

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 ARTHUR WEST,

4
5 Petitioner,

6 v.

7
8 CITY OF OLYMPIA,

9 Respondent.

10 And

11
12 THE PORT OF OLYMPIA,

13
14 Intervenor.
15

Case No. 08-2-0001

ORDER ON DISPOSITIVE MOTION

16 **This Matter** comes before the Board on the City of Olympia's (Olympia) Dispositive
17 Motions. The City of Olympia filed its Motion on February 28, 2008. Pursuant to the
18 Board's February 29, 2008 Order Re: Petitioner's Request for Reconsideration of
19 Prehearing Order and Port of Olympia's Motion for Extension of Time, the date for the
20 parties to file dispositive motions was extended to March 12, 2008, with a reply date of
21 March 24, 2008. On March 12, 2008, Olympia filed an addendum to its dispositive motion
22 and the Port of Olympia (Port) filed a Joinder to City of Olympia's Dispositive Motions. No
23 response to Olympia and the Port's motions was filed by the March 24, 2008, the date set in
24 the Board's February 29, 2008 Order. Instead, West filed his response on March 25, 2008.
25
26

27 Due to the unavailability of the parties on a mutually convenient date, the parties were
28 notified on March 18, 2008 that oral argument on the motion would not be heard.

29 Accordingly, the motion was heard based on the filed pleadings.

30 Having reviewed the pleadings filed by the parties, the Amended Petition for Review, and
31 the files and records herein, the Board grants Olympia's dispositive motion. Accordingly,
32

this appeal is dismissed.

ORDER ON DISPOSITIVE MOTION
Case No. 08-2-0001
April 2, 2008
Page 1 of 8

Western Washington
Growth Management Hearings Board
515 15th Avenue SE
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-725-3870
Fax: 360-664-8975

1 **I. PRODECURAL BACKGROUND**

2 Petitioner Arthur West (West) filed his Petition for Review with the Board on January 2,
3 2008. In that Petition, he raised a challenge to “Ordinance _____, of December 2007,
4 amending the City of Olympia comprehensive Plan”¹ A copy of the ordinance or resolution
5 challenged was not attached.
6

7 The Prehearing Conference in this matter was held on February 5, 2005. At that time, West
8 was requested to provide a more definite statement of the issues. On February 11, 2008
9 West filed Petitioner’s Statement of the Issues. On February 19, 2008 the Board issued the
10 Prehearing Order. The Board rejected Petitioner’s proposed restatement of the issues as
11 being an improper expansion of the issues as stated in the Petition for Review.² Therefore
12 the Board ruled that the issues presented to the Board for resolution would be exactly as
13 stated in the original Petition for Review. Those issues are as follows:
14
15

- 16 1. Did the City fail to address in the unamended portions of its Comprehensive Plan the
17 capital facilities and utilities located in the Port of Olympia and identified in the Port
18 of Olympia’s SEPA determinations No. 07-02 and 07-03, as required by RCW
19 36.70A.070(3) and (4)?
20
21 2. Does the Amended Comprehensive Plan fail to contain any reference to the City of
22 Olympia policy of delegating land use authority to the Port of Olympia through some
23 form of unwritten agreement-understanding?
24
25 3. Does the Amended Comprehensive Plan fail to conform to the actual development
26 approved and/or under construction in the Central and Admiral District and elsewhere
27 on the property of the port of Olympia and is it otherwise in harmony with SEPA and
28 the GMA?
29
30
31
32

¹ Petition for Review in case no. 08-2-0001. Ordinance number was unspecified in the original petition.

² Prehearing Order at 1.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

II. POSITION OF THE PARTIES

Olympia's Position

Olympia alleges that Issue 1 must be dismissed because it is untimely.³ It argues that, to the extent the Petition challenges the City's existing, unamended Comprehensive Plan and/or development regulations, the Petition must be dismissed because the time for such has passed. Olympia notes that the comprehensive plan and development regulation review that is required under the Growth Management Act (GMA) under RCW 36.70A.130 was completed by December 13, 2005, with the resolution being published on December 23, 2005. Therefore, because a challenge to a GMA action must be filed within 60 days of the publication of such action, a challenge could be brought no later than February 21, 2006.⁴ Since West's Petition was filed on January 2, 2008, it was filed nearly two years too late, Olympia argues.

