State of Washington
GROWTH MANAGEMENT HEARINGS BOARD
FOR EASTERN WASHINGTON

BRUCE ROBERTS and MARILYN TAYLOR, Petitioner, v. BENTON COUNTY and BENTON COUNTY BOARD OF COMMISSIONERS, Respondent, NOR AM DEVELOPMENT, LLC, Intervenors, CITY OF RICHLAND, Intervenors.	Case No. 05-1-0003 **ORDER ON MOTION FOR RECONSIDERATION**

I. PROCEDURAL HISTORY

On April 1, 2005, BRUCE ROBERTS and MARILYN TAYLOR, by and through their representative, Bruce Roberts, filed a Petition for Review.

On April 8, 2005, the Board received Motion of Nor Am Development, LLC, Requesting Intervenor Status on the Side of Respondents, Declaration of Loren D. Combs in Support of, and Memorandum of Nor Am Development, LLC, in Support of Motion to Intervene.

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On April 26, 2005, the Board received Motion of City of Richland Requesting Intervenor Status on Side of Respondents.

On April 26, 2005, the Board heard the Motions to Intervene filed by Nor Am Development, LLC, and the City of Richland before the Prehearing conference. The Board grants Intervenor status to Nor Am Development, LLC, and the City of Richland. The parties are intervening on behalf of the Respondent.

On August 16, 2005, the Board held the Hearing on the Merits. On September 20, 2005, the Board issued its Final Decision and Order.

On September 30, 2005, the Board received Motion of Nor Am Development, LLC for Reconsideration.

On October 5, 2005, the Board received Petitioners Answer to Nor Am Development's Motion for Reconsideration.

II. DISCUSSION

The Intervenor, Nor Am Development, LLC., submitted a Motion for Reconsideration of Legal Issue No. 3 in the Eastern Washington Growth Management Hearings Board's (Board) Final Decision and Order (FDO), on the grounds that the Board's FDO is based on a misinterpretation of fact or law, material to Intervenor. Nor Am believes the Board misinterpreted the law and facts when it determined that "Resolution 05-057 fails to comply with RCW 36.70A.070(3), RCW 36.70A.070(4), and RCW 36.70A.070(6) in that the Resolution fails to use an updated Capital Facilities Element and plan for utilities and transportation facilities in the expanded UGA area.

They contend that RCW 36.70A.110 does not require capital facilities planning as a prerequisite to UGA designation, that there is ample support in the record that adequate public facilities and services will be available at the time of development and that RCW 36.70A(3), (4) and (6) require only that the County's Comprehensive Plan contain capital facilities, utilities and transportation elements and these were not before the Board in this case.

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The Petitioners responded to the Motion for Reconsideration arguing that one of the mandatory elements within Chapter 36.70A is a capital facilities element (CFE). They contend Benton County should have updated their CFE after the County finalized the boundaries for the UGA in 2003, noting that Nor Am Development claims that there is no requirement for a CFE for a UGA until the UGA is established.

The Petitioners also cite *Durland v. San Juan County*, WWGMHB, 00-2-0062c FDO (May 7, 2001). The Western Board found an updated CFE is required for a designated UGA:

> "A designated UGA without any updated or adequate inventory, estimate of current and future needs or adoption of methodologies to finance such needs for infrastructure does not comply with the GMA, nor did the county properly address urban facilities and services through an analysis of capital facilities planning."

The Petitioners also argue that the record shows a CFE update was not done, despite the Intervenor's claim that there is no proof that the CFE was not done. The Petitioners cite the staff comment quoted in the FDO and additional case law concerning "evidence". *WEC v. Whatcom County.*

The Board has reviewed its prior decision and continues to hold that the County is out of compliance on Legal Issue No. 3.

