

CENTRAL PUGET SOUND

GROWTH MANAGEMENT HEARINGS BOARD

STATE OF WASHINGTON

FRIENDS OF THE LAW and BEAR) **Case No. 94-3-0009**

CREEK CITIZENS FOR GROWTH)

MANAGEMENT,) **ORDER GRANTING**

)DISPOSITIVE MOTIONS

Petitioners,)

)

v.)

)

KING COUNTY,)

)

Respondent,)

)

and)

)

PORT BLAKELY TREE FARMS,)

)

Intervenor.)

)

On August 16, 1994, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review from Friends of the Law and Bear Creek Citizens for Growth Management (collectively referred to as **FOTL**). Petitioners challenge the failure of King County (the **County**) to adopt a comprehensive land use plan or final urban growth area by July 1, 1994 pursuant to Chapter 36.70A RCW, the Growth Management Act (**GMA**).

A prehearing conference in this case was held in Seattle on September 28, 1994. On September 29, 1994, the Board entered a Prehearing Order and Order Granting Intervention to Port Blakely Tree Farms. The Prehearing Order recited four legal issues to be determined by the Board. Each of these issues has subsequently been the subject of a dispositive motion.

Dispositive Motions

On October 11, 1994, FOTL filed a "Dispositive Motion of FOTL Regarding Legal Issues 1 and 2" (**FOTL's Dispositive Motion**). A Declaration of Joseph Elfelt (**Elfelt Declaration**) was

enclosed with FOTL's Dispositive Motion. Four exhibits were attached to the Elfelt Declaration:

Exhibit A is an excerpt from the King County Comprehensive Plan Supplemental Environmental Impact Statement, Executive Proposed Plan, dated June, 1994.

Exhibit B is an excerpt from the Draft Environmental Impact Statement for the Proposed Bear Creek Community Plan and Area Zoning, dated July 29, 1987 and issued on August 31, 1987.

Exhibit C is an excerpt from the Draft Supplemental Environmental Impact Statement for the King County Countywide Planning Policies, dated January 12, 1994.

Exhibit D is an excerpt from the Final Supplemental Environmental Impact Statement for the Countywide Planning Policies Proposed Amendments, dated May 18, 1994.

Also on October 11, 1994, "King County's Dispositive Motion Seeking Dismissal of Legal Issues Three and Four" (**County's Dispositive Motion**) was filed with the Board. An Affidavit of Kevin Wright (**First Wright Affidavit**), with two exhibits, A and B, was attached to the County's Dispositive Motion:

Exhibit A is a Petition for Review filed with the Board in *FOTL et al. v. King County et al.* (**FOTL I**), CPSGPHB Case No. 94-3-0003, dated January 27, 1994.

Exhibit B is the Board's Order on Dispositive Motions in *FOTL I*, dated April 22, 1994.

Port Blakely Tree Farms (**Port Blakely**) did not file a dispositive motion.

Responses to Dispositive Motions

On October 21, 1994, "King County's Response to Dispositive Motion of FOTL Regarding Legal Issues 1 and 2" (**County's Response**) and a second Affidavit of Kevin Wright (**Second Wright Affidavit**) were filed with the Board. In addition, the Board also received a "Response to FOTL Dispositive Motion by Intervenor Port Blakely Tree Farms" (**Port Blakely's Response**) and a "Response of FOTL and Bear Creek Citizens to King County Motion Seeking Dismissal of Legal Issues III and IV" (**FOTL's Response**). FOTL also filed a "Declaration of David A. Bricklin Providing a Document Pertaining to Dispositive Motions" (**Bricklin Declaration**). One exhibit was attached to the Bricklin Declaration:

Exhibit A is an October 14, 1994 King County Council Memorandum from Jerry Peterson to Brad Duerr, Rebecha Cusack and Janet Masuo.

Replies to Responses

On October 28, 1994, the Reply Brief of King County (**County Reply**) and Declaration of Janet Masuo (**Masuo Declaration**) were filed with the Board. On the same day, the "Reply Memorandum of Friends of the Law and Bear Creek Citizens for Growth Management in Support of Dispositive Motion Regarding Legal Issues 1 and 2" (**FOTL's Reply**) was filed with the Board, along with the Supplemental Declaration of Joseph Elfelt (**Supplemental Elfelt Declaration**) and a Declaration of Alexa A. Cole (**Cole Declaration**). The Supplemental Elfelt Declaration contained three exhibits:

Exhibit A is a King County Parks, Planning and Resources Department "Land Use" map, dated 1994.

Exhibit B is a King County Parks, Planning and Resources Department "Service & Finance Strategy" map, also dated 1994.

Exhibit C is the October 14, 1994 memorandum from Jerry Peterson to Brad Duerr, Rebecha Cusack and Janet Masuo, previously attached as Exhibit A to the Bricklin Declaration.