Olympia also argues that Issues 2 and 3 must be dismissed as outside the Board's subject matter jurisdiction. It points out that Issue 2 questions whether or not a delegation to the Port of Olympia is permissible. Olympia argues that West has failed to cite any provision of the GMA that would prohibit such a delegation. With regard to Issue 3, Olympia argues that the Board has no jurisdiction to consider the application of the GMA to a specific development.

Port's Position

The Port joins in Olympias' dispositive motion and requests that the Petition be dismissed because Petitioner's RCW 36.70A.130 "failure to act" challenge was not timely brought pursuant to RCW 36.70A.290(2).⁵ The Port notes that the present Petition raises the same three issues that were dismissed in *West v. Olympia*, WWGMHB Case No, 06-2-0026 in which the Board ruled that any challenge to the 2005 Comprehensive Plan was untimely.⁶

³ City of Olympia's Dispositive Motion at 4.

⁴ Id.

⁵ Port of Olympia's Joinder to City of Olympia's Dispositive Motions.

⁶ Id. at 6.

1 The Port also argues that the Petitioner is attempting to bring a “failure to act” challenge
2 under the GMA, but that such a challenge can only be brought concerning the City of
3 Olympia’s periodic review actions, under RCW 36.70A.130 (1), which occurred in 2005.
4 Thus, the Port argues, the appeal is untimely.⁷

5
6 **West’s Position**

7 In his response, West does not contest that he is attempting to challenge unamended
8 provisions of Olympia’s comprehensive plan. Instead, he argues that the “early and
9 continuous public participation” requirement of RCW 36.70A.160⁸ and the public interest in
10 citizen involvement recited in RCW 36.70A.010, should lead to an interpretation of the act
11 contrary to one that would have “ a ‘closed season’ for GMA appeals except once every
12 several years”.⁹ “This seven year itch approach to planning would make a mockery of the
13 goals of concurrency, consistency, and continuous public participation” Petitioner asserts.¹⁰

14
15
16 **III. BOARD DISCUSSION**

17 The jurisdiction of the boards is established in RCW 36.70A.280 and 36.70A.290. RCW
18 36.70A.280 provides:

19 A growth management hearings board shall hear and determine only those petitions
20 alleging either:

- 21 (a) That a state agency, county, or city planning under this chapter is not in
22 compliance with the requirements of this chapter, chapter 90.58 RCW as it relates
23 to the adoption of shoreline master programs or amendments thereto, or chapter
24 43.21C RCW as it relates to plans, development regulations, or amendments,
25 adopted under RCW 36.70A.040 or chapter 90.58 RCW; or
26 (b) That the twenty-year growth management planning population projections
27 adopted by the office of financial management pursuant to RCW 43.62.035
should be adjusted.¹¹

28 RCW 36.70A.290 provides:
29
30

31 ⁷ Id.

32 ⁸ The Board presumes Petitioner meant to cite RCW 36.70A.140

⁹ Petitioner’s Reply Brief at 1.

¹⁰ Id.

¹¹ RCW 36.70A.280(1).

1 All petitions relating to whether or not an adopted comprehensive plan, development
2 regulation, or permanent amendment thereto, is in compliance with the goals and
3 requirements of this chapter or chapter 90.58 or 43.21C RCW must be filed within
4 sixty days after publication by the legislative bodies of the county or city.¹²

5 In this case, Petitioner seeks review in a Petition that neither specified nor attached the
6 ordinance or resolution under appeal.¹³

7
8 Nevertheless, **Issue 1** as stated in the Petition for Review asks:

9 *Does the amended Comprehensive Plan fail to incorporate all of the mandatory*
10 *elements of a valid comprehensive plan in relation to the capital facilities, utilities, rail*
11 *projects, industry, projected traffic from that and other development and facilities, and*
12 *the foreseeable impacts of such development and facilities at the Port of Olympia?*

