

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2
3 LESLIE A. POWERS,

4
5 Petitioner,

6 v.

7
8 JEFFERSON COUNTY,

9 Respondent.

Case No. 08-2-0010

ORDER ON DISPOSITIVE MOTION

10
11
12 THIS Matter comes before the Board upon the motion of Jefferson County to dismiss.¹
13 Petitioner, Leslie Powers, opposes the motion to dismiss.²

14
15 Oral argument on the Motion was heard telephonically by the Board on April 17, 2008.
16 Respondent was represented by its attorney David Alvarez. Petitioner Leslie A. Powers
17 appears pro se. Board members Holly Gadbow and James McNamara were present. Mr.
18 McNamara is the Presiding Officer.

19
20 In this order, the Board finds that the Jefferson County Appellate Hearing Examiner's
21 decision to uphold the Major Revision to the Port Ludlow Master Planned Resort is not
22 subject to the Board's jurisdiction. Petitioner fails to show that the decision of the Jefferson
23 County Appellate Hearings Examiner is either a comprehensive plan amendment or a
24 development regulation. Therefore, the Board lacks subject matter jurisdiction over claims
25 that the Major Revision to the Port Ludlow Master Planned Resort fails to comply with the
26 Growth Management Act (GMA).

27
28
29 The Board therefore grants the County's motion to dismiss the Petition for Review.
30
31
32

¹ Jefferson County's Notice of Motion for Dispositive Motion, filed April 2, 2008.

² Petitioner's Memorandum In Opposition to Respondent's Motion to Dismiss.

1 I. DISCUSSION

2 **Positions of the Parties**

3 County's Position

4 The County argues that the Board lacks subject matter jurisdiction to hear an appeal of a
5 "Major Resort Revision" concerning Port Ludlow, a Master Planned Resort ("MPR"). The
6 County asserts that the action being appealed is a land use decision on a permit, rather
7 than a legislative decision.³ The County notes that, under RCW 36.70A.280(1)(a), a
8 Growth Management Hearing Board's jurisdiction is limited to legislative acts that relate to a
9 comprehensive plan, a development regulation, and amendments thereto.⁴ The County
10 further notes that the Petition for Review in this case makes no mention of a legislative
11 decision to adopt, amend, or revise either a comprehensive plan or development
12 regulation.⁵ Instead, the County claims that because the applicant in the decision under
13 appeal in this case sought a permit pursuant to the shoreline management master program,
14 a zoning permit, a subdivision approval, the Petition is actually challenging a project permit
15 application.
16
17
18

19 The County further argues that any claim the MPR or development regulations do not
20 comply with the GMA are time barred. The County notes that the MPR was adopted in
21 1998 as part of the County's comprehensive plan and the applicable development
22 regulations were adopted in 1999.⁶ There have been no legislative actions taken by the
23 County to amend the text, maps, purpose or size of the MPR. Further, there have been no
24 amendments to the applicable development regulation in the last 60 days, the County
25 argues.⁷
26
27
28
29
30

31 ³ Memorandum of Authorities in Support of Respondent's Dispositive Motion, at 1-2.

32 ⁴ Id. at 3.

⁵ Id. at 4.

⁶ Id. at 6.

⁷ Id. at 7.

1 Petitioner's Position

2 In response, the Petitioner argues that the motion must be denied because it relies upon
3 facts not asserted in Petitioner's petition.⁸ Petitioner asserts that the County improperly
4 approved an amendment to a development regulation in a manner that conflicts with the
5 requirements of the GMA when it adopted an amendment to the MPR Code which
6 eliminated the expansion of the public resort described in the resort plan set out in Section
7 3.901 of the plan.⁹

9
10 Petitioner concurs with the County that jurisdiction in this matter is either lodged exclusively
11 in the Board or with the Superior Court.¹⁰ Petitioner notes that the Court in *Wenatchee*
12 *Sportsmen* held that the Board does not have jurisdiction over site specific rezones because
13 RCW 36.70A.020(7) excludes from the definition of development regulations decisions to
14 approve a project permit application, as defined in RCW 36.70B.020. However, Petitioner
15 argues that *Wenatchee Sportsmen* is limited in its application in this case because RCW
16 36.70A.020(4) does not reach development regulations for master planned resorts or the
17 MPR code.¹¹ Petitioner asserts that *Wenatchee Sportsmen* is further limited because even
18 a site specific development permit is not exempt from the jurisdiction of the Board if a
19 decision implicates the GMA.
20

21
22 Petitioner filed a Motion to Strike in Part Declaration of Al Scalf. That motion will be
23 discussed below.
24

25 **Board Discussion**

26 Motion to Strike

27 As noted above, with its response to the County's dispositive motion, Petitioner filed a
28 Motion to strike portions of the Declaration of Al Scalf which the County submitted in support
29 of its motion. Petitioner claims that the County brought its motion pursuant to CR 12 (b)(1)
30

31 _____
32 ⁸ Petitioner's Memorandum In Opposition to Respondent's Motion to Dismiss

⁹ Id. at 1.