Motion Hearing

The Board held a hearing on dispositive motions at 1:00 p.m. on Monday, October 31, 1994 at 1225 One Union Square, Seattle. The Board's three members were present: M. Peter Philley, presiding, Joseph W. Tovar and Chris Smith Towne. David A. Bricklin represented FOTL; Kevin Wright represented the County; and Katherine Kramer Laird represented Port Blakely. Court reporting services were provided by Duane Lodell, CSR of Robert Lewis & Associates, Tacoma. No witnesses testified.

I. FINDINGS OF FACT

1. On November 8, 1993, the King County Council passed Ordinance 11110, which designated interim urban growth areas (**IUGAs**) for the County pursuant to RCW 36.70A.110(4). The Ordinance was approved by the King County Executive on November 22, 1993. *See FOTL I, Order on Dispositive Motions*, at 5, Finding of Fact No. 5.
2. The County did not adopt a comprehensive land use plan by July 1, 1994, nor has it yet adopted such a plan. *Elfelt Declaration*, at 1, ¶ 2; *County's Response*, at 2 and 9.
3. The County did not adopt final urban growth areas (**FUGAs**), nor did it include designations of FUGAs in its comprehensive land use plan by July 1, 1994. Furthermore, the County has not subsequently done so. *Elfelt Declaration*, at 1, ¶ 2; *County's Response*, at 2 and 9.
4. On June 30, 1994, the King County Executive transmitted the Executive-Proposed Comprehensive Plan to the King County Council. *Masuo Declaration*, at 1, ¶ 4.
5. On October 19, 1994, the King County Council's Growth Management, Housing and Environment Committee completed its review of the Executive-Proposed Comprehensive Plan and made a "do pass" recommendation. *Masuo Declaration*, at 1, ¶ 5.
6. On November 14, 1994, the King County Council is scheduled to hold its initial public hearing on the proposed comprehensive plan. *Masuo Declaration*, at 1, ¶ 6; *Exhibit A to Bricklin Declaration*, at 1 -- a County staff memorandum; *Elfelt Declaration*, at 2, ¶ 3.
7. On November 18, 1994, the King County Council is scheduled to adopt the proposed comprehensive land use plan. *Supplemental Elfelt Declaration*, at 2, ¶ 6. *Exhibit A to Bricklin Declaration*, at 1 -- a County staff memorandum.

II. FOTL's Dispositive Motion -- Legal Issues 1 and 2

Legal Issue No. 1

Does the Growth Management Act (GMA) at RCW 36.70A.040(3) require King County to adopt a comprehensive plan by July 1, 1994, and did King County comply with this statutory deadline?

Discussion

RCW 36.70A.040(3) provides in part:

Any county or city that is initially required to conform with all of the requirements of this chapter under subsection (1) of this section shall take actions under this chapter as follows:

...

(d) if the county has a population of fifty thousand or more, the county and each city located within the county shall adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan on or before July 1, 1994... (emphasis added).

King County, like all counties within the Central Puget Sound, was required to conform with all requirements of the GMA from the Act's inception. It is uncontested that King County did not comply with the GMA's deadline for adopting a comprehensive plan by July 1, 1994. *See* Finding of Fact No. 2.

Conclusion No. 1

King County was required to adopt a comprehensive plan by July 1, 1994. King County has not yet adopted such a comprehensive plan and therefore has not complied with the requirements of the GMA at RCW 36.70A.040(3)(d).

Legal Issue No. 2

Does the GMA at RCW 36.70A.110(4) require King County to adopt a final urban growth area by July 1, 1994, and did King County comply with the statutory deadline?

Discussion

The last sentence of RCW 36.70A.110(4) states:

Final urban growth areas shall be adopted at the time of comprehensive plan adoption under this chapter.

In conjunction with that sentence, RCW 36.70A.110(5) provides:

Each county shall include designations of urban growth areas in its comprehensive plan.

As indicated above, RCW 36.70A.040(3)(d) requires the County to have adopted its comprehensive plan by July 1, 1994. Because RCW 36.70A.110(5) requires that FUGA designations be included in a comprehensive plan, and because the relevant portion of RCW 36.70A.110(4) requires FUGAs to be adopted at the time of comprehensive plans, the Board concludes that the County's FUGAs should also have been adopted by July 1, 1994. It is uncontested that King County did not comply with the GMA's deadline for designating or adopting FUGAs by July 1, 1994. See Finding of Fact No. 3.

Conclusion No. 2

King County was required to designate and adopt final urban growth areas at the time of comprehensive plan adoption. King County was required to adopt its comprehensive plan by July 1, 1994. King County has not yet adopted its final urban growth areas and therefore has not complied with the requirements of the GMA at RCW 36.70A.110(4) and (5).

