

CENTRAL PUGET SOUND

GROWTH PLANNING HEARINGS BOARD

STATE OF WASHINGTON

CITY OF TACOMA, CITY OF MILTON,)Case No. **94-3-0001**

CITY OF PUYALLUP and CITY OF)

SUMNER,)

Petitioners,)**ORDER ON DISPOSITIVE**

)**MOTIONS**

v.)

)
PIERCE COUNTY,)

Respondent.)

)

On February 4, 1994, the Central Puget Sound Growth Planning Hearings Board (the **Board**) entered a Prehearing Order in the above-captioned matter that established a briefing schedule for the filing of dispositive motions and corresponding responses. Subsequently, the Board also entered an Interim Order re: Motions for Amicus Status and, on February 18, 1994, an Order Granting Amicus Status to AGC, AOR, AWC, Cascadia, MBA, PNA and WSAC.

All motions were due on February 10, 1994. On that date, the Board received three motions. One motion was filed by Pierce County (the **County**), entitled Respondent's Motion to Dismiss. The County attached Respondent's Memorandum in Support of Motion to Dismiss. In addition, a black three-ring binder was filed containing sixteen exhibits. On February 17, 1994, the Cities of Tacoma, Milton, Puyallup and Sumner (the **Cities**) filed Petitioners' Memorandum in Response to Respondent's Motion to Dismiss. A Memorandum of Amicus Association of Washington Cities [**AWC**] in Opposition to Pierce County's Motion to Dismiss was also filed on that day. On February 22, 1994, the County's Rebuttal to AWC's Response and a letter from the County's attorney, Ms. Eileen McKain, were filed with the Board. The letter indicated that the County had misplaced the Cities' Response and that the County would submit its rebuttal to the Cities' Response at the hearing.

A second motion was filed by the Cities, entitled a Dispositive Motion for Order Determining That Pierce County Ordinance No. 93-91S, Section 5 Fails to Comply with the Growth Management Act (**Cities' Dispositive Motion**). The Cities' Dispositive Motion was accompanied by the Petitioners' Memorandum in Support of Dispositive Motion. It contained four exhibits. On February 17, 1994 the County filed the County's Response to Cities' Motion to Dismiss. The Cities elected not to submit a reply brief to that response.

The third motion was a Motion and Affidavit to Supplement Record with Exhibits filed by the

Cities on February 10, 1994. It is dealt with in a separate Board order.

The Board held a hearing on the motions at 1:30 p.m. on Wednesday, February 23, 1994 at 1225 One Union Square -- Seattle, Washington. The Board's three members were present: M. Peter Philley, presiding, Joseph W. Tovar and Chris Smith Towne. Kyle J. Crews and Leah Clifford represented Tacoma; Mark H. Calkins represented Milton and Sumner; Robin Jenkinson represented Puyallup; and Eileen M. McKain represented the County. Court reporting services were provided by Duane Lodell of Robert H. Lewis & Associates.

The County's Rebuttal to Cities' Response [to the County's Motion to Dismiss], due on February 22, 1994, was offered a day later, at the beginning of the hearing on the motions. The presiding officer recessed the hearing for twenty minutes to enable the Cities to read the County's Reply. The presiding officer then permitted the County to file its Rebuttal brief a day late on February 23, 1994 but gave the Cities until 5:00 p.m. on Monday, February 28, 1994 to submit any additional arguments in response to the County's Rebuttal brief. In addition, the presiding officer ordered the County to file copies of Pollution Control Hearings Board cases cited in the County's Rebuttal to Cities' Response, at 2. The County filed complete copies of these cases on February 25, 1994. The Cities filed the Petitioners' Additional Response to Respondent's Motion to Dismiss on February 28, 1994.

Two over-sized exhibits were also offered and admitted at the hearing. Exhibit 1 is an enlarged, multi-color coded version of the Interim Urban Growth Areas (**IUGAs**) map of Pierce County, dated August 3, 1993, with a sub-caption: "(Pierce County Regional Council Recommendation)".

[\[1\]](#)

Exhibit 2 is an enlarged, multi-color coded version of the Pierce County IUGAs map, dated

[\[2\]](#)

October 14, 1993, with a sub-caption: "(Adopted: Ordinance No. 93-91S)".

On February 25, 1994, the County filed a letter, dated February 24, 1994, that was addressed to the Board's presiding officer. Copies of the Cities' resolutions and signature pages that had been missing from Exhibit 4353.i and a missing page from Exhibit 5095, that had been previously filed, were attached, as requested by the presiding officer. In addition, two other exhibits were included (Exhibit Nos. 4205.c and 4209.c).

I. COUNTY'S MOTION TO DISMISS

The County's Motion to Dismiss requested that the Board dismiss either the Cities' Petition for Review in its entirety or specific legal issues listed in the Board's Prehearing Order. The motion was based on four general theories: equitable estoppel, ripeness, mootness and failure to state a claim upon which relief may be granted. The Board examines each of these theories below.

A. Equitable Estoppel

The County maintains that the Board has the authority to determine equitable issues because estoppel is a form of summary judgment. Respondent's Memorandum in Support of Motion to Dismiss, at 11. Accordingly, the County asserts that the Cities are equitably estopped from now

raising claims that the County failed to comply with the Growth Management Act (**GMA** or the **Act**) because the Cities' present claims are inconsistent with their prior actions involving the IUGAs. In contrast, the Cities and AWC contend that the Board does not have the requisite jurisdiction to determine equitable principles such as estoppel and, even if it did, the Cities are not estopped from bringing the petition presently before the Board in this case.

Whether or not the Board has subject matter jurisdiction to determine cases based on equitable doctrines is thus the first legal issue before the Board in this case. The Board holds that it does not have the authority to determine equitable issues.

1. Board's Subject Matter Jurisdiction

The Board's subject matter jurisdiction is specified at RCW 36.70A.280(1) entitled "Matters subject to board review", which provides as follows:

(1) A growth planning hearings board shall hear and determine only those petitions alleging either: (a) That a state agency, county, or city is not in compliance with the requirements of this chapter, or chapter 43.21C RCW as it relates to plans, regulations, and amendments thereto, adopted under RCW 36.70A.040; or (b) that the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted. (Emphasis added).

The Board has repeatedly referred to this provision in the GMA and the following portion of RCW 36.70A.300(1) to conclude that its subject matter jurisdiction has been strictly limited by the legislature. RCW 36.70A.300(1) provides in part:

(1) The board shall issue a final order within one hundred eighty days of receipt of the petition for review, or, when multiple petitions are filed, within one hundred eighty days of receipt of the last petition that is consolidated. Such a final order shall be based exclusively on whether or not a state agency, county, or city is in compliance with the requirements of this chapter, or chapter 43.21C RCW as it relates to plans, regulations, and amendments thereto, adopted under RCW 36.70A.040... (Emphasis added).