13 Olympia notes that this issue relates to un-amended portions of the Comprehensive Plan
14 and development regulations, and that un-amended portions of the Comprehensive Plan
15 can only be challenged when Olympia undertakes the review required by RCW
16 36.70A.130(1).¹⁴ Olympia asserts that review did not occur this year or last year. In support
17 of its motion, Olympia submitted the Declaration of Jan Weydemeyer, lead long range
18 planner for the City of Olympia.¹⁵ In her declaration Ms. Weydemeyer states that she was
19 the lead planner assigned to present the annual 2007 Comprehensive Plan and
20 development regulation amendments to the Olympia City Council. She stated that these
21 amendments were not part of a RCW 36.70A.130 review and evaluation. That
22 comprehensive review and evaluation was conducted in 2005. Further she stated that she
23 reviewed the issue statement and that none of the issues raised by Petitioner concern the
24 2007 amendments to the Comprehensive Plan and development regulations, but rather
25 concern unamended sections of the Comprehensive Plan and development regulations.¹⁶
26
27
28
29

30 ¹² RCW 36.70A.290(2).

31 ¹³ WAC 242-02-210 provides, *inter alia*, that the Petition for Review shall specify the provision of the document
32 being appealed and include one copy of the applicable provisions of the document being appealed.

¹⁴ City of Olympia's Addendum to Its Dispositive Motion

¹⁵ Declaration of Jan Weydemeyer, dated February 25, 2008.

¹⁶ *Id.* at 2.

1 Contrary to Petitioner’s unsupported assertion of “the ambiguity of the statute”¹⁷ there is
2 nothing in the GMA that would suggest that the entire comprehensive plan is opened for
3 challenge during every annual review. Petitioner cites no authority that would support such
4 an unprecedented argument. While Petitioner alludes to “a vigorous debate” over the
5 limitations upon the right to appeal contained in the GMA now being considered by the State
6 Supreme Court, that debate concerns the scope of matters subject to appeal of the review
7 and evaluation required by RCW 36.70A.130(1) and (4). As has been clearly established,
8 that is not the nature of Olympia’s recent amendments.
9

10
11 Therefore, as Issue 1 addresses matters not within the scope of the City of Olympia’s recent
12 amendments, we do not have jurisdiction over them. Any challenge to those provisions
13 should have been brought following Olympia’s comprehensive review and revisions in 2005.
14

15 **Issue 2** of the Petition for Review is stated as follows:

16 *Does the Amended Comprehensive Plan fail to contain any reference to the City of*
17 *Olympia policy of delegating land use authority to the Port of Olympia through some*
18 *form of unwritten agreement-understanding?*

19 Neither in the Petition for Review, nor in its response to the present motion has Petitioner
20 stated what provision of the GMA this issue is based upon, or how the City of Olympia as a
21 “city planning under this chapter is not in compliance with the requirements of this chapter,
22 chapter 90.58 RCW as it relates to the adoption of shoreline master programs or
23 amendments thereto, or chapter 43.21C RCW as it relates to plans, development
24 regulations, or amendments, adopted under RCW 36.70A.040 or chapter 90.58 RCW.”
25
26

27 In *Wenatchee Sportsman Ass’n v. Chelan County*, 141 Wn.2d 169, 179, 4 P.3d 123 (2000)
28 held:

29 From the language of these GMA provisions, we conclude that unless a petition
30 alleges that a comprehensive plan or development regulation or amendments to
31
32

¹⁷ Id.

1 either are not in compliance with the requirements of the GMA, a GMHB does
2 not have jurisdiction to hear the petition.

3 Because Petitioner has not shown that this issue of delegation of land use authority is a
4 GMA issue, there is no basis for the Board to consider this claim, and we lack jurisdiction to
5 hear it.
6

7
8 **Issue 3** of the Petition for Review is stated as follows:

9 *Does the Amended Comprehensive Plan fail to conform to the actual development*
10 *approved and/or under construction in the Central and Admiral District and elsewhere*
11 *on the property of the port of Olympia and is it otherwise in harmony with SEPA and*
12 *the GMA?*