III. County's Dispositive Motion -- Legal Issues 3 and 4

Legal Issues Nos. 3 and 4 are addressed below because, in determining Legal Issues Nos. 1 and 2 above, the Board has concluded that the County has failed to act to comply with the GMA.

Legal Issue No. 3

Does the Central Puget Sound Growth Management Hearings Board have jurisdiction in its compliance order (assuming the County failed to adopt its comprehensive plan and final urban growth areas by July 1, 1994) to require King County to immediately adopt a final (or amended interim) urban growth area that is limited to either existing incorporated areas or areas already characterized by urban growth that have existing public facility and service capacities to serve such development?

Discussion

When Must the County Comply?

In its Prehearing Order in this case, the Board anticipated entering an order on dispositive motions by November 14, 1994. Because the parties expected the dispositive order to constitute the Board's final decision and order in this case, their arguments regarding when the County should be ordered to adopt a comprehensive plan and FUGAs have used that date as a starting point. More specifically, FOTL has asked the Board to order the County to comply by November 18, 1994, i.e., virtually immediately. On the other hand, the County has asked to be given 180 days, which would make the compliance deadline May 15, 1995.

The relevant portion of RCW 36.70A.300 provides that when a state agency, county or city is not

in compliance with the requirements of the Act, the Board:

... shall remand the matter to the affected state agency, county, or city and specify a reasonable time not in excess of one hundred eighty days within which the state agency, county, or city shall comply with the requirements of this chapter. (emphasis added).

Since the Board has concluded that the County has failed to act, the question becomes, what is a reasonable time to give the County to act? In exercising its complete discretion in setting a compliance deadline, the Board can look at many factors. Without citing all such factors, some of the relevant ones the Board may consider, depending on the circumstances of each case, follow:

When was the statutory deadline for taking an action?

How late is the non-complying jurisdiction in taking action?

What type of action was required by the GMA?

How complex is that action?

How much public participation is required leading up to the action?

How much public participation has taken place, and is anticipated prior to taking the required action?

What type of entity is the non-complying jurisdiction?

How large is the non-complying jurisdiction?

How many decision makers must take the action required by the Act?

When is it possible for the non-complying jurisdiction to take action to bring it into compliance?

When is the non-complying jurisdiction likely to take action to bring it into compliance?

What are the mitigating and aggravating circumstances, if any, that the parties have cited to explain the non-compliance and/or the requested compliance date?

What is the potential harm caused by the noncompliance continuing?

What has been the non-complying jurisdiction's history of compliance with other GMA requirements?

What has been the non-complying jurisdiction's history of compliance with Board orders?

In this case, the County has failed to adopt its comprehensive plan and FUGAs by July 1, 1994. The County is now four months delinquent in meeting this GMA obligation with final adoption expected within weeks. Even though the County has known that it was required to adopt a

comprehensive plan since the GMA was first enacted in 1990,^[1] taking action within five months of the statutory deadline is not unreasonable in this case, given the complex requirements for any GMA comprehensive plan and the number of issues to be resolved in King County.

A comprehensive plan is a cornerstone of the GMA planning process -- a complex document comprised of several mandatory elements and possible optional elements. *See* RCW 36.70A.070 and .080 respectively. While all cities and counties must adopt a comprehensive plan, only counties are required to include a rural element (*see* RCW 36.70A.070(5)) and it is a county's obligation, not its cities', to designate and adopt FUGAs (*see* RCW 36.70A.110(4) and (5)). Therefore, adopting a county's comprehensive plan may potentially be far more complex and politically charged than adopting a city's comprehensive plan. This complexity is certainly

compounded by the size of King County, both geographically and in population, and given the scores of cities and special purpose districts within the County.

The King County Council has scheduled its first public hearing on the proposed comprehensive plan for November 14, 1994. *See* Finding of Fact No. 6. The County Council anticipates voting to adopt the proposal on November 18, 1994, four days after that hearing. *See* Finding of Fact No. 7. Having considered the factors listed above, the Board concludes that requiring the County to comply with the Board's order by November 18, 1994 is unreasonable under the circumstances and therefore will not adopt FOTL's proposed compliance date. On the other hand, the Board concludes that the County's request for 180 days to comply is also unreasonable. Therefore, the Board will reject that request. Instead, the Board will give the County until **Friday, December 30, 1994** to comply. This will enable the County to comply with the Act's requirements within six months of the July 1, 1994 deadline while not forcing the County to accelerate action if four days for public comment and County Council deliberation is insufficient to take appropriate action that complies with the GMA and Board decisions.

With What Must the County Comply?

The parties focus a great deal of their respective legal briefs on arguing what the language of the Board's compliance order should be. The County contends that:

... The only issue properly before the Board in this case is what constitutes a reasonable time within which to require King County to comply with these GMA requirements [to adopt its comprehensive plan and FUGAs]....County's Response, at 2-3.