Thus, the Board has concluded in earlier cases that it did not have the authority to determine whether the United States or Washington State Constitutions had been violated. *See Gutschmidt et*

[\[3\]](#)

al v. Mercer Island CPSGPHB Case No. 92-3-0006 (1993), at 9-10, and Order on Prehearing Motions, at 10-13. In its *Twin Falls* decision, the Board concluded that it lacked the requisite jurisdiction to determine whether statutes other than the GMA or the State Environmental Policy Act (**SEPA**) as it relates to the GMA were violated. *See Twin Falls, Inc. et al v. Snohomish County*, CPSGPHB Case No. 93-3-0003 (1993), Order on Dispositive Motions, at 4-12. (See also *Tracy v. Mercer Island*, CPSGPHB Case No. 92-3-0001 (1993), at 20; *Snoqualmie v. King County*, CPSGPHB Case No. 92-3-0004 (1993), at 16, n. 15; *Gutschmidt*, at 8; and *Happy Valley Associates et. al v. King County*, CPSGPHB Case No. 93-3-0008 (1993), Order Granting Respondent King County's Motion to Dismiss and Denying Happy Valley's Motion to Amend its Petition For Review, at 13-14.) Furthermore, in *Twin Falls* the Board also concluded that it did not have jurisdiction to determine whether the common law had been violated. *See Twins Falls*,

Order Granting WRECO's Petition for Reconsideration and Modifying Final Decision and Order, and Order Denying SNOCO PRA's Petition for Reconsideration, at 4-7.

Whether the Board has jurisdiction to determine cases based on equitable grounds is one of first impression. However, the Board's earlier analysis, in rejecting claims that the Board had jurisdiction to determine violations of the federal and state constitutions, other statutes and the common law, remains convincing. If the legislature intended that the Board have a broader jurisdiction, it would not have used the terms "only" and "based exclusively." The Board has indicated in prior decisions that this limited jurisdiction may not make practical sense because it does result in bifurcated simultaneous appeals to the Board and to the courts. This predicament is even more perplexing given the state's current political climate for instituting regulatory reform and making governmental efficiency a top priority. Nonetheless, until the legislature specifically expands the Board's jurisdiction or an appellate court informs the Board that it has erred on this point, this is the narrow road this Board will follow.

Accordingly, the County's arguments that the Board does have authority to determine cases based on equitable doctrines is rejected. The fact that the Board permits dispositive motions (which are

[4]

similar but not identical to motions for summary judgment in a court of law) does not alter the Board's conclusion. The County argues that because the Board permits dispositive motions that it

[5]

therefore implicitly permits equitable defenses to be raised. Respondent's Memorandum in Support of Motion to Dismiss, at 14. Whether the Board has summary-type procedures or not has nothing to do with whether it has jurisdiction to determine whether equitable doctrines should apply. If the Board had equitable jurisdiction (which it does not), it could make equitable determinations early in the history of a case (i.e., following a dispositive motion) or at the conclusion of a case (i.e., following a hearing on the merits of a petition for review). However, whether a body has equitable jurisdiction and the timing of when equitable defenses can be brought are separate questions.

2. Public Policy and Washington Cases

The County strenuously made public policy arguments that the Board should have equitable jurisdiction. The County quoted a California case, *Lentz v. McMahon*, 49 Cal.3rd 393, 261 Cal. Rptr. 310 (1989) to bolster its contention. That case provided:

Under this novel reasoning, nonconstitutional administrative agencies would be rendered impotent. They would be precluded not only from adjudicating claims of equitable estoppel, but also, under all circumstances, from imposing equitable remedies, and even applying general principles of law and "equity" in reaching administrative determinations. *Lentz*, page citation not provided.

Although avoiding the impotence the *Lentz* court discussed has its merits, the Board notes two matters of import.

First, the Board, as a quasi-judicial body, is charged with determining whether a respondent has complied with the law, not drafting that law. The Board cannot deny that in instances where the

GMA is unclear the possibility is greater that critics might contend that the Board's decisions have policy-making implications. However, when the Act is clear, this Board must follow the legislature's intent -- there is no room for interpretation. The language of RCW 36.70A.280(1) and RCW 36.70A.300(1) that limits the Board's jurisdiction is precisely such an instance where there is no room for interpretation.

Second, the *Lentz* decision is from California. The Board is not bound by decisions of a California court interpreting California laws. Instead, the Board must comply with decisions of Washington courts. In *Gutschmidt* the Board reviewed the direction provided by Washington courts regarding jurisdictional authority:

The general rule is that an administrative board does not have jurisdiction to hear constitutional issues. Instead, administrative agencies have to rely on express or implied powers to hear constitutional matters:

Administrative agencies are creatures of the legislature without inherent or common-law powers and may exercise only those powers conferred either expressly or by necessary implication. *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 636, 689 P.2d 1084 (1984). *State v. Munson*, 23 Wn. App. 522, 524, 597 P.2d 440 (1979); see *Human Rights Com'n v. Cheney Sch. Dist. 30*, 97 Wn.2d 118, 125, 641 P.2d 163 (1982).

Although this Board is not technically an administrative agency, it is a creature of statute, charged with interpreting specified statutes.

Nichols v. Snohomish County, 47 Wn. App. 550, 736 P.2d 670 (1987) further provides:

[1]The Snohomish County Civil Service Commission is a creature of statute and is necessarily limited to the powers and duties authorized by the Legislature. *Human Rights Comm'n v. Cheney Sch. Dist. 30*, 97 Wn.2d 118, 641 P.2d 163 (1982); *Cole v. Utilities & Transp. Comm'n*, 79 Wn.2d 302, 485 P.2d 71 (1971). *Nichols*, at 553.

Finally, *Cole v. Washington State Utilities and Transportation Commission*, 79 Wn.2d 302, 306, 485 P.2d 71 (1971), held:

An administrative agency must be strictly limited in its operations to those powers granted by the legislature. *State ex re. PUB 1 v. Department of Pub. Serv.*, 21 Wn.2d 201, 150 P.2d 709 (1944). *Gutschmidt*, Order on Prehearing Motions, at 10-13 (emphasis in original).

The County attempts to distinguish the *Chaussee* case because it dealt with a county's hearing examiner, who did not necessarily have to be an attorney, and because the Administrative Procedure Act (APA) does not apply to local governments. The County argues that the APA does apply to this Board because it is a state agency and at least one of the three Board members must be an attorney. County's Rebuttal to [AWC's] Response, at 3-4.

The Board concludes that *Chaussee* remains controlling even though it dealt with the Snohomish County Council and a county hearing examiner. Contrary to the County's position that "estoppel is not jurisdictional but is a tool," (County's Rebuttal to [AWC's] Response, at 5), the case is replete with explicit references to estoppel in terms of jurisdiction:

The interpretation by the hearing examiner that he was without jurisdiction to consider the

issue of equitable estoppel is supported by the relevant statutory and code provisions. *Chaussee*, at 638 (emphasis added).

The Council was also without jurisdiction to consider the issue of equitable estoppel. *Chaussee*, at 639 (emphasis added).

The statutory provisions governing the Council's authority do not bestow upon the Council the general jurisdiction to consider all legal and equitable issues. *Chaussee*, at 639 (emphasis added).

The applicable statutory and code provisions do not expressly or impliedly indicate that the Council has the broad jurisdictional power to consider equitable issues. *Chaussee*, at 639-640.