¹⁰ Id. at 3.

¹¹ Id. at 4.

1 (motion to dismiss for lack of jurisdiction over the subject matter). On that basis it claims
2 that, except as to facts that directly address subject matter jurisdiction, the declaration must
3 be stricken because it sets forth facts that are not in the pleadings and do not support the
4 motion or that it states legal conclusions rather than facts.
5

6 In response, at oral argument the County claimed that it did not bring the motion pursuant to
7 CR 12 (b)(1) but instead WAC 242-02-530. The County claims that the declaration was filed
8 to demonstrate that there has been no recent amendment to the County's comprehensive
9 plan or development regulations. The County denies that the Scalf declaration contains any
10 legal conclusions.
11

12 The Board notes that nothing in the County's motion asserts that is was brought under CR
13 12 (b)(1), or WAC 242-02-530. However, we note that WAC 242-02-530(4) is the applicable
14 Board procedural rule pertaining to dispositive motions. That rule provides (in pertinent
15 part) that: "Dispositive motions on a limited record, similar to a motion for summary
16 judgment in superior court or a motion on the merits in the appellate courts, are permitted."
17 CR 56, the applicable rule for motions for summary judgment allows such motions to be
18 made based on supporting affidavits. As to the claim that the declaration must be stricken
19 because it sets forth facts that are not in the pleadings, this is hardly surprising. As the
20 County pointed out in oral argument on the motion, in order to demonstrate that the Board
21 lacks jurisdiction, it must prove a negative, i.e. that it has *not* recently amended its
22 comprehensive plans or development regulations. It is not expected that the Petition for
23 Review would contain such a fact, since to do so would be to admit a lack of Board
24 jurisdiction. Therefore, we hold that facts in the Scalf declaration pertaining to the adoption
25 of Port Ludlow Master Planner Resort, the Master Planned Resort Code and the County's
26 comprehensive plan are relevant and will be allowed.
27
28
29

30 In addition, the Board allows those portions of the declaration that establish Mr. Scalf's
31 basis for making the declaration, based on personal knowledge.
32

1 Dispositive Motion

2 The jurisdiction of the boards is established in RCW 36.70A.280 and 36.70A.290. RCW
3 36.70A.280 provides:

4 A growth management hearings board shall hear and determine only those petitions
5 alleging either:

- 6 (a) That a state agency, county, or city planning under this chapter is not in
7 compliance with the requirements of this chapter, chapter 90.58 RCW as it relates
8 to the adoption of shoreline master programs or amendments thereto, or chapter
9 43.21C RCW as it relates to plans, development regulations, or amendments,
10 adopted under RCW 36.70A.040 or chapter 90.58 RCW; or
11 (b) That the twenty-year growth management planning population projections
12 adopted by the office of financial management pursuant to RCW 43.62.035
13 should be adjusted.¹²

14 RCW 36.70A.290 provides:

15 All petitions relating to whether or not an adopted comprehensive plan, development
16 regulation, or permanent amendment thereto, is in compliance with the goals and
17 requirements of this chapter or chapter 90.58 or 43.21C RCW must be filed within
18 sixty days after publication by the legislative bodies of the county or city.¹³

19 In *Wenatchee Sportsmen Ass'n v. Chelan County*, the Washington Supreme Court stated:

20 From the language of these GMA provisions [RCW 36.70A.280 and 36.70A.290], we
21 conclude that unless a petition alleges that a comprehensive plan or a development
22 regulation or amendments to either are not in compliance with the requirements of
23 the GMA, a GMHB [growth management hearings board] does not have jurisdiction
24 to hear the petition.¹⁴

25 Petitioner argues that *Wenatchee Sportsmen* is distinguishable because the claims pled in
26 the petition are not site specific and do not address a rezone, the subject matter of that
27 case. However, *Wenatchee Sportsmen* has broader application than to site specific
28 rezones. It holds that the Board's jurisdiction is limited to comprehensive plans and
29 development regulations, or amendments to either.

