

CENTRAL PUGET SOUND

GROWTH MANAGEMENT HEARINGS BOARD

STATE OF WASHINGTON

WEST SEATTLE DEFENSE FUND,)Case No. 94-3-0016

)
Petitioner,)FINDING OF COMPLIANCE

)
v.)

)
CITY OF SEATTLE,)

)
Respondent.)

)

I. PROCEDURAL HISTORY

On October 7, 1994, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review from the West Seattle Defense Fund (**WSDF**) challenging the City of Seattle's (the **City** or **Seattle**) Comprehensive Plan (the **Plan**) for not complying with the Growth Management Act (**GMA** or the **Act**) or the State Environmental Policy Act (**SEPA**). On April 3, 1995, the Board entered a Final Decision and Order in the case. The Order portion of that document (at 79-80) provided:

The City of Seattle Comprehensive Plan is **in compliance** with the requirements of the Growth Management Act except:

- 1.)Capital Facilities Plan Element—The Capital Facilities Plan Element is **remanded** with instructions for the City to bring it into compliance consistent with the Board's Final Decision and the requirements of RCW 36.70A.070(3).
- 2.)Transportation Element—The Transportation Element of the Plan is **remanded** with instructions for the City to bring it into compliance consistent with the Board's Decision and the requirements of RCW 36.70A.070(6).

It is not the Board's role to impose its opinions about the value or wisdom of optional features of a comprehensive plan. Instead, the Board is charged with determining whether those features are internally consistent and comply with the requirements of the Act. The Board's holding that the Plan's Capital Facilities Plan and Transportation Elements do not comply with the requirements of the Act, particularly because of the manner in which only

urban centers and urban villages have been adopted, is not a judgment that the urban villages strategy itself is faulty. To the contrary, the City's urban village strategy appears to be the kind of innovative technique that the Act encourages. Yet the Act also requires that a community's vision, as embodied in its comprehensive plan, be supported by an analytical rigor and an ability to provide the necessary infrastructure.

The Board notes that it is up to the City to determine how to comply with the Board's directives. Seattle has several choices, ranging at the extremes from fully adopting all categories of urban villages, to totally deleting references to the urban villages strategy and its components. If the City elects to fully adopt all categories of urban villages, it must be certain to conduct the required analysis and document it either directly or by reference in the Plan itself. The middle ground would be for the City to conduct the required analysis necessary for its urban centers and urban villages adopted to date, and to include that analysis directly in the Plan or by incorporating the relevant analysis by reference. Additional data and analysis would later be included when the Plan is amended to adopt other parts of the urban villages strategy, for instance, the adoption of hub and residential urban villages.

3.) Pursuant to RCW 36.70A.300(1)(b), the City is given until **5:00 p.m. on Friday, September 1, 1995**, to bring its Plan into compliance with the Board's Final Decision and Order and the requirements of the Act. The City shall file by **5:00 p.m. on Friday, September 8, 1995**, one original and two copies with the Board and serve a copy on WSDF of a statement indicating what attempts, if any, it made to comply with this Final Decision and Order. The Board will promptly schedule a compliance hearing sometime thereafter. (Emphasis in original).

On September 8, 1995, the City of Seattle's Statement of Compliance was filed with the Board. Five exhibits were attached to it.

On September 11, 1995, the Board issued a Final Decision and Order in *West Seattle Defense Fund, et al. v. Seattle (WSDF II)*, CPSGMHB Case No. 95-3-0040. The Board indicated (at 17, footnote 9):

At the compliance hearing in *WSDF I*, the Board will determine whether the City procedurally complied with the Board's Final Decision and Order. Since compliance requires an amendment to the Plan, the Board will not determine substantive compliance of the amendment unless and until a new petition for review is filed. See *Friends of the Law and Bear Creek Citizens for Growth Management*, CPSGMHB No. 94-3-0009 (Order Granting Dispositive Motions, November 8, 1994).

On September 18, 1995, the Board issued a Notice of Compliance Hearing setting the compliance hearing on October 4, 1995.

On September 20, 1995, the Board issued an Amended Notice of Compliance Hearing re-scheduling the hearing to October 18, 1995, as WSDF's attorney was unable to attend on the previously scheduled date.

