

**CENTRAL PUGET SOUND  
GROWTH MANAGEMENT HEARINGS BOARD  
STATE OF WASHINGTON**

WEST SEATTLE DEFENSE FUND,	)		
NEIGHBORHOOD RIGHTS CAMPAIGN,	)		
and CHARLES CHONG,	)	<b>Case No. 95-3-0040</b>	
	)		
Petitioners,	)	<b>ORDER DENYING WSDF's</b>	
)	)	<b>DISPOSITIVE MOTION</b>	v. )
	)		
CITY OF SEATTLE,	)		
	)		
Respondent.	)		
_____	)		

**I. PROCEDURAL BACKGROUND**

On April 27, 1995, the Central Puget Sound Growth Management Hearings Board (the **Board**) entered a Prehearing Order in the above-captioned case that established a schedule for filing and briefing dispositive motions.

On May 5, 1995, the Board received from the West Seattle Defense Fund (**WSDF**) “WSDF’s Motion for Summary Judgment on Legal Issue No. 1” (**WSDF’s Motion**).<sup>[1]</sup>

On May 19, 1995, the City of Seattle (**Seattle**) filed the “City of Seattle’s Brief in Opposition to Motion for Summary Judgment” (**Seattle’s Response**). A copy of Engrossed Substitute House Bill (**ESHB**) 1724, passed by the 1995 Legislature, and a Declaration of Daniel J. Evans were attached to Seattle’s Response.

On June 6, 1995, “WSDF’s Reply on Dispositive Motion on Legal Issue No. 1 and Motion to Strike Declaration of Daniel Evans” (**WSDF’s Reply**) was filed with the Board. A Declaration of Bob C. Sterbank was attached to WSDF’s Reply, as was a Seattle Department of Construction and Land Use “Land Use Information Service” weekly bulletin, dated May 25, 1995.

The Board held a hearing on WSDF’s Dispositive Motion at 1:30 p.m. on Thursday, June 8, 1995, in the Dome Room of the Artic Building, Seattle. The Board’s three members were present: M. Peter Philley, presiding, Joseph W. Tovar and Chris Smith Towne. Peter J. Eglick and Bob C. Sterbank represented WSDF while Robert D. Tobin represented Seattle. Court

reporting services were provided by Cynthia J. LaRose of Robert H. Lewis & Associates, Tacoma. No witnesses testified.

### WSDF's Motion to Strike

The parties argued WSDF's Motion to Strike. The Presiding Officer then orally **granted** the motion, concluding that the Declaration of Daniel J. Evans was not relevant to the specific legal issue presently before the Board. Nonetheless, he indicated that all Board members had read the Declaration of Daniel J. Evans, and the Declaration of Bob C. Sterbank and its attachment. Despite granting the motion, the parties were advised that, during their oral argument, they could discuss Seattle's future planning efforts, such as the proposed Seattle Commons project.

## **II. FINDINGS OF FACT**

No material facts were disputed by the parties. The Board enters the following undisputed facts:

1. July 1, 1994, was the deadline for Central Puget Sound jurisdictions to adopt comprehensive plans. In addition, unless a Central Puget Sound city or county requested an extension in writing, July 1, 1994, was also the deadline for those jurisdictions to adopt development regulations that are consistent with and implement the comprehensive plan. RCW 36.70A.040(3)(d).
2. On July 25, 1994, Seattle Ordinance 117221 was passed by the Seattle City Council adopting the Seattle Comprehensive Plan pursuant to the requirements of the Growth Management Act (**GMA** or the **Act**).
3. On October 7, 1994, WSDF filed a petition for review with the Board challenging Seattle's Comprehensive Plan for failing to comply with the requirements of the GMA and the State Environmental Policy Act (**SEPA**). *West Seattle Defense Fund v. Seattle (WSDF I)*, CPSGMHB Case No. 94-3-0016.
4. On December 12, 1994, Seattle Ordinance 117430 was passed by the Seattle City Council. The ordinance adopted development regulations that implement the City of Seattle's Comprehensive Plan. It did not take effect until April 3, 1995. The Board refers to this ordinance as "the **Implementing Development Regulation Ordinance**."
5. Also on December 12, 1994, Seattle Ordinance No. 117434 was passed by the Seattle City Council. The ordinance amended the Official Land Use Map of the City of Seattle and also did not take effect until April 3, 1995. The Board refers to it in this order as "the **Map Ordinance**."