30
31 ¹² RCW 36.70A.280(1).

32 ¹³ RCW 36.70A.290(2).

¹⁴ *Wenatchee Sportsmen Ass'n v. Chelan County*, 141 Wn.2d 169, 178, 4 P.3d 123, 2000 Wash. LEXIS 472 (2000).

1 Thus, the key question in determining the Board's jurisdiction is whether the decision being
2 challenged is a comprehensive plan, a development regulation or an amendment to either.
3 Petitioner alleges that "the amendment to Section 3.901 of Ordinance 08-1004-99 (the
4 "MPR Code") by major revision causes the MPR Code, the development regulation for the
5 Port Ludlow Master Planned Resort ("the "MPR") to be noncompliant with the requirements
6 of the Growth Management Act (the GMA") as they apply to residential development
7 associated with a master planned resort."¹⁵ However, an examination of the Appellate
8 Hearing Examiner's January 7, 2008 decision discloses nothing that purports to amend the
9 MPR Code.
10

11
12 We note that Section 3.901 of the Resort Code, now codified as JCC 17.50.020 provides:

13 **17.50.020 Resort Plan.**

14 The Resort Plan for future development of properties in the MPR-RC/CF zone shall be
15 limited and shall not exceed the scope of development set forth below and shall include no uses
16 except those set forth below, unless a major revision is approved (see JCC 17.50.060).
17 Changes to this Resort Plan that decrease the sizes noted below are allowed. As of the
18 effective date of the ordinance codified in this title, the Resort Plan shall be as set forth herein.

19 (1) Gross square feet of resort development: 498,300.

20 (2) Hotel guest rooms: 275.

21 (3) Restaurants: 59,000 total square feet:

22 One 200-seat year-round restaurant;

23 One 125-seat seasonal restaurant (near marina);

24 Also includes hotel lobby and registration area, spa area, kitchens, offices and storage
25 rooms.

26 (4) Lounge, one year-round, 125 seats: 5,000 square feet.

27 (5) Resort retail: 2,500 square feet.

28 Plus associated storage: 1,400 square feet.

29 (6) Conference center, associated with and physically part of hotel buildings: 22,000 square
30 feet.

31 Plus support areas and storage: 8,000 square feet.

32 (7) Indoor tennis courts: 26,000 square feet.

(8) Indoor sports and pool complex: 13,500 square feet.

(9) Structured/underground parking: 119,000 square feet.

(10) Museum or interpretive center: 7,500 square feet.

(11) Support buildings (maintenance, warehousing, housekeeping): 12,000 square feet.

¹⁵ Petitioner's Memorandum In Opposition to Respondent's Motion to Dismiss at 1.

- 1 (12) Youth center: 4,000 square feet.
- 2 (13) Marina expansion, slips: 100 slips.
- 3 (14) Amphitheater.
- 4 (15) Yacht club.
- 5 (16) Four detached single-family residences and one five-unit townhome structure;
- 6 provided, that these structures are not included in or limited by the gross square feet of
- 7 development for the Resort Plan noted in subsection (1) of this section.
- 8 (17) All existing townhomes; provided, that these structures are not included in or limited by
- 9 the gross square feet of development for the Resort Plan noted in subsection (1) of this section.
- 10 Building heights and impervious surface limits shall apply as set forth in Chapter 17.25
- 11 JCC. Surface parking in addition to the structured or underground parking noted above may be
- 12 provided. Miscellaneous support areas including laundry facilities and administrative offices
- 13 may be included, but shall not increase the gross square footage for the resort complex, except
- 14 that the minor revision process may be used to permit these facilities with up to a five percent
- 15 increase in gross square footage. [Ord. 8-99 § 3.901]

16 While the Resort Plan provides details on gross square footage of the resort and facilities,
17 as well as the units of various facets of the resort, it does not provide that the resort must be
18 developed to mirror these parameters. Instead this section states: "As of the effective date
19 of the ordinance codified in this title, the Resort Plan shall be as set forth herein." The same
20 section of the code also provides that "The Resort Plan for future development of properties
21 in the MPR-RC/CF zone shall be limited and shall not exceed the scope of development set
22 forth below and shall include no uses except those set forth below, unless a major revision
23 is approved (see JCC 17.50.060)." Thus, this section of the code places a cap on the scope
24 of development. It does not prohibit variation from these dimensions, and in fact references
25 a major revision section of the code (Section 3.905, codified as JCC 17.50.070) for changes
26 in allowed uses.