The Superior Court properly determined that the hearing examiner and County Council were without jurisdiction to consider equitable issues. *Chaussee*, at 640 (emphasis added).

As for the fact that the hearing examiner in *Chaussee* was not required to be an attorney, only one of the Board's three members must be an attorney while all three members must be "qualified by experience or training in matters pertaining to land use planning." RCW 36.70A.260(1). Although the non-attorney members of the Board are experts in the field of land use planning, that expertise does not necessarily translate into expertise into ancient equitable principles. This is particularly important given the possibility that two non-attorney Board members could decide a case in the attorney member's absence as long as the two agreed. See WAC 242-02-070 regarding a quorum of the Board. Although the Board has questioned whether it makes practical sense for the Board not to have jurisdiction over statutes other than the GMA or SEPA that nonetheless are related to

[6]

a case before the Board (e.g., notice provisions for enacting ordinances), such criticism is far less meritorious when it comes to the Board having jurisdiction over equitable doctrines, some of which even the courts have been confused about over the years.

The Board agrees with the Cities that the fact that *Chaussee* (at 637) points out that the APA applies only to state agencies is not relevant as to whether this Board has the appropriate equitable jurisdiction. The APA does not confer equitable jurisdiction upon the Board, nor has the County submitted any authority indicating so. In fact, a Washington appellate court has applied the same rule enunciated in *Chaussee* ("administrative agencies are creatures of the Legislature without inherent or common law powers and may exercise only those powers conferred either expressly or by necessary implication") to a state agency. In *Jaramillo v. Morris*, 50 Wn. App. 822, 829, 750 P.2d 1301 (1988), the court applied the rule (quoted above) to the Washington State Podiatry Board -- a Board governed by the APA.

3. Legal Treatises

Closely related to the arguments raised in the *Lentz* case, the County also frequently quotes a legal treatise in support of its contention that the Board has the authority to make determinations based upon equitable doctrines. As an example, the County provided the following quote:

... it ought make no difference whether the action is characterized as one in equity or law. In either instance, the preclusion principles should be applied to accomplish justice. County's

Rebuttal to AWC Response, at 1, quoting Trautman, *Claim and Issue Preclusion in Civil Litigation in Washington*, 60 Wash. L.Rev. 805, 827, n. 148 (1985), citing L. Orland, 2 *Washington Practice* 422 (3rd ed. 1972).

While individual members of the Board might totally agree with the Trautman and Orland perspective and the policy rationale behind it, the Board is charged with following the existing Washington law, not what "ought" to be the law. The Board is governed by the Washington State Constitution, the Revised Code of Washington, decisions of Washington appellate courts and those of the Thurston County Superior Court. Just as the Board is not bound by decisions of out-of-state courts, neither is it required to follow the recommendations of legal commentators if they are not consistent with existing Washington law, regardless of the merits of the suggestions.

4. Washington State Constitution

Although legal commentators have indicated that it "ought" not make a difference whether a case is in equity or at law, the Washington State Constitution makes precisely such a distinction. And, although those commentators might agree with the County's oral argument that this portion of our state's constitution is "archaic," the Board is bound to follow the existing Washington State Constitution.

Until November, 1993 Article IV, § 6 provided in part:

The superior court shall have original jurisdiction in all cases in equity and in all cases at law ...

Therefore, it gave exclusive equity jurisdiction to the superior court. However, in November, 1993 Washington voters adopted an amendment to Article IV, §6 as proposed in House Joint Resolution (**HJR**) 4201. Article IV, §6 now provides:

Superior courts and district courts have concurrent jurisdiction in cases in equity. The superior court shall have original jurisdiction in all cases at law.

The Attorney General wrote the ballot title for HJR 4201 and the accompanying explanatory statement. The latter provided:

The law as it now exists:

In the English legal system inherited by the United States, there were two separate court systems: courts of law and courts in equity. These two types of courts followed somewhat different procedures and exercised different types of powers. Certain powers were held only by courts in equity, such as the power to issue an injunction or the power to rescind a contract. The Washington state Constitution did not establish separate courts of law and courts in equity, and in the United States the distinction between legal powers and equitable powers has grown less and less clear. However, the state Constitution currently provides that "the superior courts will have jurisdiction in ... all cases in equity," subject to review on appeal. The legislature has created a system of district courts to handle smaller and simpler cases, but the Constitution currently does not provide that district courts may exercise powers historically reserved to courts in equity.

The Attorney General's Office agreed that the fine line between equitable and legal powers had become blurred. Yet the Attorney General's Office also recognized, for better or for worse, that

the state Constitution exists as written. Therefore, although the legislature had an excellent opportunity just last year to amend Article IV, §6 to eliminate the distinction between equitable and legal powers, instead it maintained the distinction.

As the text of the Statement for HJR 4201 in the state voter pamphlet explained:

What are “cases in equity”

“Cases in equity” include cases in which a court issues an injunction or restraining order to prevent some harm from occurring. Domestic violence cases, in which protective orders may be issued, are important examples of “cases in equity”.

...

The Washington Commission on Trial Courts Has Recommended This Amendment
Under the current wording of the state constitution, there is some question as to whether courts other than the Superior Courts may exercise jurisdiction in “cases in equity.”...The Washington Commission on Trial Courts, appointed by the State Supreme Court, has recommended that District Courts also hear “cases in equity”. The Legislature has agreed with this recommendation and concluded that *both* the District and Superior Courts should have jurisdiction over these cases, particularly when they involve domestic violence. (Italics in original).

As a result, now both the superior and district courts have equitable powers. Although this jurisdiction is now shared, it remains exclusively in the province of the courts. The Board was not given such jurisdiction. Unless Article IV, §6 is repealed or further amended, it remains the highest law of the state -- one that this Board is obliged to follow.

As for equitable estoppel itself, it is a "purely equitable doctrine." *Goodwin v. Gillingham*, 10 Wn.2d 656, 664, 117 P.2d 959 (1941). Estoppel can be raised as an affirmative defense pursuant to the Superior Court Civil Rules (**CR**) 8(c). Historically, until the 1993 amendment to the Constitution, equitable estoppel was a defense raised in actions in equity brought in a superior court. *Kofmehl v. Steelman*, 63 Wn. App. 133, 138, 816 P.2d 1258 (1991). Even with the 1993 amendment, the Board concludes that only the courts can apply the doctrine of estoppel.

5. Analogy to PCHB and SHB

The County has cited several decisions of the Pollution Control Hearings Board (**PCHB**) to show

[7]

that the PCHB regularly applies equitable estoppel. The County argues that since the PCHB is also a quasi-judicial state agency, this Board should apply estoppel theories. County's Rebuttal to Cities Response, at 2. The Board disagrees with the County's analysis. First, although PCHB decisions may offer the Board useful and insightful guidance (particularly as those decisions interpret SEPA), they are not legally binding upon a growth planning hearings board. Second, the

[8]

PCHB cases cited by the County provide no indication whether the PCHB first considered if it had jurisdiction to determine equitable issues; presumably, the PCHB went straight to the substantive merits of the equitable claims without the jurisdictional issue having been raised. Third, the PCHB's enabling legislation is somewhat different from the Boards'. RCW 43.21B.110

(1) provides in part:

The hearings board shall only have jurisdiction to hear and decide appeals from the following decisions of the department...

