

CENTRAL PUGET SOUND

GROWTH MANAGEMENT HEARINGS BOARD

STATE OF WASHINGTON

SOUTH BELLEVUE PARTNERS)
LIMITED PARTNERSHIP and)
SOUTH)
BELLEVUE DEVELOPMENT, INC.,)
Petitioners,)
v.)
CITY OF BELLEVUE and)
ISSAQUAH)
SCHOOL DISTRICT NO. 411,)
Respondents.)
)
_____)

Case No. 95-3-0055
ORDER OF DISMISSAL

I Procedural Background

On August 2, 1995, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review from South Bellevue Partners Limited Partnership and South Bellevue Development, Inc. (hereafter referred to as **South Bellevue**). Respondents are the City of Bellevue (the **City**) and Issaquah School District No. 411 (the **District**). The petition challenged the City’s adoption of Ordinance No. 4767 (the **Ordinance**), authorizing the collection of school impact fees for the District.

On August 4, 1995, the Board received “Respondents’ Motion to Dismiss.” The City and the School District alleged that the Board does not have jurisdiction where petitioners have failed to allege noncompliance with the Growth Management Act (**GMA** or the **Act**), and ask the Board to dismiss the petition.

On August 14, 1995, the Board issued a Notice of Hearing and Order Setting Hearing on Motion to Dismiss, scheduling the hearing for September 6, 1995.

Also on August 14, 1995, the Board received South Bellevue’s Amended Petition for Review.

On August 15, 1995, the Board received “Petitioner’s Response to Motion to Dismiss” (**Petitioner’s Response**).

On August 25, 1995, South Bellevue’s “Supplement to Petitioners’ Response to Motion to Dismiss” (**Petitioner’s Supplement Response**) was filed with the Board along with three attachments: copies of Bellevue Ordinance No. 4767, Resolution No. 5897 and Resolution No. 5903.

On August 28, 1995, the Board received South Bellevue’s request that the hearing on the motion to dismiss be rescheduled to September 7, 1995.

On August 31, 1995, the Board issued an Order Modifying Schedule for Hearing on the Motion to Dismiss, moving the hearing to September 7, 1995.

Also on August 31, 1995, the Board received “Respondents’ Rebuttal to Petitioners’ Response to Motion to Dismiss” (**Respondent’s Rebuttal**).

On August 31, 1995, South Bellevue filed its “Second Amended Petition for Review” with the Board. Besides challenging the validity of Ordinance No. 4767, South Bellevue also claims that Bellevue Resolutions Nos. 5897 and 5903 (**the Resolutions**) fail to comply with the GMA’s requirements. South Bellevue also asserted that the City failed to amend its comprehensive plan by ordinance.

On September 5, 1995, the Board’s presiding officer transmitted to the parties an Order of Dismissal issued on August 30, 1995 in CPSGMHB Case No. 95-3-0050, *Burlington Northern Railroad v. City of Auburn* (**Burlington Northern**). The transmittal sheet noted that the holding in that case would be discussed at the hearing on the Motion.

On September 7, 1995, the Board held a hearing on the Motion to Dismiss at the Board’s office in Seattle, with M. Peter Philley and Chris Smith Towne, presiding in this case, in attendance from the Board. South Bellevue Partnership was represented by G. Richard Hill. The City and the School District were represented by Eric Laschever, Grace Yuan and Richard Kirkby. Cynthia J. LaRose, of Robert H. Lewis & Associates, recorded the proceedings.

“Respondent’s Reply to Petitioners’ Second Amended Petition” (**Respondent’s Reply**) was filed during the hearing.

On September 14, 1995, “Respondents’ Statement of Supplemental Authority and Further Information and Argument Regarding Comprehensive Plan Adoption” was filed with the Board. A Declaration of Myrna Basich and four attachments were included.

On September 19, 1995, “Petitioners’ Statement of Supplemental Authority and Reply to Respondents’ Further Information and Argument” was filed. One document was attached, an article written by Hugh D. Spitzer.