The question of where King County should choose to locate its FUGA is not before the Board at this time, and it would be improper for the Board to address this issue. County's Response, at 9.

Accordingly, the County asks the Board to enter an order requiring the County to adopt its comprehensive land use plan and FUGAs within what it considers a reasonable time, 180 days of the Board's order. County's Response, at 9 and 13.

In contrast, FOTL has asked the Board to issue the following order:

King County shall adopt its FUGA no later than November 18, 1994. The FUGA shall, at a minimum, include all incorporated areas within King County. The FUGA may extend beyond incorporated areas only upon a showing that the County has met the Act's requirements for extending the FUGA beyond corporate limits as specified in the Act and as construed in this Board's prior decisions regarding UGA designations (e.g., ARR v. Kitsap County; City of Tacoma v. Pierce County). FOTL's Response, at 6; FOTL's Reply, at 12.

The Board has already concluded the reasonable amount of time issue above -- deciding that the County shall have until December 30, 1994 to adopt its comprehensive plan and FUGAs.

The next issue is whether the Board's order can explicitly require the County to comply with the GMA's requirements and Board decisions. The Board holds that whether or not its compliance order so specifies, as a matter of law, any jurisdiction planning under the Act and within the Board's jurisdiction must comply with the current requirements of the Act and this Board's

decisions, unless, of course, the latter have been reversed upon judicial review.

What Will the Board Determine at the Compliance Hearing?

RCW36.70A.330, entitled "Noncompliance," states:

- (1) After the time set for complying with the requirements of this chapter under RCW 36.70A.300(1)(b) has expired, the board, on its own motion or motion of the petitioner, shall set a hearing for the purpose of determining whether the state agency, county, or city is in compliance with the requirements of this chapter.
- (2) The board shall conduct a hearing and issue a finding of compliance or noncompliance. A hearing under this subsection shall be given the highest priority of business to be conducted by the board, and a finding shall be issued within forty-five days of the filing of the motion under subsection (1) of this section with the board.
- (3) If the board finds that the state agency, county, or city is not in compliance, the board shall transmit its finding to the governor. The board may recommend to the governor that the sanctions authorized by this chapter be imposed.

At the compliance hearing in this case, the Board will only determine whether the County adopted a comprehensive plan and FUGAs by December 30, 1994. If the County has not done so, the Board will be required to issue a finding of noncompliance. If the County has adopted its comprehensive plan and FUGAs by December 30, 1994 (and procedurally complied with the Act's requirements -- *see* discussion below), the Board will issue a finding of compliance. Assuming the County has acted by December 30, 1994, the Board will not determine whether that action substantively complies with the GMA, SEPA or prior Board decisions. Instead, a new petition for review will have to be filed, alleging that the County has not substantively complied with either the Act, SEPA, or prior Board decisions.

This holding is consistent with the County's interpretation of the nature of a compliance hearing. The County argues that the Board should determine whether its comprehensive plan and FUGAs substantively comply with the GMA and Board decisions only after a hearing on the merits if a new petition for review is filed within sixty days of the County's adoption of a comprehensive plan and FUGAs. County's Response, at 10. Port Blakely concurs with the County, arguing that:

The Board also should reserve any discussion and analysis of the County's compliance with previous Board decisions until an appropriate record and hearing on the merits.... Port Blakely's Response, at 2.

Again, in sharp contrast to these positions, FOTL contends that the Board must determine substantive compliance at the compliance hearing, rather than waiting for a new petition for review to be filed and for that new case to proceed to a hearing on the merits of the petition. FOTL's Dispositive Motion, at 9. FOTL alleges that following the compliance hearing, if the Board decides only whether the County has adopted a comprehensive plan and FUGAs by the established compliance deadline, the County will be permitted to remain in non-compliance with the Act for as much as an additional year to sixteen months. FOTL's Dispositive Motion, at 8-9; FOTL's Response, at 2-3. In the meantime, FOTL argues that additional development that does

not comply with the requirements of the Act will vest or be constructed.

FOTL labels the process envisioned by the County as the "double appeal approach" because potential challengers in failure-to-act cases would have to file one petition alleging the failure to act, and subsequently, a second petition for review after the procedural compliance hearing, if the petitioner concluded that the action failed to substantively comply with the Act. FOTL urges the Board to reject the double appeal approach because it sends the wrong message to local governments:

The County contends that it should get to go through the appeals process twice simply because they have failed to act in the first place. FOTL's Reply, at 3.

The net effect of the County's distinction [i.e., procedural compliance now, substantive compliance at new hearing on the merits] would be to reward counties and cities that failed to act and to penalize counties and cities which tried to act but did so imperfectly. FOTL's Response, at 2.