Although the above-quoted language is similar to that of RCW 36.70A.280(1), the PCHB statute does not have language comparable to RCW 36.70A.300(1), i.e., that a growth planning hearings board's final decision must be "based exclusively" upon compliance with the GMA or SEPA as it relates to the GMA. For these reasons, the Board holds that decisions of the PCHB or SHB regarding the applicability of equitable estoppel are not controlling upon it.

Conclusion

The Board concludes that it lacks the requisite specific jurisdiction to determine whether equitable doctrines have been violated.

Although the parties went to great lengths to argue why estoppel did or did not bar the Cities from raising the legal issues they did, the Board concludes it cannot address whether estoppel is applicable in this case because it does not have jurisdiction to make such a determination.

B. Ripeness

Position of the County

In the Cities' Dispositive Motion, discussed below in greater detail, the Cities ask the Board to declare Section 5 of Pierce County Ordinance 93-91S to be not in compliance with the GMA. Section 5 of the Ordinance (quoted in its entirety in Part II below) indicates that:

"... if a municipality fails to complete those [seven] steps [set forth in Section 3 of the Ordinance] by April 15, 1994, the County must designate municipal urban growth areas at the municipality's existing jurisdictional limits....County's Exhibit 5057, at 10; Cities Exhibit A, at 10 (emphasis added).

Thus, the seven steps outlined in Section 3 of the Ordinance (quoted below in its entirety in Part II of this Order) constitute the County's process for establishing final UGAs. Respondent's Memorandum in Support of Motion to Dismiss, at 18. The County alleges that "[A]ny claims regarding these prospective elements are premature." Respondent's Memorandum in Support of

[9]

Motion to Dismiss, at 19 (emphasis added). In that brief, the County does not cite to any specific authority for its ripeness position. However, it does refer to its other brief, the County's Response to Cities' Motion to Dismiss. There, the County argued that:

...In essence, the Cities are seeking an advisory opinion from this quasi-judicial board. An advisory opinion by a quasi-judicial body upon on-going legislative matters will necessarily direct and therefore, interfere with the local legislative process. For this reason, the issues relating to those steps are not ripe for the Board's review. County's Response to Cities Motion to Dismiss, at 5.

The County then cited Washington authority for the proposition that advisory opinions should not be given on purely theoretical controversies nor would courts decide on the operation or effect of

legislative enactments prior to the legislation going into effect. *State ex rel. O'Connell v. Kramer*, 73 Wn.2d 85, 87, 436 P.2d 786 (1968) and *State ex rel. Campbell v. Superior Court*, 25 Wash. 271, 65 P. 183 (1901). In addition, the County argued that if the Board ruled upon the County's prospective steps for designating final UGAs before the final UGAs themselves are drawn or required to be drawn, the Board would "essentially pre-determine the final UGAs" and set a "dangerous precedent." County's Response to Cities Motion to Dismiss, at 6. The Cities did not submit a reply brief rebutting the County's Response to Cities' Motion to Dismiss.

Position of the Cities

The Cities, citing California case law, contend that Legal Issues 5 and 6, regarding the steps required for the designation of final UGAs, are ripe for Board review. The Cities stated that they are not asking the Board to decide where the final UGAs must be, but instead, are asking that the Board determine whether or not the required steps in the County's process comply with the GMA. Therefore, the Cities ask the Board to deny the County's motion. Petitioners' Memorandum in Response to Respondent's Motion to Dismiss, at 10-11.

Discussion

[10]

The United States Supreme Court developed the ripeness doctrine in a trilogy of cases

[11]

decided in 1967. Deciding whether a case presents a cause of action ripe for judicial determination requires an evaluation of "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *First Covenant Church v. Seattle*, at 399 quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 18 L. ed. 2d 681, 87 S. Ct. 1507 (1967). "A claim is fit for judicial decision if the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *First Covenant Church v. Seattle*, at 400 quoting *Standard Alaska Prod. Co. v. Schaible*, 874 F.2d 624, 627, (9th Cir. 1989).

... a claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue. *Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 79, 768 P.2d 462 (1989) quoting *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 186, 87 L. Ed. 2d 126, 105 S. Ct. 3108 (1985).

First Covenant Church v. Seattle involved a challenge by the church as to the constitutionality of Seattle's Landmarks Preservation Ordinance 106348 and Seattle's Ordinance 112425 which designated the church as a landmark. *First Covenant Church*, at 395. The Washington Supreme Court concluded that the case was ripe because the record before the court contained factual background surrounding the designation of the Church and no additional facts needed to be developed to determine the constitutionality of that designation. In addition, Seattle's designation ordinance constituted a final action by the Landmarks Preservation Board and the Seattle City

Council. *First Covenant Church v. Seattle*, at 400.

Having reviewed what Washington courts have indicated about the ripeness doctrine, the Board notes that the majority of cases deal with constitutional questions. Thus, there is a low correlation between Washington's application of the ripeness doctrine in takings or religions freedom cases, and the use of that doctrine by this quasi-judicial board in determining issues of compliance with the GMA. Nonetheless, the Board appreciates the context of the ripeness doctrine, particularly the strong public policy in favor of judicial economy: to not review a question until it is ready.

Despite these distinctions, the Board holds that here the issue is ripe for review.

Ordinance 93-91S adopted the IUGAs and it established a process for the County's adoption of the final UGAs. The Board holds that determining whether the process established in Ordinance 93-91S for designating final UGAs complies with the requirements of the GMA is ripe. An actual controversy over this process exists between the parties. This is an issue that is primarily legal in nature and does not require further factual development. Furthermore the challenged action is final. When the County adopted Ordinance 93-91S, that action constituted a final decision establishing the process for adopting the final UGAs. This final decision gave the Board its authority to review the challenged process. Making a determination as to whether the County's process complies with the GMA is not an advisory exercise. Although the Board acknowledges the technical validity of the oral argument made by the County -- that it is free to amend the ordinance at any time -- until that occurs, existing Ordinance 93-91S remains ripe for review. However, the Board also agrees with the County that it is not the Board's responsibility, but rather the County's, to adopt the final UGAs. This Board will not infringe on the County's responsibility to make the final UGAs determination.

Thus, the question to be examined is whether the process for adopting the final UGAs is in compliance with the GMA. An examination of the County's process occurs in Part II below. The Board recognizes that the adoption of the final UGAs has yet to occur and need not occur until July 1, 1994. Therefore, the Board will not speculate as to what the final UGAs may look like. Board review of Pierce County's final UGAs will not occur until the County has adopted them and until and unless a person appeals them.

Conclusion

The Board concludes that the issue of whether the process established by Section 5 of Ordinance 93-91S complies with the GMA is ripe for Board review. However, the time is not yet ripe for the Board to determine whether final UGAs yet to be adopted by the County comply with the GMA.

C. Mootness

The County points out that the GMA requires it to adopt the final UGAs by July 1, 1994. *See* RCW 36.70A.040(3) and .110(4). The County notes that the Board's final decision and order in this case is not due to be entered until July 5, 1994. Therefore, it is the County's position that "... by the time the Board is able to issue a decision, the issues presented in this appeal will be moot." Respondent's Memorandum in Support of Motion to Dismiss, at 24 (emphasis added).