II.FINDINGS OF FACT

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

1. On March 1, 1995, the City Planning Commission held a public study session on comprehensive plan amendments relating to school impact fees. Respondent's Reply, at 2.
2. On June 5, 1995, the Bellevue City Council passed Ordinance No. 4767, adding a new chapter to the Bellevue City Code (BCC) and authorizing the collection of school impact fees for Issaquah School District No. 411.
3. On June 9, 1995, the City published notice of adoption of Ordinance No. 4767.
4. On June 26, 1995, the Bellevue City Council passed Resolution No. 5897, a resolution adopting the City's 1995 amendments to its comprehensive plan as separately set forth in Resolutions Nos. 5898, 5899, 5900, 5901, 5902 and 5903.
5. On June 26, 1995, the Bellevue City Council also passed Resolution No. 5903, a resolution relating to the capital facilities element of the Bellevue Comprehensive Plan.
6. The City had not published notice of adoption of Resolutions Nos. 5897 and 5903 at the time of the September 7, 1995 hearing on the Respondents' Motion to Dismiss.
7. The City intended to publish the text of Resolutions Nos. 5897 and 5903 in the September 15, 1995 edition of the *Eastside Journal American* newspaper. Declaration of Myrna Basich, at 2, ¶4.

III.DISCUSSION

A. Ordinance 4767

Because the Board held a hearing on the Respondents' Motion to Dismiss in lieu of a prehearing conference, the only legal issues presently before the Board are those set forth in South Bellevue's pleadings, specifically Petitioners' Second Amended Petition for Review. That document raises six legal issues, A through F. Specifically, Respondents have asked the Board to

^[1] dismiss five of the six issues, Legal Issues A, C, D, E and F. The City and School District ask the Board to dismiss Legal Issues, A, C and D because they contend the Board does not have jurisdiction to determine whether the City violated the requirements of Chapter 82.02 RCW when it adopted Ordinance 4767. Respondents ask the Board to dismiss Legal Issue E because they contend that the Board does not have jurisdiction to determine whether the vested rights doctrine has been violated. Finally, they ask the Board to dismiss Legal Issue F because the Second Amended Petition for Review does not indicate which provisions of the GMA have been violated and because Ordinance 4767 was enacted pursuant to the requirements of Chapter 82.02 RCW.

Chapter 82.02 RCW

The three growth management hearings boards are quasi-judicial state agencies charged by the legislature with determining whether governments have complied with the requirements of the GMA. In one of its first cases, the Board reviewed case law regarding the authority of such

agencies, and concluded that the growth management hearings boards' authority must be strictly limited in its operations to those powers granted by the legislature. *Gutschmidt v. City of Mercer Island*, CPSGPHB Case No. 92-3-0006, Order on Prehearing Motions, at 10-13 (December 31, 1992). In ensuing cases determining the extent of the Board's jurisdiction, the fact that the GMA's jurisdictional statute, RCW 36.70A.280(1) ^[2] used the word "only" and .300(1) used "exclusively" proved controlling.

Subsequently, the Board has consistently defined its jurisdiction in a narrow fashion and concluded that it does not have authority to determine:

- whether the United States and Washington State **Constitutions** have been violated (*Gutschmidt*, Order on Prehearing Motions, at 11-13);

- whether the **common law** has been violated, specifically:

tortious interference with contractual relations -- *Twin Falls Inc. et al. v. Snohomish County*, CPSGPHB Case No. 93-3-0003, Order on Dispositive Motions, at 4-12 (June 11, 1993);

spot zoning -- *Twin Falls*, Order Granting WRECO's Petition for Reconsideration and Modifying Final Decision and Order..., at 5 (October 6 1993);

indispensable party rule -- *Pilchuck Newberg Organization (PNO) v. Snohomish County*, CPSGMHB Case No. 94-3-0018, Order Denying Dispositive Motions, at 16-17 (February 1, 1995); *Alberg v. King County*, CPSGMHB Case No. 95-3-0041, Final Decision and Order, at 32 (September 13, 1995);

- whether **equitable doctrines**, such as the doctrine of equitable estoppel, have been violated *Cities of Tacoma, Milton, Puyallup and Sumner v. Pierce County*, CPSGPHB Case No. 94-3-0001, Order on Dispositive Motions, at 3-4 (March 4, 1994).

- whether **statutes** other than the GMA or the State Environmental Policy Act (**SEPA**) as it relates to the GMA have been violated (*Snoqualmie v. King County*, CPSGPHB Case No. 92-3-0004, Final Decision and Order, at 16 (March 1, 1993); *Gutschmidt v. Mercer Island*, CPSGPHB Case No. 92-3-0006, Final Decision and Order, at 8 (March 16, 1993); *Twin Falls*, Order on Dispositive Motions, at 10-12 (June 11, 1993)), specifically:

Chapter 4.96 RCW -- *Twin Falls v. Snohomish County*, Order on Dispositive Motions, at 12;

Chapter 64.40 RCW -- *Twin Falls v. Snohomish County*, Order on Dispositive Motions, at 12;

