis Dellwo, Board Member