The Cities point out that Legal Issues 5 and 6 in this case address the County's process for designating the final UGAs. The Cities' Dispositive Motion currently before the Board challenges the County's process. Therefore, the Cities counter that the County's mootness claim is not yet ripe. As for the other legal issues raised in the Cities' Petition for Review, the Cities maintain that "... they are not yet moot or expected to become moot until sometime after the hearing on the merits." The Cities then cite to *Orwick v. Seattle*, 103 Wn.2d 249, 253, 692 P.2d 793 (1984) for authority supporting their position. Petitioners' Memorandum in Response to Respondent's Motion to Dismiss, at 12.

The Board holds that at this time, the issues in this motion are not moot. The *Orwick* court recited the general rule regarding moot issues:

A case is moot if a court can no longer provide effective relief. *Orwick*, at 253; *State v. Turner*, 98 Wn.2d 731, 733, 658 P.2d 658 (1983); *In re Cross*, 99 Wn.2d 373, 377, 662 P.2d 828 (1983).

One of the policy rationales for the general rule is as follows:

This is to avoid the danger of an erroneous decision caused by the failure of parties, who no longer have an existing interest in the outcome of a case, to zealously advocate their position. *Orwick*, at 253.

An exception to the general rule has been created:

We do make an exception for moot cases involving "matters of continuing and substantial public interest." However, the moot cases which this court has reviewed in the past have been cases which became moot only after a hearing on the merits of the claim. In those cases, the facts and legal issues had been fully litigated by parties with a stake in the outcome of a live controversy. After a hearing on the merits, it is a waste of judicial resources to dismiss an appeal on an issue of public importance which is likely to recur in the future. *Orwick*, at 253 (emphasis added; citations omitted).

At this point, the Board has not held the hearing on the merits in this case. It is not scheduled until April 12, 1994. The Board agrees with the Cities that the mootness issue is not yet ripe. At a later point however, the Board may determine that the legal issues before it in this case have become moot.

In addition, the Board makes the following legal and practical observations. First, although "[C]omprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption" (RCW 36.70A.320), the Board does not presume that a local jurisdiction will meet its statutorily imposed deadline. In this instance, although the Board fully expects the County to adopt its final UGAs by July 1, 1994, there is no guarantee that it will do so by that date. If it fails to meet this deadline, a potential petitioner has the opportunity to file a petition for review alleging a failure to comply with a deadline. Thus, although the Board expects compliance by a deadline and once a deadline has been met the underlying action is presumed valid, the Board legally cannot presume that a local government will meet its GMA deadline. Furthermore, it must be pointed out that even an "interim" regulation or "interim" UGA remains in effect until it is amended, repealed or expressly expires on a given date. As a result, the

County's legal argument regarding mootness may not come into play until after the Board has issued its final decision and order in this case. Nothing prevents the Board from issuing its final decision before July 5, 1994 -- the one hundred and eighty day deadline. Obviously, if the Board enters its order before the County adopts its final UGAs, the mootness issue will never have ripened.

A related practical concern also arises. The County may full well meet its July 1, 1994 deadline for adopting its comprehensive plan and final UGAs. Yet the Board would not officially know that such an event took place unless a petitioner brought a case challenging those actions. Because a potential petitioner has sixty days from publication to appeal such an action (RCW 36.70A.290 (2)), the Board would not know that the County had adopted its final UGAs until well after the Board's July 5, 1994 deadline for issuing a final order in this case. Thus, practically it may be difficult to ever raise a timely mootness issue on the IUGAs. Clearly, at this point it is too early -- the Cities have challenged the County's final UGAs designation process well before final UGAs are due for adoption. This Board may reach a decision before July 1, 1994, or before the County adopts final UGAs since the hearing on the merits in this case is scheduled for April 12, 1994.

Conclusion

The County has not yet adopted its final UGAs nor is it required to do so. The County's deadline for adopting final UGAs is July 1, 1994. The final hearing on the merits of the Cities Petition for Review in this case is scheduled for April 12, 1994. Subsequently, the Board is required to issue its final decision and order in this case by July 5, 1994 at the latest. Therefore, at this time the legal issues in this case regarding the process for adopting final UGAs are not moot.

D. Failure to State a Claim

The Cities filed a detailed Petition for Review in this case on January 6, 1994. It put the County on more than adequate notice as to the nature of its complaint. The Board holds that the Cities Petition for Review meet the requirements of WAC 242-02-210 for the contents of such a document. In particular, the Cities' Petition for Review contained a detailed statement of the issues presented for resolution by the Board.

The County claims that the Cities have failed to state a claim upon which relief can be granted. The County contends that because it consulted with the Cities about the adoption of the IUGAs, the GMA's requirements have been met (e.g., RCW 36.70A.110 and WAC 365-195-825(3)(b)). Respondent's Memorandum in Support of Motion to Dismiss, at 24.

In response, the Cities' contended that the "failure to state a claim" portion of the County's motion was framed using the language of a rule for superior court: CR 12(b)(6). Applying the case law that has evolved in determining whether a CR 12(b)(6) motion should be granted, the Cities argued that the County has failed to meet its burden in bringing such a motion. Petitioners' Memorandum in Response to Respondent's Motion to Dismiss, at 13-14.

The Board's Rules of Practice and Procedure, specifically WAC 242-02-650(3), indicate that the Board may refer to but is not bound by the Washington Rules of Evidence (**ER**). A similar rule

regarding the use of Superior Court Civil Rules (**CR**) does not exist. However, WAC 242-02-270 (2) and WAC 242-02-410(2) specifically cite to a limited portion of these rules. Finally, WAC 242-02-530(4) by implication refers to the CRs when it mentions dispositive motions being similar to motions for summary judgment in superior court. Except for these provisions, that explicitly or by implication, refer to the CRs, the CRs are not binding upon the Board. As is the case with the ERs, a Board is free to refer to the CRs for assistance; however, the Board is not bound by them. As the Board has pointed out on previous occasions, although it has many of the trappings of a court of law, it is not *per se* a court of law. Instead, it is a quasi-judicial body, not bound by either the ERs or CRs unless Chapter 242-02 WAC so directs. *See Twin Falls*, at 49 and *Northgate Mall Partnership v. Seattle*, CPSGPHB Case No. 93-3-0009 (1993), Order Granting Seattle's Motion to Dismiss..., at 8.

Accordingly, the Board does not recognize a "failure to state a claim" defense *per se*. Instead, issues before the Board generally must ask whether the challenged action complies with the GMA. Whether Sections 3 and 5 of Ordinance 93-91S comply with the GMA is precisely the issue raised in Legal Issues 5 and 6. At least parts of those issues are the subject of the Cities' Dispositive Motion addressed below in Part II.

Conclusion

The Board concludes that the content of the Cities' Petition for Review complies with the requirements of WAC 242-02-210. The Board will determine whether the portions of Pierce County Ordinance 93-91S challenged by the Cities comply with the requirements of the GMA. This determination will take place in response to the Cities' Dispositive Motion (Part II below) and in the final decision and order that the Board will issue in this case.