To maximize the amount of time before faced with the imposition of sanctions, it is better to do nothing than to try to do the right thing and fail. FOTL's Response, at 3-4.]

FOTL's arguments, in urging the Board to substantively review the County's actions when the Board holds the compliance hearing in this case, are not without merit. The Board sympathizes with FOTL's concerns and agrees that "the double appeal approach" may not be the most efficient, particularly from a petitioner's perspective. However, the Board concludes that granting FOTL's request would be improper. Consequently, the Board holds that at the yet to be scheduled compliance hearing, the Board will only determine whether the County adopted its comprehensive plan and FUGAs by December 30, 1994. As part of its review, the Board may determine whether the County complied with the procedural requirements of the Act, e.g., pre-adoption public notice, public hearing and post-adoption publication of notice. *See FOTL I*, Order on Dispositive Motions, at 22-24; and Order Denying Motions for Reconsideration, at 9-11. Once the County does adopt its comprehensive plan and FUGAs, and publishes notice thereof, that will trigger a new sixty day period for interested persons to challenge the enactments for not complying with the Act or SEPA. As a result, the ultimate issues before the Board will have changed dramatically from "did the County act to meet its deadline?" to, "now that the County has acted, does its action comply with the Act?" If the Board were to permit FOTL to substantively challenge the comprehensive plan and FUGAs at the compliance hearing, the Board would only be compounding an already convoluted appeals process. Under such circumstances, FOTL would be entitled to argue substantive noncompliance at the compliance hearing while simultaneously it and/or other potential challengers could file new petitions for review independently challenging the same document. One must keep in mind the nature of the underlying documents being reviewed: legislative enactments of county government with countywide impact, upon which potentially thousands of development decisions rely, as opposed to quasi-judicial permit decisions of limited effect. Therefore, certainty in the appeals process is critical. Having ongoing duplicative appeals at the Board level proceeding on different schedules defeats this purpose.

FOTL's timing scenario, although practically quite possible, only focuses on the policy argument that the Act demands timely adoption and timely compliance. *See* FOTL's Dispositive Motion, at 5-6; FOTL's Response, at 1-2, and 4. Although the Board concurs that timely adoption and timely compliance are crucial for effective implementation of the GMA, FOTL's argument is not convincing in light of several other considerations.

The Act concentrates on the Board's review of adopted documents such as countywide planning policies, comprehensive plans, and development regulations. *See* for instance, RCW 36.70A.280 (1), .290(2), .300(1) .310, and .320. Consequently, most of the Board's rules of practice and procedure assume review of an adopted document. However, failure-to-act petitions are also anticipated by both the Act (*see* RCW 36.70A.310 and .345) and by the Board's own rules (*see* WAC 242-02-220(4)).

This case is a "failure-to-act" matter. The County failed to act to adopt its comprehensive plan and FUGAs by the GMA's specified July 1, 1994 deadline. The crucial legal question presently before the Board is quite limited: did the County act by July 1, 1994? *See* Legal Issues Nos. 1 and 2 above. The answer is obvious: "no." Had the County acted by July 1, 1994 and a portion or all of its comprehensive plan been challenged and found to be in noncompliance with the Act, the Board, upon remand, would have ordered the County to bring the noncomplying provision(s) into compliance with the Act. Under those circumstances, at the compliance hearing the Board would substantively determine whether the corrective action taken by the County complied with the Act. A new petition for review would have been unnecessary; the double appeal approach would be inapplicable.

However, the fact that this is a failure-to-act case does make a difference. To begin with, since the County has not yet acted, no document exists for the Board to remand. *See* RCW 36.70A.300(1) (b). Similarly, RCW 36.70A.290(4) requires the Board to base its final decision on the record developed by the jurisdiction taking a challenged action. A major distinction between a petition for review alleging a failure to act by a specified deadline, and a petition challenging an action for not complying with the GMA, is that with the former, no record *per se* exists. On the other hand, a complete record below does exist when a jurisdiction has taken an adoption action.

Both the County and Port Blakely argue that the record below of the County's actions in adopting the comprehensive plan and FUGAs will not be available unless and until it is assembled for a hearing on the merits of a second, still to be filed petition for review. The Board disagrees. The County has until December 30, 1994 to adopt its comprehensive plan and FUGAs. That is the compliance deadline. In early January, 1995, the Board will schedule a compliance hearing. *See* RCW 36.70A.330(1) above. The actual compliance hearing will be held sometime in mid-to-late January. At that time, assuming the County has adopted its comprehensive plan and FUGAs, the Board could conceivably require submittal of the complete record below compiled in taking those actions. At the very least, the record will technically exist; practically, whether it will be available is another question.