42 U.S.C. 1983 -- *Twin Falls v. Snohomish County*, Order on Dispositive Motions, at

12;

Chapter 36.93 RCW -- boundary review board decisions -- *Sumner v. Pierce County Boundary Review Board*, CPSGMHB Case No. 94-3-0013, Order Granting Respondents' Motion to Dismiss, at 4 (December 14, 1994);

Title 56 RCW -- sewer district comprehensive plans -- *Hensley v Snohomish County, Cross Valley and Alderwood Water Districts*, CPSGMHB Case No. 94-3-0029, Order Granting Snohomish County's Dispositive Motion, at 3 (February 24, 1995);

Chapter 82.02 RCW -- impact fees -- *Robison et al. v. City of Bainbridge Island*, CPSGMHB Case No. 94-3-0025, Order Granting BISD's Dispositive Motion re: Jurisdiction, at 6 (February 24, 1995); and *Slatten v. Steilacoom*, CPSGMHB Case No. 94-3-0028, Order Dismissing Legal Issue No. 10, at 2 (February 24, 1995).

In *Robison*, the Board reviewed Reengrossed Substitute House Bill (**ReESHB**) 1025 (Chapter 32, Laws of 1991, 52nd Legislature, 1991 Special Session) which was approved by Governor Gardner on July 16, 1991 with the exception of section 19, which was vetoed. ReESHB 1025 became effective immediately upon approval and is the legislation that created the growth management hearings boards. The Board answered the question of what the reference to "this chapter" in RCW 36.70A.280(1) and .300(1) cited above meant. It concluded that "this chapter" referred to Chapter 36.70A RCW rather than to Chapter 32, Laws of 1991 because section 41 of ReESHB 1025 specified that sections 5 through 14 of that piece of legislation, which created the hearings boards, were added to Chapter 36.70A RCW. *Robison*, at 5-6. Consequently, the Board again narrowly interpreted its jurisdiction and held:

... the fact that impact fees have been authorized does not mean that this Board has jurisdiction to determine whether the impact fees have been properly imposed....

...
Although cities and counties planning under the Act that elect to impose impact fees pursuant to RCW 82.02.050 must still comply with the requirements of Chapter 82.02 RCW, judicial review to determine whether impact fees were properly imposed must be obtained from the superior courts

IV. CONCLUSION

The reference in RCW 36.70A.280, .290, .300, .310, .320, and .330 to "this chapter" is to Chapter 36.70A RCW. Therefore, pursuant to RCW 36.70A.280(1)(a), the Board has jurisdiction to hear and determine only petitions for review alleging that a state agency, county, or city is not in compliance with the requirements of Chapter 36.70A RCW, or Chapter 43.21C RCW as it relates to plans, regulations, and amendments thereto adopted under RCW 36.70A.040. Accordingly, the Board does not have jurisdiction to review petitions for review that allege that a state agency, county or city action fails to comply with Chapter 82.02, or other chapters in the RCW besides Chapters 36.70A or 43.21C

RCW. *Robison*, Order Granting BISD's Dispositive Motion re: Jurisdiction, at 5-6.

South Bellevue asks the Board to reconsider its holding in *Robison* that the Board does not have jurisdiction to determine whether provisions of Chapter 82.02 RCW have been violated.

Petitioners make three basic arguments to support their request. First, they point out that the Board's own rules of practice and procedure at WAC 242-02-040(1) define the term "Act" as meaning any statute created or amended by Chapter 17, Laws of 1990, 1st ex. sess. and chapter 32, Laws of 1991, sp. sess., and subsequent amendments. Because the pertinent parts of Chapter 82.02 RCW were amended in Chapter 17, Laws of 1990 1st ex. sess., the Board has jurisdiction over that chapter. Petitioners' Response, at 5.

Second, South Bellevue contends that Ordinance 4767 is a development regulation as defined by RCW 36.70A.030(8) of the Act. Since RCW 36.70A.280 indicates that the Board has jurisdiction over development regulations, South Bellevue claims that the Board has jurisdiction over Ordinance 4767 despite the fact that it was adopted pursuant to the requirements of RCW 82.02.150.

Third, South Bellevue argues that the Board has the specialized expertise to review land use matters arising under the GMA and that impact fees are an integral part of that Act. "The Superior Courts are clearly not an appropriate forum of first resort to decide RCW 82.02 claims." Petitioner's Response, at 6.