Moreover, the Board does not recognize "a failure to state a claim upon which relief can be granted" defense pursuant to CR 12(b)(6). Instead, it determines whether the actions challenged by a petitioner comply with the requirements of the GMA or SEPA as it relates to the GMA.

II. CITIES' DISPOSITIVE MOTION

The Cities' Dispositive Motion asked the Board to determine that Section 5 of Pierce County Ordinance No. 93-91S fails to comply with the requirements of the GMA, the procedural criteria at Chapter 365-195 WAC, and the Pierce County County-Wide Planning Policies (**PCCPPs**). Section 5 of Ordinance No. 93-91S provides:

The steps set forth in Section 3 are required by state laws, regulations, Central Puget Sound Growth Hearings Board decisions, County-wide planning policies, and will expedite the designation of final urban growth areas by the County. Therefore, if a municipality fails to complete those steps by April 15, 1994, the County must designate municipal urban growth areas at the municipality's existing jurisdictional limits. Once the steps set forth in Section 3 are complete, the County will designate final municipal urban growth areas during the

annual plan amendment process as authorized by RCW 36.70A.130(2).County's Exhibit 5057, at 10; Cities' Exhibit A, at 10 (emphasis added).

Positions of the Parties

During oral argument at the hearing on this motion, the Cities again stressed that the objectionable part of Section 5 is the second sentence emphasized in the quotation above. It is that sentence that the Cities contend does not comply with the GMA.

The Cities allege that the objectionable portion of Section 5 fails to comply with the GMA because, by its operation, it would deny a city any final urban growth area beyond its existing municipal boundaries. Therefore, a city would be precluded from complying with GMA and PCCPPs mandates to accommodate Washington Office of Financial Management (OFM) projected urban growth, and it would allow the County to make a "mandatory unilateral ministerial decision" regarding a city's final UGA. This automatic default provision back to an existing municipal boundary conflicts with GMA requirements that a final UGA be determined following consultation, negotiation and an attempt to reach agreement with the city. The Cities contend that, because the second sentence of Section 5 is, in effect, a sanction or exercise of authority by the County that exceeds that set forth in the GMA, that provision cannot comply with the Act. Petitioners' Dispositive Motion Memorandum, at 5-7.

Among the County's responses to the Cities' allegations are that the operation of Section 5 does not constitute a "sanction"; that the Cities have not met their burden to demonstrate by a preponderance of the evidence that the County erroneously interpreted or applied the GMA; and that the County was not acting in a unilateral manner but rather has been working with the Cities in an open, public forum all along. The County also repeatedly argues that the Cities agreed to the IUGA boundaries (with minor exceptions).

Discussion

RCW 36.70A.110 is the relevant section in the GMA relating to urban growth areas. Entitled, "Comprehensive plans--Urban growth areas", it provides:

(1) Each county that is required or chooses to plan under RCW 36.70A.040 shall designate an urban growth area or areas within which urban growth shall be encouraged and outside of which growth can occur only if it is not urban in nature. Each city that is located in such a county shall be included within an urban growth area. An urban growth area may include more than a single city. An urban growth area may include territory that is located outside of a city only if such territory already is characterized by urban growth or is adjacent to territory already characterized by urban growth.

(2) Based upon the population growth management planning population projection made for the county by the office of financial management, the urban growth areas in the county shall include areas and densities sufficient to permit the urban growth that is projected to

occur in the county for the succeeding twenty-year period. Each urban growth area shall permit urban densities and shall include greenbelt and open space areas. Within one year of July 1, 1990, each county that as of June 1, 1991, was required or chose to plan under RCW 36.70A.040, shall begin consulting with each city located within its boundaries and each city shall propose the location of an urban growth area....The county shall attempt to reach agreement with each city on the location of an urban growth area within which the city is located. If such an agreement is not reached with each city located within the urban growth area, the county shall justify in writing why it so designated the area an urban growth area. A city may object formally with the department over the designation of the urban growth area within which it is located. Where appropriate, the department shall attempt to resolve the conflicts, including the use of mediation services.

(3) Urban growth should be located first in areas already characterized by urban growth that have existing public facility and service capacities to serve such development, and second in areas already characterized by urban growth that will be served by a combination of both existing public facilities and services and any additional needed public facilities and services that are provided by either public or private sources. Further, it is appropriate that urban government services be provided by cities, and urban government services should not be provided in rural areas.

(4) On or before October 1, 1993, each county that was initially required to plan under RCW 36.70A.040(1) shall adopt development regulations designating interim urban growth areas under this chapter....Adoption of the interim urban growth areas may only occur after public notice; public hearing; and compliance with the state environmental policy act, chapter 43.21C RCW, and RCW 36.70A.110. Such action may be appealed to the appropriate growth planning hearings board under RCW 36.70A.280. Final urban growth areas shall be adopted at the time of comprehensive plan adoption under this chapter.

(5) Each county shall include designations of urban growth areas in its comprehensive plan. (Emphasis added).

RCW 36.70A.110 was adopted as part of the original Act. However, in 1993 the legislature adopted ESHB 1761 (Laws of 1993, 1st Sp. Sess., ch. 6) that again amended RCW 36.70A.110 and added new subsections (4) and (5). ESHB 1761 became effective on June 1, 1993. As a result of the new requirement for counties to "adopt development regulations designating interim urban growth areas" on or before October 1, 1993, the County adopted Ordinance No. 93-91S on October 13, 1993.

The Board concludes that the second sentence of Section 5 of Pierce County Ordinance No. 93-91S does not comply with the Growth Management Act. Therefore, the Board will not reach the questions of whether or not Section 5 of Pierce County Ordinance No. 93-91S complied with the Procedural Criteria or the PCCPPs.

Virtually all of the argument presented by the parties to the Board and the exhibits submitted by the County focused on the question of whether the Cities had specific knowledge about and/or

[12]

agreed to the provisions of Section 3. Very little argument and no explicit evidence in the record before the Board at this time indicated that the Cities were even aware of, let alone consented to, the second sentence of Section 5. The Board will refer to this second sentence as the "**consequences provision.**"

The only issue before the Board at this time is whether the consequences provision is in compliance with the GMA. The Board holds that the alleged knowledge and/or agreement of the Cities with that provision is immaterial for purposes of determining whether the consequences provision complies with the GMA. It makes no difference whether the Cities agreed to that provision or not. Even if a city's legislative authority, prior to the County's enactment of Section 5, had unanimously voted to abide by its provisions, such a vote would not cure the fundamental flaw in the consequences provision. The flaw exists whether the Cities acquiesced to it or not. Likewise, a private citizen could have challenged the consequences provision as easily as the Cities. The question of whether that citizen agreed to the provision would never have been raised. Thus, regardless of the petitioner's identity, the issue before the Board at this time remains the same.

On its face, the consequences provision in Section 5 violates the requirements of the Act. As drafted, Section 5 is designed to operate as a purely mechanical default judgment. If a city fails to

[13]

complete the seven steps specified in Section 3 of Ordinance 93-91S by April 15, 1994, the County automatically must designate municipal urban growth areas at the municipality's existing jurisdictional limits. This provision, as adopted, leaves absolutely no room for the County to employ discretion.

