

CENTRAL PUGET SOUND

GROWTH MANAGEMENT HEARINGS BOARD

STATE OF WASHINGTON

CONCERNED CITIZENS)Case No. 95-3-0044
FOR SKY VALLEY,)
)
Petitioner,)**ORDER GRANTING THE**
)**DISPOSITIVE MOTION OF**
v.)**CONCERNED CITIZENS FOR**
)**SKY VALLEY REGARDING**
CITY OF GOLD BAR,)**LEGAL ISSUES 1, 2, 3 AND 4**
)
Respondent.)
)

PROCEDURAL HISTORY

On April 19, 1995, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review from Concerned Citizens for Sky Valley (**CCSV**) alleging that the City of Gold Bar (**Gold Bar** or the **City**) failed to designate critical areas, agricultural lands, forest lands and mineral resource lands by the September 1, 1991 deadline established by the Growth Management Act (**GMA** or the **Act**) and failed to adopt development regulations to conserve agricultural lands, forest lands and mineral resource lands and protect critical areas by the September 1, 1991 deadline established by the Act. The Petition also alleged that Gold Bar failed to adopt a comprehensive plan by the July 1, 1994 statutory deadline and failed to adopt development regulations to implement the comprehensive plan by the January 1, 1995 extended deadline pursuant to RCW 36.70A.040(3)(d). The matter was assigned Case No. 95-3-0044. Petitioner also asked that the Board expedite its review of the issues.

On April 26, 1995, the Board entered a “Notice of Hearing” (the **Notice**) in this matter. The Notice set forth a schedule for the filing of dispositive motions and submittal of briefs on such motions.

On May 18, 1995, the Board received a “Dispositive Motion of Concerned Citizens for Sky Valley Regarding Legal Issues 1, 2, 3 and 4” (the **Motion**). On June 2, 1995, the Board received “City of Gold Bar’s Responsive Brief to Dispositive Motions” (the **City brief**). On June 9, 1995, the Board received “Reply Memorandum of Concerned Citizens for Sky Valley in Support of

Dispositive Motion.”

On June 12, 1995, the Board conducted a hearing on the Motion. Present in the Board’s Seattle office were Steve Erdman representing CCSV, Theresa Rozzano-Preston representing Gold Bar, Board members Chris Smith Towne, M. Peter Philley and Joseph W. Tovar, presiding officer. Court reporting services were provided by Robert Lewis of Tacoma. Upon a question from the Board, CCSV clarified that the Legal Issues 1, 2, 3 and 4 referenced in the Motion were set forth in the Petition for Review in paragraphs 7, 8, 9 and 10, respectively. The City offered a “Supplemental Exhibit to Response/Index” which was a calendar and listing of meetings scheduled by the City, which was admitted without objection.

LEGAL ISSUES BEFORE THE BOARD

The Petition for Review listed “Issues Presented for Resolution” in paragraphs 7 through 10. Those issues, renumbered 1, 2, 3 and 4, are:

1. Does the GMA require cities to designate agricultural lands, forest lands, mineral resource lands, and critical areas by September 1, 1991, and did Gold Bar comply with this statutory deadline? RCW 36.70A.040(3), RCW 36.70A.170(1).
2. Does the GMA require cities to adopt development regulations which assure the conservation of agricultural lands, forest lands, mineral resource lands, and critical areas, by September 1, 1991, and did Gold Bar comply with this statutory deadline? RCW 36.70A.040(3), RCW 36.70A.060(1,2).
3. Does the GMA require cities to adopt comprehensive plans by July 1, 1994, and did Gold Bar comply with this statutory deadline? RCW 36.70A.040(3).
4. Did Gold Bar receive an extension until December 31, 1994 from DCTED for the adoption of development regulations implementing the comprehensive plan, and did Gold Bar comply with this deadline? RCW 36.70A.040(3).

POSITIONS OF THE PARTIES

CCSV

CCSV cited the Act’s requirements relative to designation of critical areas and resource lands, RCW 36.70A.170, which provides:

- (1) On or before September 1, 1991, each county, and each city, shall designate where appropriate:
 - (a) Agricultural lands that are not already characterized by urban growth and that have long-term significance for the commercial production of food or other agricultural products;
 - (b) Forest lands that are not already characterized by urban growth and that have long-term significance for the commercial production of timber;
 - (c) Mineral resource lands that are not already characterized by urban growth and that have long-term significance for the extraction of minerals; and

(d) Critical areas.

CCSV cited the Act's requirements to adopt regulations relative to critical areas and resource lands at RCW 36.70A.060, which provides in pertinent part as follows:

(1) Each county that is required or chooses to plan under RCW 36.70A.040, and each city within such county, shall adopt development regulations on or before September 1, 1991, to assure the conservation of agricultural, forest, and mineral resource lands designated under RCW 36.70A.170.

...

(2) Each county and city shall adopt development regulations that protect critical areas that are required to be designated under RCW 36.70A.170. For counties and cities that are required or choose to plan under RCW 36.70A.040, such development regulations shall be adopted on or before September 1, 1991.