During oral argument, South Bellevue asked the Board to adopt a new test for determining its jurisdiction: if the subject matter of an ordinance, adopted under statutory authority besides Chapter 36.70A RCW, is specifically addressed in a jurisdiction's comprehensive plan adopted as required by the GMA, then the Board should have jurisdiction over the related ordinance even though it was adopted pursuant to the requirements of a statute other than the Act.

The Board concludes that Ordinance 4767 was adopted pursuant to Chapter 82.02 RCW and reaffirms its holdings in *Robison* and *Slatten* that it lacks jurisdiction over such legislative enactments. The ordinance is clearly an impact fees enactment authorized by Chapter 82.02 RCW. Although the ordinance refers to Chapter 82.02 RCW several times, it does not refer to the GMA [\[3\]](#) at all.

Having reached this conclusion, the Board nonetheless will address South Bellevue's arguments because they do have merit. Particularly intriguing is the Petitioners' proposed "bright line test:" any ordinance regulating a topic cited in the comprehensive plan is subject to Board jurisdiction regardless of underlying statutory authority relating to that topic. On several occasions, the Board has pointed out that it might make sense for it to have broader jurisdiction to cover matters directly related to the GMA, either procedurally (such as notice and publication requirements for GMA enactments) or substantively (such as provisions of the 1990 and 1991 legislation popularly referred to as within the GMA but not codified within Chapter 36.70A RCW). However, at the same time, the Board has been keenly cognizant of the limits of authority placed by both the legislature and the courts on quasi-judicial bodies.

The Board holds that the Petitioners' proposed bright line test would extend the Board's

jurisdiction too far. As the name indicates, a comprehensive plan is required to be “comprehensive.” This is particularly true in a GMA context because, beside the required elements of a plan, a jurisdiction is permitted to adopt “optional” elements at its discretion. *See* RCW 36.70A.070 and .080. No limit is placed on the nature or scope of optional features of a comprehensive plan, other than they must be internally consistent with the remainder of the plan and also be consistent with county-wide planning policies.

As a result of the potential broad subject matter of a truly comprehensive plan, virtually any aspect of modern culture can be included. Under South Bellevue’s proposal, this Board would have jurisdiction over any development regulation that implements the comprehensive plan regardless of underlying statutory authority for the regulation. Such a rule would circumvent both the appellate case law that narrowly defines agency authority and the legislative intent as evidenced by the use of the word “only” in RCW 36.70A.280. In addition, the Board would usurp the authority of other boards and agencies such as the Shorelines Hearings Board (*see* below) or boundary review boards. The Board holds that if the statutory authority for adoption of a regulation is a source other than Chapter 36.70A RCW, this Board does not have jurisdiction over the regulation. RCW 36.70A.280 binds the Board to determining only whether a city or county has not complied with the requirements of Chapter 36.70A RCW, SEPA as it relates to the GMA, and shoreline master programs; the provision does not extend Board jurisdiction into determining whether the requirements of other statutes have been met. In this case, the underlying statutory authority for the Ordinance is Chapter 82.02 RCW. Although RCW 36.70A.070 is referenced in Chapter 82.02 RCW, that reference does not confer Board jurisdiction over impact fee ordinances.

[4]

[5]

Accordingly, the Board does not have jurisdiction over the Ordinance. Importantly, legislative action since the original creation of the boards in 1991 is consistent with the Board’s interpretation and contrary to South Bellevue’s. Under South Bellevue’s theory, the Board (since its inception) would certainly have had jurisdiction over legislative enactments adopted pursuant to the Shoreline Management Act (**SMA**), codified at Chapter 90.58 RCW, since many comprehensive plans refer to shorelines, either directly or through critical area discussions. With the passage in 1995 of Engrossed Substitute House Bill 1724, §§ 108 and 110, the legislature explicitly gave the Board jurisdiction over the local government legislative enactments taken pursuant to the SMA, shoreline master programs. The legislature is presumed to be aware of the interpretations of legislation by quasi-judicial bodies it created. Therefore, the legislature is presumed to have been aware of the Board’s consistently narrow interpretation of its subject matter jurisdiction. This narrow interpretation was based on both the language of the GMA and the case law regarding the scope of quasi-judicial agency authority. The legislature reacted to this conservative construction by somewhat expanding the Board’s jurisdiction. Consequently, the Board now does have jurisdiction over shoreline master programs adopted pursuant to the requirements of the SMA. The Board did not have such jurisdiction however, at the time it was created. The Board did not obtain this jurisdiction until it was specifically granted to it by the 1995 legislature. Furthermore, the Board’s jurisdiction, albeit expanded compared to

its scope in 1991, is still limited to what the legislature has specified.