The problem with this lack of discretion is that where a city has "... territory that is located outside of a city..." that is unquestionably "... territory already characterized by urban growth" (*see* RCW 36.70A.110(1)), it is assumed that this land should be included within that city's final UGA. Yet, because of the consequences provision in Section 5, this land would not be

[14]

included within the city's final UGA. Such a possibility is not in compliance with the GMA. The Act requires a county to employ discretion in adopting UGAs, not just to mechanically use existing corporate limits to derive such a boundary. Thus the consequences provision of Section 5 could result in two conditions that are contrary to the Act: failure to designate as urban growth area land that is clearly characterized as urban, and failure to recognize that the delivery of urban

[15]

governmental services to the urban growth area is to be done primarily by cities.

As previously indicated, the Board did not discover any evidence in the record before it that the Cities agreed to the consequences provision. This results in the County, in effect, ignoring the procedural requirements of RCW 36.70A.110(2), emphasized in the quote above. The Board completely concurs with the County's assertion that it is a regional government under the GMA and clearly has the authority to designate both the Interim and the Final UGAs. However, the

exercise of this authority is governed by the procedural requirements of the Act, including a requirement for consultation and an attempt to reach agreement with the Cities. When this process does not result in agreement, there are several required steps described in RCW 36.70A.110(2) prior to the County's action designating IUGAs or final UGAs.

The Board takes no position at this time whether the seven steps of Section 3 of Ordinance 93-91S are in compliance with the GMA. In addition, the Board takes no position at this time whether the activities described in the record before us constitute the attempt to reach "agreement" required by RCW 36.70A.110(2). The Board's decision on this dispositive motion turns solely on whether the consequences provision of Section 5 complies with the GMA. Finally, it is important to note that the Board does recognize and agree with the County's practical desire to establish a deadline for Cities to meet in order for the County to meet its July 1, 1994, deadline for adoption of final UGAs and for both cities and the County to adopt comprehensive plans. *See* RCW 36.70A.040(3). Given the time required to adopt a legislative enactment, the April 15, 1994 date seems quite appropriate. As indicated, the issue, however, is not the April 15 date or any specific date, but rather whether the consequences provision of Section 5 complies with the GMA. Those consequences are not in compliance with the GMA because they are automatic, taking effect by default.

The second sentence of Section 5 could have been drafted to serve the purpose of mandating a deadline for cities to submit recommendations for proposed final UGAs so that the County could meet its July 1, 1994, deadline, and to have still been in compliance with the GMA.

As one example only, the consequences provision of Section 5 could have stated:

... Therefore, if a municipality fails to complete those steps by April 15, 1994, the County may be required to designate municipal urban growth areas boundaries at the municipality's existing jurisdictional limits, until the municipality accomplishes the steps set forth in Section 3.

Conclusion

The second sentence of Section 5 of Ordinance 93-91S fails to comply with the GMA because it precludes the County from employing any discretion in designating final UGAs. As a result, a municipal UGA boundary would automatically be drawn at existing corporate limits if a city were to fail to complete any one of the seven steps specified in Section 3 of the ordinance -- even where a UGA should extend beyond those boundaries.

Although the County has yet to designate final UGAs, it is the process for doing so (i.e., the consequences provision) that is violative of the Act. Had the second sentence enabled the County to use discretion, it would comply with the GMA.

Ultimately, the County may decide that the UGAs should be drawn precisely at municipal boundaries based on the requirements of RCW 36.70A.110. Such a decision necessarily must involve the use of discretion in light of the particular facts specific to the area in question. It cannot be done automatically.

III.ORDER

Having reviewed the documents listed above that were filed with the Board in support of and in opposition to the motions before the Board, having considered the oral arguments of the parties, and having deliberated on the matter, the Board enters the following order.

ORDERED:

- 1.The County's motion to dismiss Legal Issues Nos. 1, 2 and 3 because of the doctrine of equitable estoppel is **denied** since the Board does not have jurisdiction to determine violations of equitable doctrines.
- 2.The County's motion to dismiss Legal Issues Nos. 5 and 6 because the case is not ripe is **denied** because the Board concludes that the issue, whether the process in Section 5 of Ordinance 93-91S for adopting final UGAs complies with the GMA, is ripe.
- 3.The County's motion to dismiss the Cities' petition because the legal issues before the Board will be moot if the County adopts final UGAs before the Board enters its final decision is **denied** because the issues before the Board are not moot at this time.
- 4.The County's motion to dismiss the Cities' petition for failure to state a claim upon which relief can be granted is **denied**.
- 5.The Cities' Dispositive Motion regarding Section 5 of Ordinance 93-91S is **granted** because that provision fails to comply with the requirements of the GMA.
- 6.Section 5 of Pierce County Ordinance 93-91S is **remanded** to the County with instructions to the County to bring it into compliance with the requirements of the GMA.
- 7.Pursuant to RCW 36.70A.300(1)(b), the Board directs Pierce County to comply with this Order no later than **May 1, 1994**, unless otherwise subsequently directed by the Board when it issues the final decision and order in this case.

So ORDERED this 4th day of March, 1994.

CENTRAL PUGET SOUND GROWTH PLANNING HEARINGS BOARD

M. Peter Philley
Presiding Officer

Joseph W. Tovar, AICP
Board Member

Chris Smith Towne
Board Member

[1]

A smaller version of this map was attached as Exhibit 4029.c to the County's Motion and Memorandum to Dismiss.

[2]

A smaller version of this map was attached as Exhibit A to Pierce County Ordinance 93-91S. A black and white version was attached as Exhibit B to the Cities' Dispositive Motion, while a color version was included in the County's Exhibit 5057 to its Motion and Memorandum to Dismiss.

[3]

References to a prior Board case are to the Board's Final Decision and Order in that case unless otherwise noted by reference to the specific Board order.

[4]

See WAC 242-02-530(4) and *Twin Falls*, Order on Dispositive Motions, at 18-21.

[5]

Unlike the Pollution Control Hearings Board (**PCHB**), which was required to "... develop procedures for summary procedures, consistent with the rules of civil procedure for superior court on summary judgment..." (see RCW 43.21B330), the growth planning hearings boards were given no such mandate. In addition, unlike the PCHB, the growth planning hearings boards are required to issue a final decision within one hundred and eighty days from the date a petition for review was filed. See RCW 36.70A.300(1).

[6]

See *Twin Falls*, Order on Dispositive Motions, at 10.

[7]

The County claims that the "... Board is more like the PCHB or Shorelines Board and may, as they do, apply estoppel theories to cases before them." County's Rebuttal to Cities' Response, at 2. Although the County lists several PCHB cases to bolster this contention, it failed to provide any Shorelines Hearings Board (**SHB**) authority to verify that the SHB indeed does determine cases before it based upon equitable doctrines. The Board notes that SHB's enabling legislation is greatly different than that of a growth planning hearings board. For instance, RCW 90.58.180(4) (b) authorizes the SHB to determine that a rule, regulation or guideline "Constitutes an implementation of this chapter in violation of constitutional or statutory provisions;" (emphasis added). Thus, the SHB appears to have specific legislative authorization to conduct constitutional analysis. The Board also notes that unlike RCW 36.70A.280 (1), which specifically refers only to the GMA or SEPA, RCW 90.58.180(4)(b) does not specify and thereby limit which statutes may be reviewed by the SHB.

