

CENTRALPUGETSOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

ASSOCIATION OF RURAL RESIDENTS,)

Case No.93-3-0010

)

Petitioner ,

)

)

FINDING OF
NONCOMPLIANCE

)

)

KITSAP COUNTY,

)

Respondent.)

)

PROCEDURAL HISTORY

On December 6, 1993, the Central Puget Sound Growth Planning Hearings Board (the Board) received a Petition for Review from the Association of Rural Residents (Rural Residents) challenging the adoption of Kitsap County (the County) of its Interim Urban Growth Area (IUGA) in the area north of the community of Kingston pursuant to Kitsap County Ordinance No.155-1993 (the Ordinance).

On June 3, 1994, the Board issued its Final Decision and Order (the FDO) in this matter. The FDO concluded that the Ordinance did not comply with the requirements of the Growth Management Act (GMA) and remanded the Ordinance to the County with instructions to bring it into compliance with the Act, specifically RCW 36.70A.110, and with the Board's holdings and conclusions, by October 3, 1994.

Subsequently, the County sought reconsideration of the Board's FDO. On June 24, 1994, the Board entered an Order Denying Kitsap County's Petition for Reconsideration.

- On July 22, 1994, the Board received a copy of "Petition for Review Under Chapter 34.05 - RCW. Writ of Review and Declaratory Judgment" (Petition for Review) which was filed - by Kitsap County with the Thurston County Superior Court. The Petition for Review named the Association of Rural Residents and the Central Puget Sound Growth Management Hearings Board as Respondents. In its Prayer, the Petition for Review asks, among other things, that the Court enter a stay of the effectiveness of the Board's Final Decision and Order and a judgment reversing the Board's decision after a full hearing.

On August 29, 1994, the County filed its Motion for Stay with the Thurston County Superior Court.

Pursuant to ESSHB 2510, the name of the growth planning hearings boards was changed to growth management hearings boards, effective June 9, 1994.

On September 26, 1994, the County's Motion for a Stay of the Board's Order (Motion for Stay) was argued in Thurston County Superior Court. No decision has yet been reached on the Motion for Stay.

On October 12, 1994, the Board issued a "Notice of Compliance Hearing" which scheduled a hearing for October 26, 1994. On October 18, 1994, the Board received a "Motion to Reschedule Compliance Hearing" from Rural Residents. On October 21, 1994, the Board issued an "Order Rescheduling Compliance Hearing."

The compliance hearing in this matter was held in Seattle, at 1:30 p.m. on October 27, 1994. Present in the Board's Seattle office were Board members Chris Smith Towne and presiding officer Joseph W. Tovar, with Board member M. Peter Philley participating telephonically. Present in the Seattle office was David A. Bricklin, representing Rural Residents. Participating telephonically was Douglas B. Follner, representing the County. Court reporting services were provided by Robert H. Lewis of Tacoma.

Rural Residents argued that the County had not complied with the Board's Order of June 3, 1994 and that it was timely and appropriate for the Board to recommend to the Governor that sanctions be imposed upon the County. The County agreed that it had not complied with the Board's June 3, 1994 FDO, but argued that, because it had filed a petition for review and a Motion for Stay of the effectiveness of the Board's FDO with Thurston County Superior Court, it would not be appropriate for the Board to recommend that the Governor impose sanctions. After hearing further argument by both parties, the presiding officer closed the hearing and directed Rural Residents to submit a post-hearing brief to provide legal authority for the proposition that the County's non-compliance is not excused by the pendency of the action on the Motion for Stay. The County was given the option to submit a rebuttal brief.

On November 3, 1994, the Board received "A.R.R.'s Legal Memorandum Regarding Sanction Recommendation." On November 7, 1994, the Board received "Kitsap County's Brief Re: Sanctions."

FACTS BEFORE THE BOARD

RCW 36.70A.110(4) requires the County to adopt an IUGA on or before October 1, 1993.

On October 4, 1993, the County adopted Ordinance No. 155-1993, entitled "Ordinance Adopting Interim Urban Growth Areas as Required by the Growth Management Act."