Finally, the Board will turn to South Bellevue's argument concerning the growth management boards' rules of practice and procedure. WAC 242-02-040(1), defines the word "Act" broadly to include all provisions of the 1990 and 1991 GMA, regardless of whether the individual subsections were codified in Chapter 36.70A or amended previously existing statutes. As the parties were told at the hearing on the motion in this case, the broad definition was purposefully crafted so as not to preclude the filing of any petitions for review, with the understanding that the parameters of the boards' subject matter jurisdiction would be decided by each board on a case-by-case basis.

Subsequently, this Board has limited its jurisdiction in the series of decisions referenced above. Each time it has done so, the Board has looked to the language of the Act itself, rather than to the WAC definition of "Act," since the former necessarily must control over the latter. Therefore, although one reading only WAC 242-02-040(1) could argue that the Board has more expansive jurisdiction, the Board only has the jurisdiction conferred upon it by the legislature. A board cannot expand its jurisdiction by rule unless authorized to do so by the legislature. This Board concludes that the legislature has not authorized the self-expansion of the growth management hearings boards' jurisdiction by administrative rule-making. Instead, given the manner in which the 1995 legislature explicitly expanded the boards' jurisdiction, it appears that that method continues to be the only manner in which the Board's jurisdiction is defined.

Common Law Vested Rights Doctrine

The vested rights doctrine is a common law concept. As the Washington Supreme Court stated:

Under this doctrine, developers who file a timely and complete building permit application obtain a vested right to have their application processed according to the zoning and building ordinances in effect at the time of the application. The Washington doctrine protects developers who file a building permit application that (1) is sufficiently complete, (2) complies with existing zoning ordinances and building codes, and (3) is filed during the effective period of the zoning ordinances under which the developer seeks to develop. *See, e.g., Allenbach v. Tukwila*, 101 Wn.2d 193, 676 P.2d 473 (1984). Once a developer complies with these requirements a city cannot frustrate the development by enacting new zoning regulations. The purpose of the vesting doctrine is to allow developers to determine, or "fix," the rules that will govern their land development. *See Comment, Washington's Zoning Vested Rights Doctrine*, 57 Wash. L. Rev. 139, 147-50 (1981). The doctrine is supported by notions of fundamental fairness. *West Main Assocs. v. Bellevue*, 106 Wn.2d 47, 50-51, 720 P.2d 782 (1986).

In *Twin Falls*, Order on Dispositive Motions, at 4-12, the Board concluded that it does not have jurisdiction over common law doctrines. Although the Board has never been asked to determine whether it has jurisdiction over the vested rights doctrine, the Board now holds that it also does not have jurisdiction over this common law doctrine. Therefore, whether the Ordinance violates the doctrine will have to be answered by a superior court.

B. Resolutions Nos. 5897 and 5903

For an act with the magnitude of the GMA, it has few procedural requirements. One of them is specified at RCW 36.70A.290(2) which provides:

(2) All petitions relating to whether or not an adopted comprehensive plan, development regulation, or permanent amendment thereto, is in compliance with the goals and requirements of this chapter or chapter 43.21C RCW must be filed within sixty days after publication by the legislative bodies of the county or city. The date of publication for a city shall be the date the city publishes the ordinance, or summary of the ordinance, adopting the comprehensive plan or development regulations, or amendment thereto, as is required to be published. Promptly after adoption, a county shall publish a notice that it has adopted the comprehensive plan or development regulations, or amendment thereto. The date of publication for a county shall be the date the county publishes the notice that it has adopted the comprehensive plan or development regulations, or amendment thereto. Emphasis added.

The Board agrees with the parties in this case that subsection (2) is not as clearly drafted as it could have been. For instance, it requires cities to adopt an ordinance, while it is silent as to whether counties must adopt an ordinance or may enact by resolution. As another example, it requires counties to “promptly” publish notice of adoption but is silent as to how soon after adoption cities must publish. Therefore, the Board must resolve these uncertainties.

In a recent decision, *Burlington Northern v. Auburn*, CPSGMHB Case No. 95-3-0050, Order of Dismissal (August 31, 1995), the Board held:

The Board fundamentally disagrees with the City’s statement that “RCW 36.70A.290(2)... constitutes a technical error.” There are good policy reasons why a GMA-required comprehensive plan should be adopted by ordinance rather than resolution. Because comprehensive plans are controlling documents under the GMA, rather than discretionary advice, or “a basic source of reference” (*see* RCW 35A.63.080) they now have the force of law, unlike the comprehensive plans adopted pursuant to Chapters 36.70 RCW and 35A.63 RCW. *See also* RCW 36.70A.120 which requires that each city and county planning under the Act shall perform its activities “in conformity” with its comprehensive plan. It is both appropriate and necessary that such binding laws be codified, as ordinances are and resolutions are not.