CCSV cited the Act's requirements relative to the timeline for adoption of comprehensive plans at RCW 36.70A.040(3)(d), which provides:

... 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, ...

CCSV attached to its prehearing brief a letter from the City to the Washington State Department of Community, Trade and Economic Development, dated June 30, 1994 in order to establish that the City requested an extension of the July 1, 1994 deadline for comprehensive plan adoption. *See* Exhibit D, attached to the Motion. CCSV also attached to its Reply Brief the Legal Sections of the *Monroe Monitor* for the months of January, February and March, 1992. *See* Exhibit E, CCSV Reply Brief. CCSV cited to this exhibit to support the contention that the City did not publish legal notice, before or after the fact, of the adoption of Resolution 92-1, the "GMA Critical Areas Interim Protective Policy." At the prehearing conference, CCSV stated that the *Monroe Monitor* is the official newspaper of record for the City of Gold Bar.

CCSV argued that the City has not complied with the Act relative to critical areas, resource lands, a comprehensive plan and development regulations to implement the plan. CCSV asks that the City be given three months to designate critical areas and resource lands and to adopt regulations to protect the former and conserve the latter. CCSV also asks that the City be given six months to adopt a comprehensive plan and development regulations to implement the plan.

Gold Bar

The City does not dispute that it has not designated critical areas and resource lands, not adopted development regulations to protect critical areas and conserve resource lands, not adopted a comprehensive plan and not adopted implementing regulations. *See* City brief, at 6. At the hearing, the City admitted that the "GMA Critical Areas Protective Policy" was not adopted by ordinance and that it did not designate or regulate land. The City then used the fact that the City has not yet adopted these GMA documents to argue that CCSV does not have standing to bring the present appeal. The City cited several sections of the Act in support of the proposition that a failure-to-act

violation must be addressed to the Governor, rather than this Board. In support of this proposition, Gold Bar cited the following provisions of RCW 36.70A.345:

The governor may impose a sanction or sanctions specified under RCW 36.70A.340 on: (1) A county or city that fails to designate critical areas, agricultural lands, forest lands, or mineral resource lands under RCW 36.70A.170 by the date such action was required to have been taken; (2) a county or city that fails to adopt development regulations under RCW 36.70A.060 protecting critical areas or conserving agricultural lands, forest lands, or mineral resource lands by the date such action was required to have been taken; ... (4) a county or city that fails to adopt its comprehensive plan or development regulations when such actions are required to be taken. (Emphasis by Gold Bar).

The City also argued that the Board's [old] Rules, WAC 242-02-220, differentiate between adopted GMA actions and a failure to act, and that the latter falls within the category of "all other matters":

(1) A petition relating to whether or not an adopted comprehensive plan, development regulation, or subsequent amendments, is in compliance with the goals and requirements of the act shall be filed with a board within sixty days from the date of publication by the legislative body of the county or city as specified by RCW 36.70A.290(2).

(2) A petition relating to an adopted county-wide planning policy shall be filed within sixty days of its adoption.

(3) For all other matters, a petition must be filed with a board within sixty days of the final written decision, order, determination, publication, or action being entered (emphasis by Gold Bar at the hearing).

At the hearing, the Board pointed out that those rules were amended effective 11/22/94 by the addition of paragraph (5) to WAC 242-02-220, as follows:

A petition relating to the failure of a state agency, city or county to take an action by a deadline specified in the act may be brought at any time after the deadline for action has passed.

In the alternative, Gold Bar argues that it has made diligent efforts to comply with the requirements of the GMA, but that there have been extenuating circumstances that have prevented it. The City pointed out that Gold Bar is only a half a square mile in size, has a full time staff of only four people, none of whom is a planner, has experienced significant staff turnover in recent years and is presently undertaking its GMA planning with no financial support from either the State or the County. The City also declares that it fully intends to comply with the requirements of the Act and is actively pursuing same, although no specific time frames were cited. City brief, at 9. The City asked that, in the event the Board concludes that the City has not complied with the Act, it be given an additional 180 days to comply.

DISCUSSION

There are no disputed facts in this case. The Board holds that the City has not designated critical

areas or resource lands as required by RCW 36.70A.170; has not adopted regulations to protect critical areas and conserve resource lands as required by RCW 36.70A.060; and has not adopted a comprehensive plan or implementing development regulations as required by RCW 36.70A.040. The Board takes note of Gold Bar's past staffing and funding difficulties. Nevertheless, all jurisdictions in the Central Puget Sound region, regardless of size or local circumstances, are obliged to meet the procedural and substantive requirements of the Growth Management Act set forth above.

The Board is aware that the size and circumstances of smaller communities will likely result in GMA enactments that are less lengthy and complex than what might be expected in larger jurisdictions. It is therefore not unreasonable to expect Gold Bar to achieve results within a relatively short period of time. The Board therefore agrees with CCSV that the City's noncompliance should be corrected within three months with regard to critical areas and resource lands, and within six months with regard to the comprehensive plan and implementing development regulations.