Another major difference is that in a failure-to-comply case, the Board has a 180 day period to review the record that has already been prepared.^[1] In a failure-to-act case, the Board has only 45

[1]

days to review the same record since the Board is required to issue a finding of compliance or noncompliance within forty-five days of the filing of a motion for a compliance hearing. *See* RCW 36.70A.330(2). Therefore, the Board is expected to issue its finding in late February or early March, 1995.

If the Board granted FOTL's request, the Board would have to review the County's entire comprehensive plan and relevant portions of the underlying record in less than forty-five days. On the other hand, if the Board requires a new petition for review to be filed if one alleges substantive noncompliance, the Board has considerably more time to review those portions of the comprehensive plan that have been challenged. Given the potential magnitude of the record below compiled in adopting a comprehensive plan, the amount of time the Board has to review the record is no idle concern. Clearly, the Board will have more time to review the record below if it adopts the County's "double appeal approach" than if it adopts FOTL's approach requiring a determination of substantive compliance sooner, at the compliance hearing, rather than later at a hearing on the merits of a new petition for review.

Although the amount of time available to the Board to review the record below is certainly an important factor to the Board, it is not the controlling factor. More important is how this quasi-judicial board fits into the governmental process in our democracy. Local elected officials are required to swear or affirm that they will uphold and comply with the laws of the state, whether they like them or not. That tenet is a fundamental concept that goes to the heart of our democratic society. A key element of the GMA, a law of the State of Washington that officials have sworn or affirmed to uphold, is that it requires local elected officials to take action. Clearly, taking such action is an extremely difficult political, practical and legal proposition involving often costly and complicated land use and planning issues. Nonetheless, because the very officials required by the Act to make the tough decisions have taken an oath to uphold the law, this Board assumes that local elected officials are proceeding in good faith to comply with the requirements of the GMA. Nothing in the limited record before the Board in this case convinces the Board otherwise; the fact that the County missed its July 1, 1994 deadline does not mean that elected officials are acting in bad faith. Missing the deadline was presumably a result of the complexity of the task. Significantly, once a local jurisdiction adopts its comprehensive plan and development regulations, those documents are presumed valid. *See* RCW 36.70A.320. Thus, the Board's assumption that elected officials are proceeding in good faith in attempting to implement the Act becomes a statutory presumption of validity once a GMA action has taken place. By ordering the County to comply with the Act's requirements and prior Board decisions by December 30, 1994, the Board is requiring the County to comply with the Act six months after the July 1, 1994 deadline. The Board is not giving the County an additional six to sixteen months of time, as FOTL argues, since the County's comprehensive plan is presumed valid upon adoption. The Board cannot now speculate upon what the County may do in the future.

The Board is required to issue its final decision and order within one hundred eighty days of receipt of a petition for review. *See* RCW 36.70A.300(1). As a result of the Board's decision in this

failure-to-act case, this order constitutes the Board's final decision and order and is being issued well before the 180th day. The Board has answered the only legal issues before it at this time that it can now answer: "Yes, the County was required to adopt its comprehensive plan and FUGAs by July 1, 1994, and no, the County has not yet done so." Although FOTL raised other legal issues in its petition, such as asking the Board to require the County to immediately amend Ordinance 11110 (*see* FOTL's Petition for Review, at 3, ¶ 10.3), the Board cannot and will not prospectively determine those legal issues before the County has taken action. The County's IUGAs, which were not timely appealed, remain in effect. While those IUGAs were presumed valid during the sixty day appeal period and during the pendency of any appeals, now that they have withstood challenge (and can no longer be appealed), they no longer retain their presumption -- instead, they are valid as a matter of law until amended, repealed, or replaced by FUGAs and their implementing development regulations or until they expire by their own terms. *See Tacoma et al. v. Pierce County*, CPSGMHB Case No. 94-3-0001, at 16-17.

In the meantime, the draft comprehensive plan remains precisely that: a proposal that the County Council may or may not adopt in its present form. FOTL has put the County on notice regarding its concerns about the size and location of the FUGAs. *See* the Elfelt Declaration and Supplemental Elfelt Declaration, for instance. The County's elected officials are entitled to consider and weigh FOTL's input as well as similar or contrasting opinions of other members of the public before they act to adopt the comprehensive plan. That is how the legislative process works. Assuming, for the sake of argument only, that FOTL's position is correct,^[1] the County Council deserves the opportunity to respond to FOTL's concerns by making corrections to the proposal so that it will comply with the GMA. This Board will not interfere with the legislative process in such an inappropriate way by now ordering the County to do so.

Conclusion No. 3

Because the Board has concluded that the County failed to adopt its comprehensive plan and FUGAs by July 1, 1994 and has yet to do so, the Board does have the authority to require the County to adopt the comprehensive plan and FUGAs within a reasonable period. The Board can exercise its discretion in determining what a reasonable period is, ranging from immediately to a maximum of 180 days. The Board has determined that the County must adopt its comprehensive plan and FUGAs by December 30, 1994.