On October 5, 1995, the Board received a petition for review from the West Seattle Defense Fund

which was assigned as CPSGMHB Case No. 95-3-0073 (*WSDF III*). WSDF III involves a challenge of the City's amendments to its Plan in response to the Board's remand in the present case.

On October 18, 1995, and prior to the compliance hearing, the Board received from WSDF a Declaration of Julie Brown with one exhibit; a Declaration of Bob C. Sterbank in Support of WSDF's Response to Seattle's Statement of Compliance and five exhibits; and a Declaration of Charles Chong with one exhibit.

The Board held its compliance hearing in this matter at 2:00 p.m. on Wednesday, October 18, 1995, at its offices in Seattle. M. Peter Philley, presiding officer in this case, appeared for the Board. Peter J. Eglick and Bob C. Sterbank represented WSDF. Robert D. Tobin represented Seattle. Court reporting services were provided by Cynthia J. LaRose of Robert H. Lewis & Associates, Tacoma. WSDF's Hearing Statement in Response to Seattle's Statement of Compliance was filed during the hearing. The presiding officer subsequently allowed the parties to file additional documents in support of their respective positions.

On October 26, 1995, the Second Declaration of Charles Chong in Support of WSDF Response to City Statement of Compliance and a Declaration of Alfred A. Rousseau in Support of WSDF Response to City Statement of Compliance were filed with the Board.

On October 27, 1995, the City of Seattle's Reply to WSDF's Response to City's Statement of Compliance was filed with the Board. A Declaration of Bob Morgan was attached.

On November 1, 1995, WSDF's Reply on Seattle's Statement of Compliance was filed with the Board. In addition, a Declaration of Bob C. Sterbank in Support of WSDF's Reply on Seattle's Statement of Compliance, with fourteen attached exhibits, was filed.

II. STATEMENT OF FACTS

1) On June 29, 1995 and again on July 7, 1995, notice was mailed that the City Council's Planning and Regional Affairs Committee would hold a public hearing on July 12, 1995 to review draft amendments to the Plan, in response to the Board's final decision and order in this case. *See* Declaration of Bob Morgan attached to City of Seattle's Reply to WSDF's Response to City's Statement of Compliance, at 3.

2) On July 12, 1995, the City Council's Planning and Regional Affairs Committee held a public hearing on the draft amendments to the Plan. *See* Declaration of Bob Morgan attached to City of Seattle's Reply to WSDF's Response to City's Statement of Compliance, at 3.

3) On July 28, 1995, the City Council's Planning and Regional Affairs Committee had a public meeting where it voted to recommend approval to the full City Council of the Plan amendments. *See* Declaration of Bob Morgan attached to City of Seattle's Reply to WSDF's Response to City's Statement of Compliance, at 3-4.

4) Notice of the County Council's July 31, 1995 public meeting to vote upon the proposed Plan amendments was mailed to all persons listed on the City Council's general hearing and mailing list. *See* Declaration of Bob Morgan attached to City of Seattle's Reply to WSDF's

Response to City's Statement of Compliance, at 4.

5) On July 31, 1995, at a public meeting of the Seattle City Council, Ordinance No. 117735 passed, "An Ordinance amending the City of Seattle Comprehensive Plan." Attachment 1 to City of Seattle's Statement of Compliance. *See also* Declaration of Bob Morgan attached to City of Seattle's Reply to WSDF's Response to City's Statement of Compliance, at 4; and Exhibits G and J to Declaration of Bob C. Sterbank in Support of WSDF's Reply on Seattle's Statement of Compliance.

6) On August 7, 1995, the City published notice of adoption of the Plan amendments in the Daily Journal of Commerce. *See* Declaration of Bob Morgan attached to City of Seattle's Reply to WSDF's Response to City's Statement of Compliance, at 4.

III. DISCUSSION

As the Board's footnote indicated in *WSDF II*, the issue before the Board in this compliance hearing is to determine whether the City procedurally complied with the remand portion of the Final Decision and Order in this case, *WSDF I*. The Board limited the scope of this compliance hearing pursuant to a prior holding in *Friends of the Law v. King County*, CPSGPHB Case No. 94-3-0009, Order Granting Dispositive Motions, at 10. WSDF has pointed out that *Friends of the Law* was a "failure to act" case as opposed to a case such as this one, where the jurisdiction acted, but the Board subsequently determined that its actions failed to comply with the GMA. In *Friends of the Law*, the Board stated that in the latter scenario, which will now be called a "failure to comply" situation, the Board would determine substantive compliance at the compliance hearing rather than requiring a new petition for review to be filed. *Friends of the Law*, Order Granting Dispositive Motions, at 11. The Board now partially overturns *Friends of the Law* and issues a modified holding in its place.

