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BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

LEVI BUSSANICH, LEVI BUSSANICH AND
SHARLYN BUSSANICH, HAWENT LLC, THE
BRUMBACH FAMILY LTD. PARTNERSHIP,
HOWARD AND NANCY POLEN, JUDITH AND
THOMAS BUSH AND RUBY L. BRUMBACK,

Case No. 09-2-0001

ORDER ON DISPOSITIVE MOTION

Petitioners,

v.

CITY OF OLYMPIA,

Respondent.

This matter comes before the Board on the City of Olympia’s (hereafter the “City”) motion to dismiss Issues 1, 2, 3, 4 and 5.¹ No reply to the motion was filed by Petitioners by the date set forth in the Prehearing Order.²

The City argues that these issues must be dismissed as matters outside the Board’s jurisdiction. It notes that the Board has only the power to determine compliance with the goals and requirements of the Growth Management Act (GMA), the Shoreline Management Act (SMA), and associated review under the State Environmental Policy Act (SEPA).³

The City states that this appeal concerns a portion of Ordinance 6594 that adopts the City of Olympia Comprehensive Plan Transportation 2025 map. That map shows a potential new future connection, known as the “Ensign Road Connection”.

The Board will review its jurisdiction over the five issues raised in this appeal.

¹ City of Olympia’s Dispositive Motion, filed March 18, 2009.
² Pursuant to the Board’s March 5, 2009 Prehearing Order, the deadline for a response to substantive motions was March 30, 2009.
³ Id. at 1.

1 Issue 1

2 Issue 1, as stated in the Prehearing Order, reads as follows:

- 3 **1. Did the City of Olympia, in its adoption of a comprehensive plan amendment**
4 **requiring the extension of Ensign Road (the “Amendment”), violate RCW**
5 **36.70A.020(6) by requiring Petitioners to use their land for a provision of a**
6 **public facility in a manner that is inconsistent with basic GMA principles?**

7 The City argues that this issue relates to a project-specific requirement regarding what
8 action might be required of Petitioners at the time a developer project is proposed for the
9 Ensign Road area. The City states that the Board does not have jurisdiction over a specific
10 development proposal.⁴ Further, the City argues that any decision to require Petitioners to
11 use their land for an extension of Ensign Road would arise only at the time of a specific
12 project proposal.⁵

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15 An examination of the ordinance under appeal, No. 6594, does not reveal any City
16 requirement for a dedication of property for an extension of Ensign Road. Section 19 of the
17 Ordinance amends the Olympia Comprehensive Plan Transportation Map to adopt the
18 “Transportation 2025 Map”. The ordinance does not appear to require dedication of right of
19 way for a road extension. Were such a requirement to be made it would occur, according to
20 the City, at the time a specific project is proposed for the vicinity of Ensign Road.
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23 Petitioners have failed to respond to this motion and thus have not presented any argument
24 to contest the City’s position that this is a project specific matter over which this Board has
25 no jurisdiction. The Board agrees that it lacks jurisdiction over permitting decisions.⁶
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30 ⁴ City Motion at 2.

31 ⁵ Id.

32 ⁶ *Woods v. Kittitas County*, 162 Wn.2d 597, 610 (2007)(Holding GMHBs do not have jurisdiction to decide challenges to site-specific land use decisions because site-specific land use decisions do not qualify as comprehensive plans or development regulations).

1 In the absence of any argument to counter the City's position that this is a project specific
2 issue, it does not appear that the Board has jurisdiction to decide this issue, and it is
3 dismissed.

4
5 Issue 2

6 Issue 2, as stated in the Prehearing Order, reads as follows:

7 **2. Did the City of Olympia, in its adoption of the Amendment, impose an**
8 **unconstitutional exaction on the Petitioners in violation of the Washington**
9 **State and United States Constitutions?**

10
11 The City argues that this is a project-specific issue, rather than a comprehensive plan and
12 development regulation issue, and therefore the Board lacks jurisdiction.⁷ The City relies
13 upon the case of *Achen v. Clark County, supra*, for the position that the Board lacks
14 jurisdiction to determine whether an unconstitutional taking has occurred.