6. January 1, 1995, was the deadline imposed upon Central Puget Sound jurisdictions to adopt development regulations to implement comprehensive plans, if the jurisdiction, like Seattle, had obtained a six month extension from the Washington State Department of Community, Trade and Economic Development (**DCTED**) pursuant to RCW 36.70A.040(3) (d).
7. On April 3, 1995, Sections 1 through 90 and 92 of the Implementing Development Regulation Ordinance (*see* Section 95 of the Implementing Development Regulation Ordinance, at 95) and the Map Ordinance (*see* Section 2 of the Map Ordinance, at 1) became effective.
8. On April 4, 1995, the Board entered its Final Decision and Order in *WSDF I*, remanding the Capital Facilities Plan Element and the Transportation Element of the Seattle Comprehensive Plan for further action to bring these provisions into compliance with the requirements of the GMA. The Board's Final Decision and Order in *WSDF I* was not subsequently appealed to superior court.
9. On May 15, 1995, Governor Lowry approved all but sections 103, 302 and 903 of ESHB 1724.
10. On July 23, 1995, ESHB 1724 takes effect.
11. On July 24, 1995, the hearing on the merits in this case, *WSDF II*, is scheduled to take place.
12. September 1, 1995, is the deadline the Board gave Seattle in *WSDF I* to bring its Comprehensive Plan into compliance with the Board's Final Decision and Order and the requirements of the Act.
13. On or before September 11, 1995, the Board must issue its Final Decision and Order in this case.

### **III. DISCUSSION**

Legal Issue No. 1 asks:

*May development regulations implementing urban villages, as contained in Ordinance Nos. 117430 and 117434, legally take effect under RCW 36.70A.040(3) and (4) before the City of Seattle has completed transportation and capital facilities planning required on remand*

*pursuant to the Board's Final Decision and Order, dated April 4, 1995, in West Seattle Defense Fund v. Seattle, CPSGMHB Case No. 94-3-0016, and the Board has taken final action on the City's amended Comprehensive Plan?*

WSDF argues that Ordinances Nos. 117430 and 117434 may not legally take effect until the City has completed its transportation and capital facilities planning as required on remand by the Board in *WSDF I*. WSDF bases its contention on the fact that:

... the GMA planning process is a multi-tiered, hierarchical and iterative process, where comprehensive plans build upon and implement county-wide planning policies, and individual jurisdictions' development regulations build upon and implement their comprehensive plans. It is through this hierarchical planning process that local jurisdictions are to ensure concurrency and consistency, and meet the other goals of the GMA. Under such a regime, development regulations that implement components of a comprehensive plan (such as urban villages) may not legally take effect where a plan is incomplete because the Board has remanded portions of it for additional analysis and revision. WSDF's Motion, at 8-9.

...

... Until the City has complied with the Board's [Final Decision and] Order, and the Board has taken final action on the Seattle Plan, Seattle has no final, adopted Comprehensive Plan in effect, and has nothing for the development regulations to be consistent with or implement.... WSDF's Motion, at 13.

In contrast, Seattle argues that the Board does not have authority to grant WSDF's request, which the City characterizes as imposing "an injunction against the operation of City ordinances and a moratorium on neighborhood planning..." Seattle's Response, at 3.

Furthermore, Seattle disputes WSDF's position that:

... as long as a dispute exists about a comprehensive plan's conformance with the GMA, at least before a Growth Board, no subsequent steps may be undertaken because the latter builds upon the former. Therefore WSDF claims that until the Board (or perhaps the Supreme Court) has finally determined that the Comprehensive Plan conforms to the GMA, no development regulations or neighborhood plans which seek to implement the Plan may be adopted or given effect. Seattle's Response, at 3-4.

...

Although WSDF's theory has a superficial lustre, there is simply no evidence that the Legislature intended subsequent phases in the planning and regulatory process to be locked in limbo pending a final determination of legality by the Board or the courts regarding a preceding phase.... The Legislature directed that development regulations be adopted

within six months of adoption of a comprehensive plan, notwithstanding that appeals to the Growth Boards challenging comprehensive plans might not be resolved within that period, to say nothing of the time required for any judicial review. RCW 36.70A.040(3). And, of course, the Legislature explicitly stated that development regulations are presumed valid upon adoption. RCW 36.70A.320.... Seattle's Response, at 4-5 (emphasis in original).

Legal Issue No. 1 focuses on the tension created by two sections of the GMA referenced in the quotation above. First, RCW 36.70A.320 provides in part:

Comprehensive plans and development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption.

Therefore, pursuant to this provision alone, one must presume that the Implementing Development Regulation Ordinance and the Map Ordinance are valid.

However, a second section of the Act, RCW 36.70A.040(3)(d), requires counties and cities to "... adopt a comprehensive plan under this chapter and development regulations that are consistent with and implement the comprehensive plan..." A conflict arises because the Board remanded parts of Seattle's comprehensive plan in *WSDF I*. In essence, the existence of this provision raises the question, how can a jurisdiction adopt an implementing development regulation if that regulation attempts to implement a comprehensive plan that the Board has found to not comply with the Act?

In order to answer this question and to resolve this apparent conflict, the Board must first examine the nature of the presumption of validity. It becomes irrefutable if no one challenges an action taken by a city or county within the Act's statute of limitations:

... The GMA presumes that local actions are valid. However, if someone believes that the local legislative action does not comply with the Act, they have sixty days to appeal the action to a growth planning hearings board. The state legislature purposefully limited appeals of local legislative actions to this 60 day period so that the GMA's iterative planning process can continue with some certainty. As a result, if no one appeals an action within the statutory time period, the local legislative action is valid -- the presumption (that an action that is appealed to this Board can only be overcome by a preponderance of the evidence) has now become irrefutable. *Twin Falls, Inc. et al. v. Snohomish County*, CPSGPHB 93-3-0003 (1993) (Final Decision and Order, September 7, 1993), at 55.