27 It has not been alleged, and an examination of the Appellate Hearing Examiner's decision
28 does not reveal, that the decision under appeal approved a change to the MPR that
29 exceeded the scope of development as set out in section 3.901.

30 Not only did the Appellate Hearing Examiner not amend section 3.901, it is apparent that he
31 was operating entirely within the scope of the MPR code. The Appellate Hearing Examiner,
32 in the Summary section of the decision under appeal states: "Perhaps the most significant

1 modification is that the townhomes are subjected to the bulk and dimensional standards of
2 single-family homes in the MPR code. The MPR code could not be clearer on this
3 requirement **and the Appellate Hearing Examiner (“AHE”) had no choice but to follow**
4 **it.**¹⁶ (emphasis supplied). Far from amending a development regulation, the Appellate
5 Hearing Examiner was merely applying it. Thus, his decision was clearly a permitting
6 decision, not a legislative amendment of the MPR code and is outside the Board’s
7 jurisdiction to review.
8

9
10 Petitioner has also alleged that “the major revision process did not comply with the
11 requirements of the GMA or the Jefferson County Comprehensive Plan as adopted on July
12 31, 1998 by Resolution 72-98, (the “Comprehensive Plan”).¹⁷ In particular, Petitioner takes
13 exception with the fact that the adoption was not made by the legislative body, the adoption
14 was not preceded by notice, the amendment was not submitted as part of the annual
15 amendment cycle, and the application was not accompanied by the public notice and public
16 participation required under the GMA.¹⁸ Because the Board finds that the challenged action
17 was a project permit decision, and not an amendment of a development regulation, the
18 referenced GMA requirements for adoption and amendment of comprehensive plans and
19 development regulations do not apply. Thus, these challenges do not serve as a basis for
20 Board jurisdiction.
21

22
23 To the extent that Petitioner is arguing that, through the major revision to the MPR the
24 County has approved a project that is now so modified that it is not compliant with the
25 GMA, we must reject that argument.
26

27 The recent case of *Woods v. Kittitas County* directly addressed the question of whether a
28 project permit needs to be consistent with the GMA. The Court noted:
29
30

31
32 _____
¹⁶ Final Decision on Appeal, dated January 7, 2008, at 1.

¹⁷ Petitioner’s Memorandum In Opposition to Respondent’s Motion to Dismiss at 2.

¹⁸ Id. fn. 2.

1 Assuming that a project permit must be consistent with development regulations
2 or a comprehensive plan, there is the potential that the actual regulations or plan
3 are not consistent with the GMA. As noted above, a comprehensive plan or
4 development regulation's compliance with the GMA must be challenged within
5 60 days after publication. RCW 36.70A.290(2). Once adopted, comprehensive
6 plans and development regulations are presumed valid. RCW 36.70A.320(1).
7 Thus, if a project permit is consistent with a development regulation that was not
8 initially challenged, there is the potential that both the permit and the regulation
9 are inconsistent with the GMA. While this is problematic, the GMA does not
10 explicitly apply to such project permits and the GMA is not to be liberally
11 construed. *Skagit Surveyors*, 135 Wn.2d at 565. This court's "role is to interpret
12 the statute as enacted by the Legislature ... ; we will not rewrite the [GMA]." *Id.*
13 at 567. Because the GMA does not provide for it, we hold that a site-specific
14 rezone cannot be challenged for compliance with the GMA.¹⁹

15 This present case presents a similar situation. If the MPR code is not consistent with the
16 GMA, a challenge to that code ought to have been when the code was adopted. The
17 County's master planned resort development regulations were adopted in 1999 and have
18 not been recently amended.²⁰ In accordance with RCW 36.70A.320(1), the County's code
19 regulating existing MPRs is considered valid on adoption.

20 If the MPR revision is consistent with the MPR code, it is not within the Board's authority to
21 consider its compliance with the GMA. As the Court in *Woods v. Kittitas County* held, "the
22 GMA does not explicitly apply to such project permits and the GMA is not to be liberally
23 construed".²¹

24 **Conclusion:** The decision of the Jefferson County Appellate Hearings Examiner approved
25 neither a comprehensive plan amendment nor a development regulation. Therefore, the
26 Board lacks subject matter jurisdiction over claims that the Major Revision to the Port
27 Ludlow Master Planned Resort fails to comply with the RCW 36.70A.280(1) and RCW
28 36.70A.290(2).
29
30
31

32 ¹⁹ *Woods v. Kittitas County*, 162 Wn.2d 597, 614 (2007).