The Board is also entitled to require the County to adopt its comprehensive plan and FUGAs in compliance with the Act and consistent with the Board's prior cases. In this case, the Board will so order. However, whether the Board explicitly requires a jurisdiction to comply with the GMA's requirements and prior decisions of the Board or not, the jurisdiction as a matter of law must do so.

In the compliance hearing that will be held in this case, the Board will determine only whether the County adopted its comprehensive plan and FUGAs by December 30, 1994. The Board will not determine at that time whether those documents substantively comply with the Act. The

County Council's enactment enjoys the presumption of validity until and unless a preponderance of the evidence proves otherwise. Persons concluding that the yet to be adopted comprehensive plan and/or FUGAs do not comply with the GMA must file a new petition for review within sixty days of post-adoption publication of notice. This would afford the County and other interested parties the opportunity to fully argue their positions and have the Board give thorough and measured consideration to those arguments.

Legal Issue No. 4

If the Board has such jurisdiction, should it in its compliance order (assuming the County failed to adopt its comprehensive plan and final urban growth areas by July 1, 1994) require King County to immediately adopt a final (or amended interim) urban growth area that is limited to either existing incorporated areas or areas already characterized by urban growth that have existing public facility and service capacities to serve such development?

Discussion

The Board will not resolve Legal Issue No. 4 because of its conclusions regarding Legal Issue No. 3. It would be premature for the Board to order the County to immediately adopt FUGAs limited to either existing incorporated areas or areas already characterized by urban growth that have existing public facility and service capacities to serve such development. Therefore, the County's motion to dismiss this issue will be granted.

Nonetheless, a comment is warranted. Although instances clearly may exist where a FUGA should be drawn precisely at existing municipal boundaries, the Act does permit FUGAs to be extended beyond existing city limits. If the legislature intended FUGAs to be identical to corporate limits, it would have explicitly so stated. Instead, the legislature crafted the GMA to allow FUGAs to be designated in six additional areas. *See Association of Rural Residents v. Kitsap County*, CPSGPHB Case No. 93-03-0010 and *Tacoma et. al v. Pierce County*, CPSGPHB Case No. 94-3-0001. Although the Act does not confer unbridled discretion upon counties in determining where to locate FUGAs, counties do have discretion to make the FUGA decisions they deem appropriate under the circumstances, based upon a thorough review and rigorous analysis of an array of objective factors to determine actual capacity (e.g., twenty year population projections; availability of information provided by the cities; current population, zoning and densities; amount of open space, greenbelts and critical areas; to name just a few).

While the objective analysis is essential, counties also have the latitude to consider subjective factors, such as a land supply market factor and the preferred vision that each city expresses in its comprehensive plan.^[1] The explicit articulation and balancing of these factors has been described as the requirement to "show your work" when designating urban growth areas. *See Rural Residents*, at 20-21.

A precautionary note is also warranted: just as one must read the entire GMA to understand the nuances of what the Act requires or allows, so too must one read all of a given decision to understand how the Board interprets the Act. Although the County may conclude after conducting rigorous analysis (and as urged by FOTL) that it would be best to adopt FUGAs limited exclusively to existing incorporated areas or to encompass only those additional areas already characterized by urban growth that have existing public facility and service capacities to serve such development, the Act does not *per se* mandate such a conclusion.^[1] The County is entitled to exercise its discretion in applying the requirements of the Act for designating FUGAs. The appropriate exercise of that discretion may lead to FUGAs being drawn to include unincorporated lands and even non-urbanized lands.

Conclusion No. 4

It would be premature for the Board to determine this issue at this point prior to the County having adopted its comprehensive plan and FUGAs.

IV. ORDER

Having reviewed the documents filed in this case and considered the oral argument of the parties, and having deliberated upon the matter, the Board enters the following order:

FOTL's Dispositive Motion regarding Legal Issues Nos. 1 and 2 is **granted**. Legal Issues Nos. 1 and 2 are appropriately before the Board now rather than at a hearing on the merits and are fully **resolved** by this order.

The County's Dispositive Motion regarding Legal Issues Nos. 3 and 4 is **granted**. Legal Issues Nos. 3 and 4 are **dismissed**.^[1]

Accordingly, King County is ordered to adopt a comprehensive plan that includes designations of final urban growth areas by **5:00 p.m. on Friday, December 30, 1994**. The comprehensive plan and FUGAs shall comply with the requirements of the Growth Management Act and shall be consistent with prior Board decisions. In determining whether the County has complied with this order, the Board will not determine whether the comprehensive plan and FUGAs substantively comply with the GMA or prior Board decisions.

