

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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4
5 GROVER AND PAT HARADER, et al.,

6 Petitioners,

7 v.

8 CITY OF NAPAVINE,

9 Respondent,

10 and

11 KATHLEEN HEIKKILA and ALTA J. WACHTER,

12 Amicus Curiae.
13
14

Case No. No. 04-2-0017c

FINAL DECISION

And

ORDER

15
16 THIS Matter comes before the Board on a consolidated petition for review. Two petitions for
17 review were filed in this case: one petition by Vincent Panesko, on August 9, 2004
18 (WWGMHB Case No. 04-2-0015); and one by Grover and Pat Harader, Keith Ikerd, and
19 Richard and Judy Battin, on August 23, 2004 (WWGMHB Case No. 04-2-0017). The
20 petitions were consolidated by order of the Board on August 27, 2004 into this case number,
21 Respondent City of Napavine, is represented by attorney Keith Dearborn, who filed a notice
22 of appearance with the Board.
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25 Petitioners request that the Board review Resolution # 04-54-06 passed by the Napavine
26 City Council on June 22, 2004; a resolution regarding consideration of water supply and
27 sewerage service south of Napavine to a prospective industrial land bank developer.
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29 Petitioners contend that the resolution violates the Growth Management Act, Ch. 36.70A
30 RCW (the Act, or GMA) in several respects. The City first argues that the Board lacks
31 subject matter jurisdiction over this resolution.
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1 **SUMMARY OF THE DECISION**

2 Here, we determine that the Growth Management Hearings Board (the Board) does not
3 have jurisdiction to determine whether Napavine Resolution 04-54-06 complies with the
4 Growth Management Act. The commitment by the City in that resolution to provide
5 municipal water and sewerage services to users that meet certain conditions was not
6 adopted as an amendment to Napavine’s Comprehensive Plan or its development
7 regulations. Nor does any party offer evidence that the resolution constitutes a *de facto*
8 amendment of the comprehensive plan; in fact, the Petitioners’ issue statement does not
9 include an allegation that the resolution is inconsistent with the City’s comprehensive plan.
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13 Since the Board’s jurisdiction is limited by statute to comprehensive plans, development
14 regulations, and amendments to them, the Board does not have jurisdiction over the
15 challenged resolution. RCW 36.70A.280; 36.70A.290. Without subject-matter jurisdiction,
16 the Board may not reach the substantive issues in this case.
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18 **PROCEDURAL HISTORY**

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20 On August 26, 2004, at a prehearing conference, a request was made, followed by formal
21 motion from Vincent Panesko, to allow area residents, Ms. Kathleen Heikkila and Ms. Alta
22 Wachter, to appear as amicus curiae. They submitted a copy of a letter to the Napavine
23 City Council commenting on the referenced resolution. Ms. Heikkila also filed a motion
24 requesting amicus status in the case. Work and personal circumstances were forecasted to
25 make appearance and presentation at hearing(s) problematic. There was no objection to
26 allowing Ms. Heikkila and Ms. Wachter to appear as amicus curiae.
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29 A first Prehearing Order was issued on August 31, 2004. A Corrected Prehearing Order
30 and a Corrected Order on Consolidation were issued on September 10, 2004. In the course
31 of two months, briefs were filed, arguments made, and responses received from both
32

1 petitioners and the City of Napavine. A Hearing on the Merits took place on December 7,
2 2004 in the historic Lewis County Courthouse in Chehalis.

3
4 Following Respondent's submission of a two-item Index of the Record made by Napavine in
5 mid-September, Petitioners filed proposed additions and supplements to the Index, largely
6 copies of minutes of Napavine City Council meetings prior to the June 22, 2004
7 consideration and adoption of the subject resolution. Thirty items were proposed. On
8 October 1, 2004 the Board received a memorandum from Respondent Napavine exhorting
9 the Board to call for a motion from Petitioners to explain and defend proposed additions and
10 supplements, in accordance with WAC 242-02-540. Responsive statements, motions, and
11 argument were received from Vincent Panesko and from Grover and Pat Harader, et al., in
12 early October. On October 19, 2004 the Presiding Officer ruled by order that documents
13 numbered 1 through 28 were admitted, that document 29 duplicated one item in the City's
14 submitted Index, and that document 30, the Heikkila August 9, 2004 letter to the Napavine
15 City Council, should be submitted as the Heikkila and Wachter amicus brief at, or prior to,
16 the Hearing on the Merits.
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20 Respondent Napavine submitted a motion to supplement the Index, dated October 15th,
21 proposing the record for this case include:
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- 23 a) Attachment 8 of the State's Department of Health's Interim Planning Guidance for
24 Water System Plan/Small Water System Management Program Approvals (DOH
25 Publication #331-256, revised March 2004) and,
26 b) An August 5, 2004 comment letter from the State's Department of Community
27 Development (CTED), Growth Management Services Division to the City of Winlock
28 containing opinions about a proposed Winlock Comprehensive Plan.