Apart from the sound policy rationale for requiring Plan adoption by ordinance rather than resolution, the Board is bound by the Act’s clear and unambiguous language. If the notice that must be published is notice of adoption of an ordinance, then the inescapable legal conclusion is that GMA plans can only be adopted by ordinance. Furthermore, RCW 36.70A.290 was adopted more recently than RCW 35A.63.072. Although the legislature did not repeal the latter, the former is controlling. Clearly, the legislature is aware of the distinction between a resolution and an ordinance, unless it declares the two to be synonymous, which it did in RCW 36.70.020(12) and RCW 35A.63.010(7). The legislature did not make such a finding in Chapter 36.70A. RCW. The Board respectfully disagrees

with the Western Board's conclusion that "ordinance" is a generic term. The Board holds that a GMA comprehensive plan can only be adopted by ordinance. *Burlington Northern*, Order of Dismissal, at 3 (footnote omitted).

In this case, it is undisputed that the City adopted certain legislative enactments by resolution rather than by ordinance, specifically Resolution No. 5897 which adopted six other resolutions, including Resolution No. 5903 which Petitioners challenge in their Second Amended Petition for Review. The question before the Board is whether the *Burlington Northern* holding controls in this case. Respondents have asked the Board to reconsider that decision or to distinguish the facts in this case from those in *Burlington Northern*.

The Board declines the request; cities must adopt their comprehensive plans and any amendments to them by ordinance. The Act's language is unequivocal.

Interestingly, the facts before the Board in this case are very illustrative. Clearly, the City knows that both the GMA and Chapter 35A.63 RCW exist. The caption for Resolution No. 5897 states:

A RESOLUTION relating to the Comprehensive Plan of the City of Bellevue, as adopted pursuant to the Growth Management Act of 1990, as amended, (chapter 36.70A RCW) and as adopted pursuant to chapter 35A.63 RCW, adopting the City's 1995 amendments to the Comprehensive Plan as separately set forth in Resolution Nos. 5898, 5899, 5900, 5901, and 5903; and further amending Sections 1 and 2 of Resolution No. 5726.

The City's recognition of both the GMA and Chapter 35A.63 is repeated throughout Resolution

No. 5897. Because RCW 35A.63.010(7) ^[6] indicates that in Chapter 35A.63 RCW only, "resolution" and "ordinance" are synonymous, the City contends that all it had to do was adopt Resolution No. 5897 by resolution. However, that definition of the word "ordinance" is limited to Chapter 35A.63 RCW and does not apply to the GMA. In contrast, RCW 36.70A.290(2) specifies adoption only by ordinance. As indicated in the discussion above regarding the Ordinance, this Board only has jurisdiction over whether cities and counties have complied with the requirements of Chapter 36.70A RCW, SEPA as it applies to the GMA, and shoreline master programs. The City has not complied with the requirement to adopt its comprehensive plan or amendments to it by ordinance. Ironically, the City could have easily complied with both chapters by adopting a resolution and an ordinance pursuant to Chapter 35A.63 RCW (or by ordinance only since resolution and ordinance are synonymous under that chapter) and by adopting an ordinance pursuant to the GMA.

A second consideration warrants discussion. At the time of the hearing on motions, the City admitted that it had not published a notice of adoption of the Resolutions. The Resolutions were passed on June 26, 1995. According to the undated Declaration of Myrna Basich, which the Board presumes was prepared after the hearing on the motion to dismiss, notice of adoption was to occur on September 15, 1995. Although RCW 36.70A.290(2) does not explicitly require that cities promptly publish notice of adoption, the Board now so holds: cities, like counties, must publish notice of adoption of a comprehensive plan or development regulation, or amendment to either, promptly after passage.

One of the fundamental purposes of the GMA is to provide certainty in the land use planning process. This concept is evidenced by the seventh planning goal at RCW 36.70A.020(7) which provides:

Permits. Applications for both state and local government permits should be processed in a timely and fair manner to ensure predictability. Emphasis added.

In addition, the growth management hearings boards are required to issue their final decisions and orders within one hundred and eighty days after receipt of a petition for review. RCW 36.70A.300.