The Board also addresses the argument advanced by Gold Bar that the Act only authorizes the Board to hear and decide petitions for review in instances where a local government has acted, but limits the consideration of a failure to act in accordance with GMA requirements to the Governor. In support of this position, Gold Bar cites RCW 36.70A.345. The Board rejects this view.

As indicated above, the Board's rules contemplate petitions for review being filed by anyone for a jurisdiction's failure to act. *See* WAC 242-02-220(5). Consistent with these rules, and the Act's emphasis on public participation at RCW 36.70A.020(11) and .140, the Board finds that .340 and .345 are *alternative* routes for any potential petitioner seeking redress for a jurisdiction's failure to act. Such potential petitioners may either file a petition for review with a Board, which may culminate in the imposition of sanctions pursuant to .340, or may appeal directly to the Governor, pursuant to .345, which likewise may culminate in the imposition of sanctions.

The Board also rejects Gold Bar's related contention that the Board has jurisdiction over only adopted GMA enactments. Gold Bar cites the use of the word "adopted" in RCW 36.70A.280 and .300 to support this contention. RCW 36.70A.280(1) provides, in pertinent part:

A growth management 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, or amendments, adopted under RCW 36.70A.040; ... (Emphasis added)

RCW 36.70A.300(1) provides, in pertinent part:

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)

The Board has previously interpreted these statutes to mean that it has jurisdiction over both adopted GMA enactments and failures to adopt specifically mandated GMA enactments. *See* Order on Kitsap County's Dispositive Motion, at 13, *Association of Rural Residents v. Kitsap County*, CPSGMHB Case No. 94-3-0004 (1994).

The word "adopted" applies to the phrase discussing Chapter 43.21C RCW, the State Environmental Policy Act (SEPA). RCW 43.21C.075(1) requires that SEPA-based appeals be "linked" to an underlying governmental action. In GMA cases, an underlying action is adoption of a comprehensive plan or development regulation. Thus, if a jurisdiction has not adopted such a document, the SEPA appeal is not ripe and cannot be brought. The word "adopted" does not mean that unless a development regulation or comprehensive plan has been enacted, the Board lacks jurisdiction.

Instead, the first phrase of RCW 36.70A.280(1)(a) and the second sentence of .300(1) is crucial: the Board must determine whether a challenged jurisdiction has complied with the Act's requirements. Meeting a GMA deadline is a requirement of the Act. If a jurisdiction fails to act to meet that deadline, the Board has jurisdiction.

Moreover, the Board's interpretation is consistent with the use of the word "adopted" in RCW 36.70A.290. There, "adopted" does mean that a jurisdiction must have acted in order for the sixty day statute of limitations to be triggered. Without "adoption" and subsequent publication, the statute of limitations cannot begin.

ORDER

Having considered the documents filed in support of and in opposition to the dispositive motion, and the parties' oral arguments, the Board enters the following:

The Dispositive Motion is **granted**.

1. Gold Bar is required by the GMA to designate critical areas and resource lands (agricultural lands, forest lands, and mineral resource lands) by the deadlines set forth in the Act, and has not done so. Pursuant to RCW 36.70A.300(1)(b), the City is given until **Monday, September 11, 1995** to designate critical areas and resource lands pursuant to RCW 36.70A.170.

2. Gold Bar is required by the GMA to adopt regulations to protect critical areas and conserve resource lands by the deadlines set forth in the Act, and has not done so. Pursuant to RCW 36.70A.300(1)(b), the City is given until **Monday, September 11, 1995** to adopt regulations to protect critical areas and to conserve resource lands pursuant to RCW 36.70A.060.

3. Gold Bar is required by the GMA to adopt a comprehensive plan by the deadline set forth in the Act, and has not done so. Pursuant to RCW 36.70A.300(1)(b), the City is given until **Monday, December 11, 1995** to adopt by ordinance its comprehensive plan.

4. Gold Bar is required by the GMA to adopt development regulations implementing the comprehensive plan by the deadline set forth in the Act, and has not done so. Pursuant to RCW 36.70A.300(1)(b), the City is given until **Monday, December 11, 1995**, to adopt development

regulations implementing its comprehensive plan.
So ordered this 14th day of June, 1995.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Joseph W. Tovar, AICP
Presiding Officer

M. Peter Philley

Chris Smith Towne

NOTE: This Order Granting CCSV's Dispositive Motion constitutes the Board's final order in this case as specified by RCW 36.70A.300, unless a party files a Petition for Reconsideration pursuant to WAC 242-02-830.

PRESS RELEASE

June 13, 1995

On June 13, 1995, the Central Puget Sound Growth Management Hearings Board granted a Motion by Concerned Citizens for Sky Valley which found the City of Gold Bar has not designated critical areas and resource lands, has not adopted regulations to protect critical areas and to conserve resource lands and has not adopted a comprehensive plan. The Board ordered the City to designate critical areas and resource lands and to adopt regulations to protect critical areas and conserve resource lands by September 11, 1995. The Board also ordered the City to adopt a comprehensive plan by December 11, 1995.

For more information about this case, please call the Board's Administrative Assistant, Diane Rennell, or the presiding officer for this case, Joseph W. Tovar, at the board's office, (206)389-2625

5344ODM.doc