29 Petitioners responded to the motion urging denial of the proposed exhibits. The Presiding
30 Officer issued an order on November 3, 2004 under terms of WAC 242-02, ruling that the
31 Board is taking judicial notice of the DOH publication and denying the admission of the
32 CTED August 5, 2004 letter to Winlock. At the Hearing on the Merits on December 9, 2004

1 the Presiding Officer and board members, persuaded by the probable relevance of the
2 CTED letter, set aside the November 10, 2004 ruling and admitted it as an exhibit.

3
4 On October 22, 2004 Respondent filed a second motion to supplement the record before
5 the Board, offering

- 6
7 a) A letter from Vincent Panesko to the Winlock City Council, dated August 3, 2004, and
8 b) A letter from attorney Alexander Mackie to attorney Keith Dearborn remarking on
9 matters at issue in some area cases; letter subject captioned "Lewis
County/Winlock/Panesko."

10 A response to this motion was filed by Vincent Panesko on October 28, 2004. The
11 Presiding Officer issued a ruling on November 10, 2004 excluding the admission of
12 Napavine's proposed supplemental exhibits under terms of WAC 242-02.

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15 On November 23, 2004 Respondent Napavine filed a third motion to supplement the record
16 with a Declaration of LaVerne Haslett, Clerk/Treasurer for the City of Napavine. There was
17 no objection. The press of time and filings of hearing briefs in late November necessitated
18 an actual ruling admitting this proposed exhibit at the outset of the Hearing on the Merits on
19 December 7, 2004.
20

21 22 **BURDEN OF PROOF**

23 In determining a decision on the issues presented in this case, Petitioners bear the burden
24 of proof. Comprehensive plan amendments and development regulations, and
25 amendments to them, are presumed valid upon adoption. RCW 36.70A.320(1). To meet
26 their burden Petitioners must show that the resolution at issue is clearly erroneous:
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29 The board shall find compliance unless it determines that the action by the
30 state agency, county, or city is clearly erroneous in view of the entire record
31 before the board and in light of the goals and requirements of this chapter.
32 RCW 36.70A.320(3)

1 In order to find the City of Napavine's action clearly erroneous, the board must be "left with
2 the firm and definite conviction that a mistake has been made." *Department of Ecology v.*
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4 *PUD 1*, 121 Wn.2nd 179, 201, 849 P.2d 646 (1993).
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7 **ISSUES POSED IN THE CONSOLIDATED PETITION FOR REVIEW**

- 8 1. Is the extension of the Napavine water and sewer lines across the Napavine Urban
9 Growth Area(UGA) boundary, as proposed in Resolution No. 04-54-06, in compliance
10 with RCW 36.70A.110(4)?
- 11 2. Is the commitment by the City of Napavine to provide water to a private developer
12 outside the UGA before providing sufficient water to serve residential needs inside
13 the City's UGA for the next 20 years in compliance with RCW 36.70A.070(1)?
- 14 3. In approving Resolution 04-54-06, did the City of Napavine fail to comply with public
15 participation requirements of the GMA, especially RCW 36.70A.020(11), .035, .070,
16 .106, .130, and .140?
- 17 4. Does Resolution 04-54-06, as enacted, substantially interfere with the realization of
18 GMA Goal 11 by failing to provide for citizen involvement? {RCW 36.70A.020(11)}
- 19 5. Did the City of Napavine fail to comply with public participation requirements of the
20 GMA in not properly publishing notice? {RCW 36.70A.290(2), RCW 36.70A,020 (11),
21 .035, .070, .106, .130, and .140}
- 22 6. If the water and sewer line extensions are determined to be noncompliant, will
23 continued planning and installation of such lines during the remand period
24 significantly interfere with fulfillment of Goal 1 {RCW 36.70A.020(1)} of the GMA?
- 25 7. If providing water outside the City's UGA before fulfilling needs inside the UGA is
26 determined to be noncompliant, will continued planning during the remand period
27 significantly interfere with meeting Goal 1 {RCW 36.70A.020(1)} and Goal 10
28 {RCW.36.70A.020(1)} of the GMA?
- 29 8. If the Board determines that City of Napavine Resolution 04-54-06 is not in
30 compliance with the GMA, should the Board impose an order of invalidity upon
31 actions and services authorized in the subject resolution?
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1 **BOARD DISCUSSION**