On June 3, 1994, the Board issued a Final Decision and Order which found that the County was not in compliance with the requirements of RCW 36.70A.110 and ordered that the County comply by no later than October 3, 1994. At the time of the October 27, 1994 compliance hearing, the County had not yet taken action to comply with the FDO.

RCW 36.70A.330(2) and W AC 242-02-890(3) require the Board to issue a Finding of Compliance or Non-Compliance within forty-five days from the date a motion for compliance hearing is filed by a party or the Board itself. Since the Board entered its own motion for hearing on October 12, 1994, the forty-fifth day falls on a Saturday, November 26, 1994. Pursuant to W AC 242-02-060, when a deadline falls on a Saturday, the deadline moves to the next working day, which is Monday, November 28, 1994.

RCW 36.70A.330(3) and W AC 242-02-890(4) require that if the Board finds that the County is not in compliance, it must transmit its finding to the Governor and recommend that sanctions authorized by the Act be imposed.

DISCUSSION

N

Rural Residents and the County were each asked to address the Board's authority to recommend sanctions, particularly in view of the fact that the County has filed a Petition for Review and Motion for Stay of the Board's FDO to Thurston County Superior Court. In "ARR's Legal Memorandum Regarding Sanction Memorandum," Rural Residents cites both the Administrative Procedures Act (APA) and case law in support of the proposition that the Board has authority to recommend sanctions, notwithstanding the County's filing of a petition for review with Thurston Superior Court, including a Motion for Stay. In "Kitsap County's Brief re: Sanctions" the County does not directly refute the legal analysis presented by Rural Residents, but rather argues that, even if the Board finds noncompliance, it retains discretion to recommend sanctions. The County argues that the Board should utilize this discretion because of the extenuating circumstances in this case (i.e., the bringing of an appeal and motion for stay to Thurston Superior Court by the County) and because the imposition of sanctions in this instance would have a "chilling effect" on the bringing of appeals of Board decisions.

There is no dispute as to whether the County has taken action to comply with the Board's Final Decision and Order. The County has not done so. By filing with Thurston County Superior Court a Petition for Review of the Board's Final Decision and Order, the County is availing itself of a right specifically assured by RCW 36.70A.300(2). Furthermore, seeking a stay of the Board's FDO is specifically authorized by the APA. In its deliberation, the Board must focus on the legal effect that its FDO has in light of the County's choice to exercise these legitimate rights of appeal.

While the Board is not critical of the County for exercising its rights of appeal, the County nonetheless has an ongoing duty to act in good faith to comply with the Board's FDO unless ordered otherwise. The Board finds no legal argument to support the proposition that the County's exercise of its judicial appeal right relieves it of the duty to comply with the Board's Order. Only if a Stay of the FDO is granted by the Thurston County Superior Court or an appellate court would the County be temporarily relieved of the duty to comply. As of this writing, no such Stay has been granted.

FINDING
:

Kitsap COUNTY, having failed to carry out the actions required by the Board's Final Decision and Order by October 3, 1994, is not in compliance with the requirements of the Growth Management Act.

RCW 36.70A.330(3) requires that the Board transmit its finding of noncompliance to the Governor, and authorizes it to recommend to the Governor that sanctions be imposed. The Governor is authorized by RCW 36.70A.340 and .345 to impose such sanctions. The Board will recommend that the Governor impose appropriate sanctions.

So ORDERED this 18th day of November, 1994.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS
BOARD

JJ(.

~ ~ ~

Board Member

(---'~~ 1/tr1}'2Z<-----

~--~ii"AlCp""--

Chris Smith Towne
Board Member

Presiding Officer

FINDING
-

Kitsap COUNTY, having failed to carry out the actions required by the Board's Final Decision and Order by October 3, 1994, is not in compliance with the requirements of the Growth Management Act.

RCW 36.70A.330(3) requires that the Board transmit its finding of noncompliance to the Governor, and authorizes it to recommend to the Governor that sanctions be imposed. The Governor is authorized by RCW 36.70A.340 and .345 to impose such sanctions. The Board will recommend that the Governor impose appropriate sanctions.

So ORDERED this 18th day of November, 1994.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS
BOARD

JJ
~~~

Board Member

~:f;==

Presiding Officer

~~~:~~~

Chris Smith Towne
Board Member