When a failure to act petition for review is filed with the Board, and the Board issues a final decision and order concluding that a local jurisdiction did indeed fail to take an action required by the GMA, and orders the jurisdiction to take subsequent action that will require adoption of a comprehensive plan or development regulation by a specified deadline, then the scope of compliance hearing will be limited: whether the subsequent action was indeed taken by the compliance deadline and, in taking such an action, whether the minimal requirements of pre-hearing notice, a public hearing and post-adoption publication of notice of adoption took place. When a local jurisdiction takes an action to comply with the Act's requirements, but a petition for review is filed challenging that action as failing to comply with the GMA, and the Board issues a final decision and order concluding that the action indeed failed to comply with the Act, and orders the jurisdiction to take subsequent action that will require an amendment(s) to the document enacted by a specified deadline, then the scope of the compliance hearing will be limited. The scope of such hearing will be limited to whether the subsequent action was taken by the compliance deadline and, in taking such an action, whether the minimal requirements of pre-hearing notice, a public hearing and post-adoption publication of notice of adoption took place.

The key in the first scenario is that, by the compliance deadline, the local government must take an original action it previously had failed to take. In the second scenario, it must amend a document previously adopted. Both scenarios require the local government to take a legislative action. In either case, RCW 36.70A.290(2) requires that the jurisdiction publish notice of adoption, which in turn triggers the statute of limitations for filing a petition for review with the Board. The Board has expanded its *Friends of the Law* holding because it has determined that the policy reasons for conducting only a minimal procedural review at a compliance hearing in a “failure to act” case apply equally well for a “failure to comply” case.

Of particular importance is the fact that in a failure to comply case where the Board’s remand requires an amendment to the adopted comprehensive plan or development regulation, the amendment action is presumed valid (*see* RCW 36.70A.320) and, by determining substantive compliance at the compliance hearing rather than at a hearing on the merits of a new petition for review, persons other than those parties in the underlying case would not have the opportunity to substantively challenge the amended document. By requiring a new petition for review to be filed when a comprehensive plan or development regulation has been amended, the Board is providing the opportunity for full public participation by all citizens, not just the parties in the original case.

Therefore, as indicated in *WSDF II*, the Board must now determine whether the City amended its plan, and, in so doing, did it comply with the minimum public participation requirements, i.e., pre-public hearing notice, a public hearing, and publication of a notice of adoption as listed in *Friends of the Law*.

The record before the Board reveals that the City did in fact amend its Plan in response to the Board’s remand in this case. *See* Attachment 1 to City of Seattle’s Statement of Compliance, Seattle Ordinance No. 117735, dated July 31, 1995. The two paragraphs of findings in the ordinance recite the Board’s April 4, 1995, final decision and order in this case and indicate that the ordinance was proposed in response to the Board’s order.

The Board also concludes that the City, at the barest absolute minimum (*see* Findings of Fact above), met the requirements for pre-adoption public notice, a public hearing and publication of notice of adoption.

The Board has not decided whether the City complied with the requirements of RCW 36.70A.140 for early and continuous public. That question is asked in the WSDF’s Petition for Review in *WSDF III* and will most certainly be listed as a legal issue to be determined by the Board in that case. Moreover, the Board has not determined whether the City’s Plan amendments substantively comply with the requirements of the GMA. That determination must also await *WSDF III*.

III. FINDING OF COMPLIANCE

Having reviewed the above-referenced documents and the file in this case, having considered the oral arguments of the parties, and having deliberated on the matter, the Board enters the following order:

The City of Seattle has procedurally complied with the Board's Final Decision and Order in this case by adopting amendments to the Plan and by meeting the minimum requirements of issuing notice of intent to adopt Plan amendments, holding a public hearing and publishing notice of adoption. Therefore, the Board issues a **finding of compliance** to the City.

Whether the City's amendments to its Plan and its public participation process substantively comply with the requirements of the GMA will be determined in *WSDF III*.

So ORDERED this 2nd day of November, 1995.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

M. Peter Philley, Board Member

Joseph W. Tovar, AICP, Board Member