2 As a threshold matter, the City argues that the Board lacks jurisdiction to decide the issues
3 raised in the consolidated petitions for review because the challenged enactment is neither
4 a comprehensive plan amendment nor a development regulation. City of Napavine's
5 Response Brief at 2-3. Petitioners respond that the resolution is a "GMA action" and
6 therefore is subject to the Board's jurisdiction. Petitioners' Reply Brief at 2.
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9 The question of jurisdiction must be answered before the Board can turn to the substantive
10 issues in this case. At argument, the City stated that the Board lacks subject matter
11 jurisdiction but also asked the Board to render a decision on the merits of the issues
12 presented here anyway. This the Board cannot do. If the Board lacks jurisdiction to render
13 a decision, that decision is void *ab initio*. *Wesley v. Schneckloth*; 55 Wn.2d 90, 93-4, 346
14 P.2d 658(1959); *State v. Brennan*, 76 Wn.App. 347 349, 884 P.2d 1343, ft. 4 (1994).
15 Notwithstanding the City's request that the Board rule on the issues despite its lack of
16 subject matter jurisdiction, the right to assert a lack of subject matter jurisdiction may not be
17 waived. *Sullivan v. Purvis*, 90 Wn.App. 456, 460, 966 P.2d 912, 1998 Wash. App. LEXIS
18 196 (1998). Further, if the Board were to render a decision when it lacks jurisdiction, then
19 the Board would be rendering an advisory opinion in contravention of the explicit direction of
20 the statute. RCW 36.70A.290(1).
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24 Therefore, we must first answer the question whether the Board has subject matter
25 jurisdiction in this case. The growth boards have only those powers conferred upon them by
26 statute, either expressly or by necessary implication. *Skagit Surveyors and Engineers v.*
27 *Friends of Skagit County*, 135 Wn.2d 542, 567, 958 P.2d 962, 1998 Wash. LEXIS 473
28 (1998). The jurisdiction of the boards is established in RCW 36.70A.280 and 36.70A.290.
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31 RCW 36.70A.280 provides that a growth management hearings board shall hear and
32 determine only specified types of petitions. Petitioners allege that their petition falls into the

1 category of those alleging that a city “planning under this chapter” is not in compliance with
2 the requirements of the GMA. Petitioner’s Reply Brief at 2. However, the provision that the
3 boards may find a local jurisdiction out of compliance with the GMA does not exist in the
4 abstract. The matters that may be challenged are those “relating to whether or not an
5 adopted comprehensive plan, development regulation, or permanent amendment thereto is
6 in compliance with the goals and requirements of this chapter.” RCW 36.70A.290(2). This
7 provision of the Act further requires that petitions must be brought within 60 days of
8 publication of the legislative adoption being challenged. *Id.* Therefore, the Board can only
9 review timely petitions alleging that adopted comprehensive plans, development regulations
10 or permanent amendments to either comply with the GMA.
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13 Our state supreme court issued the final word on this subject in *Wenatchee Sportsmen’s*
14 *Ass’n v. Chelan County*:

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16
17 From the language of these GMA provisions [RCW 36.70A.280 and 36.70A.290], we
18 conclude that unless a petition alleges that a comprehensive plan or a development
19 regulation or amendments to either are not in compliance with the requirements of
20 the GMA, a GMHB [growth management hearings board] does not have jurisdiction
21 to hear the petition.

22 *Wenatchee Sportsmen’s Ass’n v. Chelan County*, 141 Wn.2d 169, 178, 4 P.3d 123, 2000
23 Wash. LEXIS 472 (2000).

24 Therefore, the only question with regard to subject matter jurisdiction here is whether the
25 resolution was either a comprehensive plan amendment or a development regulation (or
26 amendment to a development regulation). The city resolution at issue states as follows:

27 Section 1. The City of Napavine will expand its water and sewer service area
28 to include all properly designated and approved UGAs, subject to conditions
29 as follows:

- 30
- 31 • All federal, state, county, and local conditions precedent to
32 establishment of the appropriate UGA are met;
 - Applicants will contract with the city for service expansion,

- Applicants will pay all costs associated with providing the service, including:
 - Planning for the service expansion, any impacts to the city's existing system which is adversely affected by the expansion, capital costs for the service expansion, operation, and administration;
 - Applicants will provide water rights to the city as needed for each expansion of service.