²⁰ See Declaration of Al Scalf, at 2, paragraph 12.

²¹ *Woods v. Kittitas County*, 162 Wn.2d 597, 614.

II. FINDINGS OF FACT

1. Jefferson County is located west of the crest of the Cascade Mountains and is required to plan pursuant to RCW 36.70A.040.
2. Petitioner participated orally and in writing at each hearing relating to the Modified Resort Plan and consolidated permits.
3. The action challenged in this case is the decision of the Jefferson County Appellate Hearings Examiner that upheld and modified a separate hearings examiner decision that conditionally approved a major revision to the Resort Plan for the Port Ludlow Master Planned Resort.
4. The Jefferson County Port Ludlow Master Planned Resort Code (MPR Code) was adopted in 1999 and has not been subsequently amended.
5. The MPR Code, at Section 3.901, sets forth the scope of development for the Port Ludlow Master Planned Resort (MPR).
6. The MPR code, at Section 3.906, contains a Major Revision process for revision to the MPR.
7. A major revision of the MPR is processed as a hearings examiner decision according to Section 3.906.
8. On January 7, 2008 the Jefferson County Appellate Hearing Examiner issued a decision upholding with modifications a major revision of the MPR.
9. The January 7, 2008 Hearings Examiner decision upholding with modifications the major revision to the MPR shows that the Appellate Hearings Examiner was applying the MPR code.
10. The Jefferson County Hearing Examiner's decision does not reveal any apparent amendment to the Jefferson County comprehensive plan or development regulations.
11. Any finding of fact later determined to be a conclusion of law is hereby adopted as such.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18

III. CONCLUSIONS OF LAW

- A. The Board has jurisdiction over the parties to this action.
- B. The decision of the Jefferson County Appellate Hearings Examiner that conditionally approved a major revision to the Resort Plan for the Port Ludlow Master Planned Resort was a permitting decision, not an amendment of the County comprehensive plan or development regulations pursuant to RCW 36.70A.020(7).
- C. The Board lacks jurisdiction over permitting decisions pursuant to RCW 36.70A.280(1) and RCW 36.70A.290 (2).
- D. The Board lacks jurisdiction over the decision of the Jefferson County Appellate Hearings Examiner that conditionally approved a major revision to the Resort Plan for the Port Ludlow Master Planned Resort pursuant to RCW 36.70A.280(1) and RCW 36.70A.290(2)
- E. Any conclusion of law later determined to be a finding of fact is hereby adopted as such.

19
20
21
22
23
24
25
26
27
28
29
30
31
32

IV. ORDER

Based on the foregoing, the Petition for Review is hereby DISMISSED.

DATED this 22nd day of April, 2008.

James McNamara, Board Member

Holly Gadbow, Board Member

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

Reconsideration. Pursuant to WAC 242-02-832, you have ten (10) days from the mailing of this Order to file a petition for reconsideration. Petitions for reconsideration shall follow the format set out in WAC 242-02-832. The original and

1 three copies of the petition for reconsideration, together with any argument in
2 support thereof, should be filed by mailing, faxing or delivering the document directly
3 to the Board, with a copy to all other parties of record and their representatives.
4 Filing means actual receipt of the document at the Board office. RCW 34.05.010(6),
5 WAC 242-02-330. The filing of a petition for reconsideration is not a prerequisite for
6 filing a petition for judicial review.

7 **Judicial Review.** Any party aggrieved by a final decision of the Board may appeal the
8 decision to superior court as provided by RCW 36.70A.300(5). Proceedings for
9 judicial review may be instituted by filing a petition in superior court according to the
10 procedures specified in chapter 34.05 RCW, Part V, Judicial Review and Civil
11 Enforcement. The petition for judicial review of this Order shall be filed with the
12 appropriate court and served on the Board, the Office of the Attorney General, and all
13 parties within thirty days after service of the final order, as provided in RCW
14 34.05.542. Service on the Board may be accomplished in person, by fax or by mail,
15 but service on the Board means actual receipt of the document at the Board office
16 within thirty days after service of the final order.

17 **Service.** This Order was served on you the day it was deposited in the United States
18 mail. RCW 34.05.010(19)
19
20
21
22
23
24
25
26
27
28
29
30
31
32

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