Promptness of publication promotes certainty. Pursuant to RCW 36.70A.290(2), publication of notice of adoption triggers the sixty-day period for filing petitions for review. In this case, any person aware of the City's actions taken on June 26, 1995 cannot rely on those actions with any deal of certainty because the City failed to publish notice of adoption. Had the City promptly published notice of adoption, persons relying on passage of the Resolutions would have known within sixty days whether they were appealed. Publication nearly three months after passage of a Resolution is not prompt and does not comply with the Act's intent.

The fact that the City did not publish notice of adoption of its Resolutions for nearly three months after passage also illustrates the historic problem with resolutions -- they are not treated the same as ordinances. As the section from McQuillan, *The Law of Municipal Corporations* (that the City and School District attached to the Respondents' Statement of Supplemental Authority and Further Information and Argument) so persuasively states:

A "resolution" is not an "ordinance," and there is a distinction between the two terms as they are commonly used in charters. A resolution ordinarily denotes something less solemn or formal than or not rising to the dignity of, an ordinance. The term "ordinance" means something more than a mere verbal motion or resolution, adopted, subsequently reduced to writing, and entered on the minutes and made a part of the record of the acting body. It must be invested, not necessarily literally, but substantially, with the formalities, solemnities, and characteristics of an ordinance, as distinguished from a simple motion or resolution.

A resolution in effect encompasses all actions of the municipal body other than ordinances. Whether the municipal body should do a particular thing by resolution or ordinance depends on the forms to be observed in doing the thing and on the proper construction of the charter. In this connection it may be observed that a resolution deals with matters of a special or temporary character; an ordinance prescribes some permanent rule of conduct or government, to continue in force until the ordinance is repealed. An ordinance is distinctively a legislative act; a resolution, generally speaking, is simply an expression of opinion or mind or policy concerning some particular item of business coming within the legislative body's official cognizance, ordinarily ministerial in character and relating to the administrative business of the municipality. Thus, it may be stated broadly that all acts that are done by a municipal corporation in its ministerial capacity and for a temporary purpose may be put in the form of resolutions, and that matters on which the municipal corporation desire to legislate must be put in the form of ordinances. It may further be stated broadly

that charters contemplate that all legislation creating liability or affecting in any important or material manner the people of the municipality should be enacted by ordinances, whether the city is acting in its governmental or private capacity. Whenever the controlling law directs the legislative body to do a particular thing in a certain manner the thing must be done in that manner...E. McQuillin, The Law of Municipal Corporations, § 15.02 (3rd Ed. 1989) (footnotes omitted; emphasis added).

Here, the controlling law, RCW 36.70A.290(2), directed cities to adopt GMA enactments by ordinance. The fact that the City failed to do so, and instead adopted its comprehensive plan amendments by resolution, and then neglected to publish notice of adoption of the Resolutions, speaks for itself as to the amount of weight normally given resolutions. Cities must adopt comprehensive plans and development regulations adopted pursuant to the requirements of the GMA by ordinance, and they must publish notice of adoption promptly thereafter.

V. ORDER

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:

- 1) Legal Issues A, C and D as set forth in the Petitioners' Second Amended Petition for Review, relating to Bellevue Ordinance No. 4767, are **dismissed with prejudice** since the Board does not have jurisdiction to determine whether requirements of Chapter 82.02 RCW have been violated.
 - 2) Legal Issue B as set forth in the Petitioners' Second Amended Petition for Review, relating to Bellevue Resolutions Nos. 5897 and 5903, is **dismissed with prejudice**. Bellevue has not taken an action to adopt these documents by ordinance as required by the Growth Management Act. Unless and until the City adopts these documents by ordinance, no GMA action has taken place. Accordingly, those amendments to the Bellevue Comprehensive Plan made pursuant to the Resolutions have no legal effect. In the event Bellevue takes action by ordinance, a new statute of limitations for appealing the adoption will begin sixty days from the date a notice of adoption was promptly published.
 - 3) Legal Issue E as set forth in the Petitioners' Second Amended Petition for Review, relating to Bellevue Ordinance No. 4767, is **dismissed with prejudice** since the Board does not have jurisdiction to determine if the common law vested rights doctrine has been violated.
 - 4) Legal Issue F as set forth in the Petitioners' Second Amended Petition for Review, relating to Bellevue Ordinance No. 4767, is **dismissed with prejudice**. The Ordinance authorizes impact fees pursuant to the requirements of Chapter 82.02 RCW over which the Board lacks subject matter jurisdiction.
 - 5) The Hearing on the Merits scheduled for November 30, 1995 is **cancelled**.
- So ORDERED this 20th day of September, 1995.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

M. Peter Philley, Board Member

Joseph W. Tovar, AICP, Board Member

Chris Smith Towne, Board Member

NOTE: This Order of Dismissal 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.