In the event any person concludes that the adopted comprehensive plan or FUGA does not substantively comply, that person must file a new petition for review within sixty days of publication of notice of adoption, as provided by RCW 36.70A.290(2).

Because this Order resolves all the legal issues before the Board in this case, the remainder of the schedule is **stricken** and the hearing on the merits **canceled**.

So ORDERED this 8th day of November, 1994.

M. Peter Philley
Presiding Officer

Joseph W. Tovar, AICP
Board Member

Chris Smith Towne
Board Member

Note: This Order Granting Dispositive Motions constitutes a final order as specified by RCW 36.70A.300 unless a party files a Petition for Reconsideration pursuant to WAC 242-02-830.

This Order Granting Dispositive Motions has been provided to the following persons:

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[\[1\]](#)

The deadline for adopting comprehensive plans was extended from July 1, 1993 to July 1, 1994 by passage of ESHB 1761, which was enacted on May 28, 1993 and took effect on June 1, 1993. To compensate for this extension,

however, the Legislature did impose a new requirement, that IUGAs be adopted by October 1, 1993. (Laws of 1993, 1st Sp. Sess., ch. 6, § 1 and 2). King County subsequently complied with the IUGA requirement. *See* Finding of Fact No. 1.

[1]

Although the Board has 180 days to enter its final decision and order, the reviewing courts on subsequent appeal do not have any deadline, nor, for that matter, is the governor required to act within a specific period in deciding whether to impose sanctions following a Board recommendation to do so. *See* RCW 36.70A.330(3) and .340. The governor is authorized to independently impose sanctions pursuant to RCW 36.70A.345 when a jurisdiction has failed to act, without a Board final decision. Again, however, no deadline for taking such gubernatorial action is specified by the Act.

[1]

These are the maximum time frames. In practice, the Board has less time under both scenarios. In a failure-to-comply action, the Index is not filed until thirty days after a petition for review has been filed. The Board does not see the record it must review and base its decision on until the parties file their prehearing briefs, shortly before the hearing on the merits. Consequently, the Board normally has approximately 70 days to actually review the record. In a failure-to-act case, the Board generally gives the parties at least a week's notice and usually two week's notice before it holds the compliance hearing. Therefore, the Board has only about 30 days to review the entire record and issue a compliance finding.

[1]

FOTL contends that the County is proposing to include areas within its FUGAs that should be outside the urban growth areas. *See* FOTL's Dispositive Motion, at 6 and Elfelt Declaration, at 2-4.

[1]

The history and theory of North American regional development runs from extremes of low to high density. The Board takes official notice of *The Elusive City: Five Centuries of Design, Ambition and Miscalculation*, Jonathan Barnett, Harper & Rowe, New York, 1986. On the one hand, Frank Lloyd Wright's designs for Broadacre City, described on pages 84, 85, is an accurate prediction of post World War II suburban sprawl. The GMA intends to reduce, rather than perpetuate sprawl, no matter how well designed. On the other hand, the extreme concentration of Manhattan, described by the Regional Plan for New York, at page 147, is the model for maximum density. Obtaining such extreme densities could result from relying solely on objective criteria, such as theoretical land capacity of existing cities. Presumably, few Washingtonians would be satisfied living with Manhattan's extreme densities. This is why the GMA leaves discretion to local legislative bodies to balance objective factors with subjective factors.

[1]

The Act does express policy preferences to conserve natural resource lands and to protect critical areas, to create a pattern of compact urban development to accommodate most new growth, to prohibit new urban growth from occurring outside FUGAs, and for cities to be the primary providers of urban governmental services. These objectives are mutually consistent.

[1]

The County moved to strike the Elfelt Declaration because a copy was filed with the County on October 12, 1994, rather than by 5:00 p.m. on October 11, 1994. *See* County's Response, at 11. FOTL pointed out that it attempted to serve a copy of the Elfelt Declaration on the County by 5:00 p.m. on October 11, 1994 but because County offices closed for business at 4:30 p.m., was unable to. Accordingly, the County was served at 8:45 a.m. on October 12, 1994. *See* Cole Declaration, at 1, ¶ 3. The County's motion to strike is **denied**. The Board established 5:00 p.m. as the filing and serving deadline in both its Prehearing Notice and Prehearing Order. Nonetheless, County representatives did not mention that their offices closed at 4:30 p.m. Had they, the Board would have ordered that copies of documents be served upon the County by 4:30 p.m. In addition, the County is not prejudiced by receiving the Elfelt Declaration when it did. Despite permitting the Elfelt Declaration, the Board notes that those portions of the Elfelt Declaration containing factual information regarding the capacity of jurisdictions in King County to accommodate future growth (i.e., at 2-4, ¶s 4-10) are not relevant to the legal issues before the Board at this time and will not be considered.