15
16 The jurisdiction of the Growth Management Hearings Boards is set out in RCW
17 36.70A.280(1):

18 (1) A growth management hearings board shall hear and determine only those
19 petitions alleging either:

20
21 (a) That, except as provided otherwise by this subsection, a state agency,
22 county, or city planning under this chapter is not in compliance with the
23 requirements of this chapter, chapter 90.58 RCW as it relates to the adoption of
24 shoreline master programs or amendments thereto, or chapter 43.21C RCW as
25 it relates to plans, development regulations, or amendments, adopted under
26 RCW 36.70A.040 or chapter 90.58 RCW. Nothing in this subsection authorizes
a board to hear petitions alleging noncompliance with RCW 36.70A.5801; or

27 (b) That the twenty-year growth management planning population projections
28 adopted by the office of financial management pursuant to RCW 43.62.035
29 should be adjusted.
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⁷ City Motion at 3.
ORDER ON DISPOSITIVE MOTION
Case No. 09-2-0001
April 1, 2009
Page 3 of 7

1 This Board has consistently held that it does not have jurisdiction to determine if an act by a
2 local government constitutes an unconstitutional taking.⁸

3
4 Petitioners having failed to file a response to the motion, and the Board having been
5 presented with no argument as to why the Board would have jurisdiction over this claim,
6 Issue 2 is dismissed.

7
8 Issue 3

9 Issue 3, as stated in the Prehearing Order, reads as follows:

10 **3. Did the Amendment impose an illegal tax on the Petitioners in violation of**
11 **RCW 82.02.020 and/or common law addressing illegal development**
12 **conditions?**

13 The City argues that this Issue does not reflect a violation of the GMA, but instead is a
14 project-specific issue over which the Board lacks jurisdiction.⁹

15
16 As noted above, the jurisdiction of the Boards is set forth in RCW 36.70A.280(1). That
17 statute does not confer jurisdiction on the Board to hear issues based on an alleged
18 violation of RCW 82.02.020.¹⁰ In the absence of any argument from Petitioners to the
19 contrary, the Board grants the City's motion to dismiss Issue 3.

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22 Issue 4

23 Issue 4, as stated in the Prehearing Order, reads as follows:

24 **4. Did the Amendment result in an uncompensated taking of Petitioners' property,**
25 **preventing them from making reasonable use of their property?**

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29 ⁸ See, eg. *In re Harborview Estates, Inc.*, WWGMHB No. 94-2-0008, Order of Dismissal, (7/x/94); *Citizens for*
30 *Rational Shoreline Planning, et al. v. Whatcom County*, WWGMHB No. 08-2-0031, Order on Dispositive
31 Motion, (1/16/09)(Holding that the Legislature did not grant the Board with authority to consider constitutional
32 issues).

⁹ City Motion at 3.

¹⁰ See e.g., *CRSP v. Whatcom County*, Case No. 08-2-0031, Order on Motions (Jan. 16, 2009); *Achen v.*
Clark County, Case No. 99-2-0040, FDO (May 16, 2000). See also are colleagues – *MBA of Pierce County v.*
Bonney Lake, CPSGMBH Case No. 05-3-0045, Order on Motions (Jan. 12, 2006).

1 The City argues that this Issue is essentially a duplicate of Issue 2, and does not reflect a
2 violation of the GMA. In addition, the City claims that this is a project specific issue over
3 which the Board lacks jurisdiction.¹¹

4
5 As the Board recently noted, by long established precedent all three of the Growth
6 Management Hearings Boards have consistently declined to consider constitutional
7 issues.¹² The Board concurs with the City that Issue 4 raises a constitutional issue over
8 which the Board has no jurisdiction. Petitioners having failed to respond to the motion and
9 present any argument as to why this Issue falls within the Board's jurisdiction, the City's
10 Motion to dismiss Issue 4 is granted.
11

12
13 Issue 5

14 Issue 5, as stated in the Prehearing Order, reads as follows:

15 **5. Did the City, through the Amendment, engage in an uncompensated taking**
16 **of Petitioners' property for a public purpose, and an act of condemnation**
17 **blight, in violation of the United States Constitution?**

18 Here again, the City argues this Issue is the same as Issue 2, and is a project-specific issue
19 rather than a comprehensive plan and development regulation issue.¹³
20

21 As noted above, in relation to Issue Nos. 2 and 4, the Board lacks jurisdiction to hear claims
22 alleging a Constitutional violation. Issue 5 is dismissed.
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¹¹ City Motion at 3.

¹² *CRSP v. Whatcom County*, Case No. 08-2-0031, Order on Motions (Jan. 16, 2009)(citing to several cases from each Board holding that the Boards do not have jurisdiction to determine constitutional issues).

¹³ City Motion at 4.

1 **ORDER**

2 Based on the foregoing, the Board determines that it has no jurisdiction to determine Issues
3 1, 2, 3, 4, and 5. The City's motion with regard to these issues is granted and those issues
4 are dismissed. There being no other issues presented in this case, the appeal is dismissed.
5

6 Entered this 1st day of April 2009.
7

8 _____
9 James McNamara, Board Member

10 _____
11 William Roehl, Board Member

12 _____
13 Nina Carter, Board Member

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15
16 **Pursuant to RCW 36.70A.300 this is a final order of the Board.**

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

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

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

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