The County had sufficient opportunity to update their CFE after determining a final boundary for its expanded UGA. In fact, the Badger Mountain Planned Development property, which was approved for urban-like development in January 2001, should have triggered an update because of the size and scope of the development. Seven years later, the Benton County CFE has not been updated to reflect the changes that have occurred within the original UGA or the proposed expansion to enlarge the UGA by 3322 acres. Good planning requires periodic updates and the GMA requires the County's CFE to be updated every six years.

In *Irondale Community Action Neighbors v. Jefferson County*, WWGMHB, 03-2-0010, FDO (Topic B, Board Discussion, para. 10), the Western Board wrote:

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> "However, although a non-municipal UGA is appropriate for the Tri-Area, the boundaries of that UGA have yet to be based on a proper analysis of capital facilities needed to serve the new UGA. For this reason, we determine that the County was premature in designating the Tri-Area as a UGA, including final boundaries for the UGA."

In addition, the Western Board determined that adequate capital facilities planning is a prerequisite to finalizing a UGA (Topic C & D, Board Discussion, para. 4 and 11):

> "A line can be set for study through a provisional UGA or other mechanism, but the UGA must not be formally designated as a final CP UGA until adequate capital facilities planning, fiscal analysis of the capacity to provide those facilities, urban LOS standards and development regulations are completed and urban services and facilities are actually in place."

> "However, having carefully considered all of the County's arguments and rationale, we remain concerned about the Tri-Area Final UGA being designated before adequate capital facilities planning for sewer, including fiscal analysis of the ability to provide those facilities, the setting of urban level of service standards and the adoption of development regulations that are ready for implementation in the UGA are completed. <u>We agree with the Petitioners that these steps must be completed prior to designation to ensure that development within the UGA will be urban in nature, that the UGA will be efficiently served with urban levels of service and that the County and its citizens can meet the financial obligations required for these urban facilities and services at the level of service adopted by the County</u>." (EWGMHB <u>emphasis</u>).

The Western Board emphasized in their FDO the requirement of the six-year plan (Topic C & D, Board Discussion, para. 12):

> "The GMA requires that cities and counties show how they will be able to serve their UGAs with urban services over the life of their 20-year land use plan, and RCW 36.70A.070(3)(d) requires "at least a six-year funding plan that will finance within projected funding capacities and clearly identifies sources of public money for such purposes."

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The Western Board also explained why capital facilities are necessary before an UGA is adopted (Topic C & D, Board Discussion, para. 16 and 18):

> "If we were to find compliance now, there might be no opportunity for Petitioners to appeal the designation of the UGA if the County determines that provision of urban levels of service, including sewers, is not possible."
>
> And...
>
> "No changes have been made to the requirements in the GMA since 1994 to negate the need for completion of adequate analysis and adoption of urban standards and regulations <u>before</u> formal designation of a UGA, either interim or final."

The Western Board also emphasized that Goal 1 of the Act has not changed and found Jefferson County out of compliance because they had not completed the preparation planning necessary to make a good decision about their UGA (Topic C & D, Board Discussion, para. 18 and 25):

> Goal (1) Urban Growth. Encourage development in urban areas where adequate public facilities and services exist or can be provided in an efficient manner.
>
> "The intent of this goal is to put urban population where it can most efficiently and cost effectively be served. Therefore, one <u>must</u> know if it can be served with urban infrastructure and services before designation."
>
> "We recommend that the county consider maintaining this area in its current status (as a provisional UGA) until the necessary interlocal agreements with service providers (i.e., the PUD) are in place, and capital facilities planning work is completed on at least the first phase of implementing sewer service."
>
> "We find that the County has not complied with the goals and requirements of the Act by prematurely adopting a final GMA Tri-Area UGA before adopting urban level of service standards, finishing required capital facilities planning and fiscal analysis of affordability of those facilities and adopting development regulations for application within the UGA."