When a local action is challenged and the Board reaches a final decision regarding the challenged GMA document, in theory, three outcomes are possible. One, the Board can find the enactment fully complies with the Act. The only way for a petitioner to prevent the enactment from taking

effect would be for that person to appeal the Board's decision to superior court (or the court of appeals [*see* § 5 of Engrossed Senate Bill 5776, Chapter 382, Laws of 1995 which amends RCW 34.05.518]) and seek a stay pursuant to RCW 34.05.550.

Two, and conversely, the Board can determine that the entire challenged document is not in compliance with the Act. If the Board concludes that a jurisdiction's comprehensive plan fundamentally fails to comply with the Act, the Board will remand the entire comprehensive plan. Furthermore, because the comprehensive plan itself does not comply with the Act, the Board could automatically conclude that any development regulations adopted to implement a completely noncomplying comprehensive plan do not *per se* comply with the Act. <sup>[2]</sup>

Three, the Board can determine that portions of the enactment comply while other parts do not comply with the Act. That is the scenario presently before us. Legal Issue No. 1 raises the question of what happens to development regulations that have been adopted to implement a comprehensive plan when portions of that plan have been found to not comply with the Act. In *WSDF I*, the Board found that only two elements of Seattle's comprehensive plan fail to comply with the Act (the capital facilities plan and the transportation elements, as they related to "adopted" urban villages only). Thus, for major geographic areas of the City of Seattle (i.e., the 82% of land area not currently designated as an urban village [*see WSDF I*, at 34]), the comprehensive plan irrefutably complies with the GMA.

The Board concludes that when portions of a comprehensive plan have been remanded with instructions to bring those provisions into compliance with the Act, and when other portions of the plan have been found to comply with the Act, the Board must determine on a case-by-case basis whether the contested portions of implementing development regulations comply with the GMA. In such a circumstance, the Board will not automatically conclude that, simply because portions of a comprehensive plan do not comply with the Act, all implementing development regulations necessarily also do not comply.

Accordingly, the Board holds that development regulations implementing urban villages, as contained in Ordinance Nos. 117430 and 117434, continue to have legal effect prior to the City of Seattle's completion of its transportation and capital facilities elements review, pursuant to the Board-ordered remand in *WSDF I*. However, such regulations must nonetheless be consistent with the adopted comprehensive plan. Determining whether specific provisions of the Implementing Development Regulation Ordinance are consistent with the comprehensive plan will be addressed at the hearing on the merits by examining Legal Issues Nos. 2, 3 and 4. In reaching this determination, the Board will scrutinize whether the regulations in question can stand despite the Board's remand of portions of the comprehensive plan. If they are closely related to provisions of the comprehensive plan that the Board has found do not comply with the Act, the regulations in question may be found not to comply with the Act.

The Board notes that its holding is consistent with subsections (2) and (4) of § 110 of ESHB 1724 (amending RCW 36.70A.300), which take effect on July 23, 1995, and provide:

(2) A finding of noncompliance and an order of remand shall not affect the validity of comprehensive plans and development regulations during the remand period, unless the board's final order also:

(a) Includes a determination, supported by findings of fact and conclusions of law, that the continued validity of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and

(b) Specifies the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

...

(4) If the ordinance that adopts a plan or development regulation under this chapter includes a savings clause intended to revive prior policies or regulations in the event the new plan or regulations are determined to be invalid, the board shall determine under subsection (2) of this section whether the prior policies or regulations are valid during the period of remand.

#### IV. ORDER

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

WSDF's Dispositive Motion is **denied**. Because Legal Issue No. 1 has been fully resolved by this order, it is **dismissed with prejudice**. Accordingly, the hearing on the merits will proceed as scheduled on July 24, 1995, to hear argument on Legal Issues Nos. 2, 3 and 4.

So ordered this 16th day of June, 1995.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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M. Peter Philley, Presiding Officer

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Joseph W. Tovar, AICP

## Board Member

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Chris Smith Towne  
Board Member

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<sup>[1]</sup> The Board's Rules of Practice and Procedure do not authorize motions for summary judgment. Instead, dispositive motions, such as motions to dismiss for lack of jurisdiction, are anticipated. Dispositive motions are similar to a motion for summary judgment but not the same. *See* WAC 242-02-530(4); Prehearing Order in this case, ¶2 at 2; and *Twin Falls v. Snohomish County*, CPSGPHB Case No. 93-3-0003 (1993), Order on Dispositive Motions, at 19-21.

<sup>[2]</sup> In contrast, if the Board determines that a jurisdiction's comprehensive plan fully complies with the Act, the development regulations adopted to implement that plan would unquestionably be presumed valid.