13 Here, apparently Petitioner requests that the Board consider “actual development approved
14 and/or under construction” for compliance with the GMA. Further evidence that Petitioner is
15 seeking to have the Board review a particular development project can be found in the
16 Petition for Review, in which Petitioner asserts that the Board “should issue a stay of all
17 construction activity, or order that the City of Olympia should issue a ‘stop work; order on
18 the construction activity that the Port is engaged in on its Marine Terminal”¹⁸ However, this
19 is a matter outside our jurisdiction. The Washington Court of Appeals has held “The GMA
20 does not have site-specific effect at the project level. Instead, it establishes a general
21 framework in which local governments are required to plan in accordance with certain
22 guidelines.”¹⁹ Consequently, we do not have jurisdiction over the matters raised in Issue 3.
23
24

25 **IV. FINDINGS OF FACT**

- 26 1. The City of Olympia is located west of the crest of the Cascade Mountains and is
27 required to plan pursuant to RCW 36.70A.040.
- 28 2. Petitioner, Arthur West filed a Petition for Review with this Board on January 2, 2008.
- 29 3. In his Petition, West challenges unamended portions of the City of Olympia’s
30 Comprehensive Plan, alleges an improper delegation of authority to the Port of
31

32

¹⁸ Petition for Review at 4.

¹⁹ *Timberlake Christian Fellowship v. King County*, 114 Wash. App. 174, 182, 61 P.3d 332 (2002).

1 Olympia, and challenges actual development approved and/or under construction in
2 the Central and Admiral District and elsewhere on the property of the Port of
3 Olympia.

- 4 4. The City of Olympia completed the comprehensive review and evaluation of its
5 comprehensive plan and development regulations in 2005.
6
7 5. Olympia's 2007 annual Comprehensive Plan and regulations were not a
8 comprehensive review and evaluation as required by RCW 36.70A.130(1) and (4).
9
10 6. None of the issues addressed in the Petition for Review were matters amended in the
11 City of Olympia's 2007 annual update.
12
13 7. Any finding of fact later determined to be a conclusion of law is hereby adopted as
14 such.

14 **V. CONCLUSIONS OF LAW**

- 15 A. The Board has jurisdiction over the parties to this action.
16
17 B. The Board lacks jurisdiction over the issues presented in this appeal pursuant to
18 RCW 36.70A.280 (1) and RCW 36.70A.290(2).
19
20 C. The Board lacks subject matter jurisdiction over the unamended portions of
21 Olympia's Comprehensive Plan (Issue 1).
22
23 D. The Board lacks jurisdiction over whether a "delegation" of authority to the Port of
24 Olympia is permissible. (Issue 2)
25
26 E. The Board lacks jurisdiction to consider the application of the GMA to a specific
27 proposed development (Issue 3).
28
29 F. Any conclusion of law later determined to be a finding of fact is hereby adopted as
30 such.
31
32

1 **VI. ORDER**

2 Based on the foregoing, the Petition for Review filed in this case is DISMISSED.

3
4 DATED this 2nd day of April, 2008.

5 _____
6 James McNamara, Board Member

7
8 _____
9 Holly Gadbow, Board Member

10
11 Pursuant to RCW 36.70A.300 this is a final order of the Board.

12 **Reconsideration.** Pursuant to WAC 242-02-832, you have ten (10) days from the
13 mailing of this Order to file a petition for reconsideration. Petitions for
14 reconsideration shall follow the format set out in WAC 242-02-832. The original and
15 three copies of the petition for reconsideration, together with any argument in
16 support thereof, should be filed by mailing, faxing or delivering the document directly
17 to the Board, with a copy to all other parties of record and their representatives.
18 Filing means actual receipt of the document at the Board office. RCW 34.05.010(6),
19 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for
20 filing a petition for judicial review.

21 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
22 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
23 judicial review may be instituted by filing a petition in superior court according to the
24 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
25 Enforcement. The petition for judicial review of this Order shall be filed with the
26 appropriate court and served on the Board, the Office of the Attorney General, and all
27 parties within thirty days after service of the final order, as provided in RCW
28 34.05.542. Service on the Board may be accomplished in person, by fax 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.

29 **Service.** This Order was served on you the day it was deposited in the United States
30 mail. RCW 34.05.010(19)

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32

Western Washington
Growth Management Hearings Board
905 24th Way SW, Suite B-2
Olympia, WA 98502
P.O. Box 40953
Olympia, Washington 98504-0953
Phone: 360-664-8966
Fax: 360-664-8975