[8]

Allied Aquatics v. Washington Department of Ecology, PCHB No. 91-40, at 11-12; *R/L Associates, Inc. et al v. Washington Department of Ecology and Maryville*, PCHB No. 90-124, at 31; *Meridian Aggregates Co. v. Washington Department of Ecology*, PCHB No. 88-149, at 5-6; *Adcock and McLanahan v. Washington Department of Ecology*, PCHB No. 87-215, at 10; and *University Mechanical Contractors, Inc. et al. v. Puget Sound Air Pollution Control Agency*, PCHB No. 87-56, at 16.

[9]

The bulk of the County's argument in the "ripeness" portion of its memorandum goes to whether or not its adopted process complies with the GMA:

Regardless of whether these prospective elements are ripe for Board review, the process proposed by the County does not alter or interfere with GMA, but ensures compliance with GMA. Respondent's Memorandum in Support of Motion to Dismiss, at 19.

[10]

The doctrines of ripeness and exhaustion are related concepts. *Estate of Friedman v. Pierce County*, 112 Wn.2d 68, 76, 768 P.2d 462 (1989). Both deal with the timing of judicial review, and have similar purposes:

Both doctrines serve agency autonomy and judicial economy by allowing most administrative proceedings to conclude prior to judicial intervention and, by deferring intervention in this manner, courts allow agencies to

perform their functions and assist their own later review of the agency's action. *Sintra, Inc. v. Seattle*, 119 Wn.2d 1, 30 (concurring opinion), 829 P.2d 765 (1992) quoting from Power, *Help Is Sometimes Close at Hand: The Exhaustion Problem and the Ripeness Solution*, 1987 U. Ill. L.Rev. 547, 612.

[11]

First Covenant Church v. Seattle, 114 Wn.2d 392, 399 n.3, 787 P.2d 1352 (1990) citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 18 L. ed. 2d 681, 87 S. Ct. 1507 (1967); *Toilet Goods Ass'n v. Gardner*, 387 U.S. 158, 18 L. Ed. 2d 697, 87 S. Ct. 1520 (1967); *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167, 18 L. Ed. 2d 704, 87 S. Ct. 1526 (1967).

[12]

The County's Exhibit No. 4205.c is the minutes of the March 18, 1993, meeting of the Pierce County Regional Council. The minutes discuss a "preliminary urban growth area" and "study areas" -- terms of art particular to Pierce County. They also indicate:

... Jurisdictions would be given until April 14th to make adjustments to their study areas.... The purpose of the April 14th deadline is so the County can move forward with a resolution. Exhibit 4205.c, at 4.

Pierce County Ordinance 93-91S was adopted on October 12, 1993. As indicated, Section 5 refers to April 15, 1994. County Exhibit 5057, at 10. The March 18, 1993, minutes refer to an April 14th date (without specifying the year). The Board concludes that the April 14th reference in the minutes was to 1993 because ESHB 1761, which imposed the additional duty on counties to adopt IUGAs, was not adopted by the legislature until May 28, 1993. The law became effective on June 1, 1993. This conclusion is confirmed by an attachment to Exhibit 4205.c, a draft Pierce County Council resolution. Section 5 specifies April 15, 1993.

[13]

Section 3 of Ordinance 93-91S provides:

The Pierce County Council recognizes that the interim urban growth areas are for an interim period only and that they may change when the UGAs are designated upon adoption of the Pierce County Comprehensive Plan. It is the intent of Pierce County to designate final municipal urban growth areas beyond existing municipal limits that include areas of unincorporated Pierce County only after all the following steps are accomplished:

- A. Negotiation and execution of interlocal joint planning agreements between Pierce County and its municipality(ies) at least delineating joint planning areas (pursuant to Resolution No. R93-127; County-wide Planning Policies [CWPP] -- UGA Policy No. 4, pp. 59-60, and WAC 365-195-335(3)(k); and
- B. Preparation by the municipality of at least a draft comprehensive plan, specifically the capital facilities element, including "tiers" (pursuant to RCW 36.70A.070 and CWPP -- UGA Policy Nos. 2 and 3, pp. 49-59); and
- C. Environmental review of the proposed municipal comprehensive plans, including proposed municipal UGAs prepared by the municipalities (pursuant to RCW 43.21C); and
- D. Preparation of fiscal analysis assessing the relative costs of providing public facilities and services with the public revenue expected to be derived from any service area or municipal boundary change (pursuant to WAC 365-195-335(3)(k), PCPP, Fiscal Policies Nos. 1-7, pp. 26-27, and Snoqualmie); and
- E. Preparation of a proposed urban growth area map clearly delineated on a map of appropriate scale, including a legal description of the proposed municipal urban growth area boundary. The proposed municipal urban growth area shall be adopted by legislative action of the respective cities and towns and include findings of fact indicating the type of urban governmental services the municipality provides or intends to provide within the proposed municipal urban growth area (pursuant to CWPP -- UGA Policy Nos. 2 and 3, pp. 49-58, specifically UGA Policy No. 2.4, p. 52); and
- F. County review of the proposed municipal urban growth area including, but not limited to, consideration of the items B., C., D., and E. above (pursuant to WAC 365-195-335(3)(c-k) and CWPP -- UGA Policy No. 1, pp. 48-49); and
- G. Initiation of negotiations addressing allocation of financial burdens within municipal UGAs, provisions of urban facilities and services, and coordinated land use regulations (pursuant to WAC 365-

195-335(3)(k) and CWPP -- Fiscal Impact Policy Nos. 1-7, pp. 26-27).County's Exhibit 5057, at 10; Cities' Exhibit A, at 10.

[14]

During oral argument, the County claimed that it could always amend the consequences provisions of Section 5 of its ordinance. This is a fatuous defense. The Board is charged with reviewing the County's existing version of Ordinance 93-91S for compliance with the GMA, not a potential one.

[15]

RCW 36.70A.110 requires the designation of IUGAs and final UGAs and subsection (3) provides that "... it is appropriate that urban government services be provided by cities...". The definition of "urban growth" at RCW 36.70A.030(14) indicates that:

"Urban growth" refers to growth that makes intensive use of land for the location of buildings, structures, and impermeable surfaces to such a degree as to be incompatible with the primary use of such land for the production of food, other agricultural products, or fiber, or the extraction of mineral resources. When allowed to spread over wide areas, urban growth typically requires urban governmental services. "Characterized by urban growth" refers to land having urban growth located on it, or to land located in relationship to an area with urban growth on it as to be appropriate for urban growth.

In turn, "urban governmental services" are defined at RCW 36.70A.030(16) to include:

... those governmental services historically and typically delivered by cities, and include storm and sanitary sewer systems, domestic water systems, street cleaning services, fire and police protection services, public transit services, and other public utilities associated with urban areas and normally not associated with nonurban areas. (Emphasis added).