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The Western Board's Findings of Fact reflect their belief that a CFE be in place before a UGA or Interim UGA can be adopted (end of document):

> Western Washington Growth Management Hearings Board's Findings of Fact
> Case No. 03-2-0010: **VI. FINDINGS OF FACT**
>
> 14) The County, at the time it designated the UGA in the Tri-Area, had not completed:
> (a) adopting urban level of service standards;
> (b) analyzing its capital facilities needs (especially sewer) and its fiscal ability to provide those needed urban facilities; and (Our emphasis).
> (c) developing and adopting urban development regulations for application within the UGA.
> 15) In order to comply with Goal 1 (Urban Growth), Goal 12 (Public Facilities and Services) and County Wide Planning Policy 2.1, all of the steps listed in Finding 14 must be completed before adoption of the non municipal UGA.

In *Fred Klein v. San Juan County*, WWGMHB FDO, 02-2-0008, October 15, 2002, one of the Petitioner's issues was whether or not San Juan County had complied with 36.70A.070(3), which requires a capital facilities plan element. Granted, this case has to do with an initial UGA, but it is clear that the GMA's requirements apply equally to enlargement of a UGA, especially at the size and scope of Benton County's proposed UGA.

The Board first described the five elements of a capital facilities plan element:

> "A comprehensive plan must include a capital facilities plan element. RCW 36.70A.070(3); WAC 365-195-300(a)(iii). A capital facilities element must contain five features: an inventory of existing capital facilities owned by public entities; a forecast of future needs for such capital facilities; the proposed locations and capacities of expanded or new capital facilities; at least a six-year plan for financing such capital facilities with clearly identified sources of public money for such purposes; and 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 the financing plan within the capital facilities plan element are coordinated and consistent. RCW 36.70A.070(3); WAC 365-195-315(1). Drainage systems and sanitary sewer systems are included in the definition of capital facilities. WAC 365-195-315(2)(a)."

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The Board then establishes that the Act requires details, not conjecture, hearsay or promises to meet demand, which San Juan County argued in case 02-2-008 and which Benton County in 05-1-0003 argues is appropriate planning prior to the establishment of their expanded UGA (Board Discussion, Issue No. 2, para. 5 and 8):

> "Instead of detailing the work that will need to be done to meet projected further demand, the wastewater analysis (San Juan County) simply notes that sewer main lines will be installed "periodically in future years to serve new customers. The scope and cost of these projects will be determined on an as-needed basis that reflects the pattern of future development." According to the statements of the County's planning representative (Mr. Mann) at the hearing, planning will be on a permit-by-permit basis. This is not what the Act contemplates as capital facilities planning."
>
> "The GMA requirements on this point are not a mere formality. If permit-by-permit planning were sufficient, there would be no need for a capital facilities analysis at all. Instead, the GMA directs local communities to think ahead and make sure that there is capacity for needed facilities where growth is being directed. (Our emphasis).The present reliance in Eastsound on private septic systems is by no means unrelated to other potential problems associated with growth, such as drainage and water quality. If the Eastsound UGA boundaries are to extend beyond the present capacity to provide service in the key areas of sewer and drainage, there must be a plan that shows how this will be done and how it will be financed."

In fact, the Western Board directed San Juan County to use its CFE as a basis for drawing their UGA boundaries (Board Discussion, Issue No. 3, para. 1):

> "The Board's final decision and compliance order of May 7, 2001 directed the County to establish non-municipal UGA boundaries using RCW 36.70A.110 criteria. In particular, we directed the County to utilize its capital facilities analysis as a basis for drawing the UGA boundaries."

The Board stands by its original FDO. Benton County failed to adequately plan by updating their capital facilities plan, utilities element and transportation element for their

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expanded UGA and find the County's actions clearly erroneous and out of compliance in Legal Issue No. 3.

III. ORDER

The Motion for Reconsideration is denied.

SO ORDERED this 20th day of October 2005.

EASTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

_____
John Roskelley, Board Member

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Dennis Dellwo, Board Member

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Judy Wall, Board Member

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