Section 2. The city staff shall be authorized to enter into contract negotiations with Sovran Development Group, keeping accordance with the conditions stated above. [sic]

A review of this resolution shows that it does not state that it adopts an amendment of the City's comprehensive plan nor does it purport to adopt a development regulation or an amendment of one. On its face, then, the resolution is neither a comprehensive plan amendment nor a development regulation.

Where a local jurisdiction takes an action to amend a portion of its comprehensive plan, even if it does not call it a comprehensive plan amendment, it may constitute a *de facto* amendment of the comprehensive plan. See *Skagit County GrowthWatch v. Skagit County*, WWGMHB Case No. 04-2-0004 (Final Decision and Order, August 23, 2004). However, there has been no evidence brought forward here that the challenged resolution actually amended the City's comprehensive plan. In fact, the issues listed in the petitions for review do not even allege that the adopted resolution is inconsistent with the City's comprehensive plan. We do not, therefore, find a *de facto* amendment of the comprehensive plan.¹

We are sympathetic to the Petitioners' desire to obtain review of the City's decision to extend its water service area. Petitioners have particularly objected to the lack of public involvement in the decision to extend water services outside the present City urban growth

¹ No one argues that the Resolution is a development regulation, *de facto* or otherwise.

1 boundaries. The GMA provides for mandatory public participation opportunities in the
2 adoption of comprehensive plan amendments and development regulations. It is therefore
3 understandable that the Petitioners would seek redress before a growth board. However,
4 we do not have the authority to reach all municipal actions nor does the GMA apply to all
5 such actions.
6

7 8 **FINDINGS OF FACT**

- 9 1. The City of Napavine is a city located in Lewis County, a county located west of the
10 crest of the Cascade Mountains that is required to plan pursuant to RCW
11 36.70A.040.
- 12 2. The City of Napavine adopted Resolution 04-54-06 on June 22, 2004.
- 13 3. Petitioners Grover and Pat Harader, Keith Ikerd, and Richard and Judy Battin, and
14 Vince Panesko participated in the process at the City leading to the adoption of
15 Resolution 04-54-06.
- 16 4. Petitioner Panesko filed a petition to review Resolution 04-54-06 with the Board on
17 August 9, 2004. It was assigned WWGMHB Case No. 04-2-0015.
- 18 5. Petitioners Grover and Pat Harader, Keith Ikerd, and Richard and Judy Battin filed a
19 petition for review of Resolution 04-54-06 on August 23, 2004. It was assigned
20 WWGMHB Case No. 04-2-0017.
- 21 6. The two petitions for review were consolidated pursuant to RCW 36.70A.290(5) into
22 WWGMHB Case No. 04-2-0017c on August 27, 2004.
- 23 7. Kathleen Heikkila and Ms. Alta Wachter sought and were granted leave to participate
24 as amicus curiae in this case without objection by any party.
- 25 8. The petitions for review in this case seek review of Resolution # 04-54-06; a
26 resolution regarding consideration of water supply and sewerage service south of
27 Napavine to a prospective industrial land bank developer.
- 28 9. Resolution 04-54-06 is not an amendment to the City's comprehensive plan.
- 29 10. Resolution 04-54-06 did not adopt a development regulation or an amendment to a
30 development regulation.
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1 11. No evidence has been provided to show that Resolution 04-54-06 is a *de facto*
2 amendment of the City's comprehensive plan.

3 12. The issues listed in the petitions for review do not allege that the adopted resolution
4 is inconsistent with the City's comprehensive plan.

5
6 **CONCLUSIONS OF LAW**

7 A. The Petitioners have standing to bring the consolidated petitions for review.

8 B. The Board has personal jurisdiction over the City of Napavine.

9 C. The Board lacks subject matter jurisdiction over Resolution 04-54-06.

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11 **ORDER**

12 Based on the foregoing determination of the Board's lack of subject matter jurisdiction, this
13 consolidated petition for review is **DISMISSED**.

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15 This is a final order for purposes of a motion for reconsideration pursuant to WAC 242-02-
16 832 and for purposes of appeal pursuant to RCW 36.70A.300(5).

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18 Entered this 2nd day of February 2005.

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21 WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

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24 _____
Margery Hite, Board Member

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27 _____
Holly Gadbaw, Board Member

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Gayle Rothrock, Board Member