[1] When the Respondents filed their original Motion to Dismiss, Petitioners had filed only the Petition for Review. Respondents asked the Board to dismiss Legal Issues A, B and C, alleging that the Board lacks jurisdiction to hear and decide issues concerning Chapter 82.02 RCW as set forth in that petition. Respondents' Motion to Dismiss, at 2. Subsequently, between the time the Respondents' Motion to Dismiss and the Respondents' Rebuttal was filed, Petitioners filed an Amended Petition for Review. Therefore, the Respondents' Rebuttal addressed the Amended Petition for Review. Accordingly, Respondents asked the Board to dismiss Legal Issues A, C and D as set forth in the Amended Petition for Review. By the time of the hearing on Respondents' Motion to Dismiss, the Petitioners had filed a Second Amended Petition for Review. During oral argument, the parties referred to that document. Accordingly, the issues set forth in the Second Amended Petition for Review are the ones the Board will rule upon.

[2] RCW 36.70A.280, Matters subject to board review, provides in part:

- (1) A growth management hearings board shall hear and determine only those petitions alleging either:
 - (a) That a state agency, county, or city *planning under this chapter* is not in compliance with the requirements of this chapter, *chapter 90.58 as it relates to the adoption of shoreline master programs or amendments thereto*, or chapter 43.21C RCW as it relates to plans, *development* regulations, or amendments, adopted under RCW 36.70A.040 *or chapter 90.58*; or
 - (b) That the twenty-year growth management planning population projections adopted by the office of financial management pursuant to RCW 43.62.035 should be adjusted.... Underlining added for emphasis; italics added to denote amendments to the statute adopted by Engrossed Substitute House Bill 1724, § 108, Laws of 1995.

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

- (1) The board shall issue a final order within one hundred eighty days of receipt of the petition for review, or, when multiple petitions are filed, within one hundred eighty days of receipt of the last petition that is consolidated. Such a final order shall be based exclusively on whether or not a state agency, county, or city is in compliance with the requirements of this chapter, *chapter 90.58 as it relates to adoption or amendment of shoreline master programs*, or chapter 43.21C RCW as it relates to plans, *development* regulations, and amendments thereto, adopted under RCW 36.70A.040 *or chapter 90.58*.... Underlining added for emphasis; italics added to denote amendments to the statute adopted by Engrossed Substitute House Bill 1724, § 110, Laws of 1995.

[3] The introductory language of the Ordinance provides:

...
WHEREAS, the City of Bellevue (the "City") is authorized by Chapter 82.02 to require new growth and development within the City of Bellevue to pay a proportionate share of the cost of new school facilities to

serve such new growth and development through the assessment of impact fees; and

...

WHEREAS, the City of Bellevue is authorized by Chapter 82.02 RCW to impose impact fees on behalf of and for the benefit of the District; and...

In addition, the second paragraph of BCC 22.18.010 indicates that the Ordinance is adopted pursuant to Chapter 82.02 RCW while the first paragraph of BCC 22.18.020 provides that terms not otherwise defined shall be defined pursuant to RCW 82.02.090. Moreover, BCC 22.18.060(A)(4) refers to impact fee exemptions pursuant to RCW 82.02.100.

[4]

Pursuant to RCW 82.02.050(4):

Impact fees may be collected and spent only for the public facilities defined in RCW 82.02.090 which are addressed by a capital facilities plan element of a comprehensive land use plan adopted pursuant to the provisions of RCW 36.70A.070 or the provisions for comprehensive plan adoption contained in chapters 36.70, 35.63, or 35A.63 RCW....Emphasis added.

[5]

The Board realizes that this result may lead to a bifurcation where a petitioner is forced to request some relief from the Board and some from the courts. As the Board stated in *Tacoma v. Pierce County*:

Whether the Board has jurisdiction to determine cases based on equitable grounds is one of first impression. However, the Board's earlier analysis, in rejecting claims that the Board had jurisdiction to determine violations of the federal and state constitutions, other statutes and the common law, remains convincing. If the legislature intended that the Board have a broader jurisdiction, it would not have used the terms "only" and "based exclusively." The Board has indicated in prior decisions that this limited jurisdiction may not make practical sense because it does result in bifurcated simultaneous appeals to the Board and to the courts. This predicament is even more perplexing given the state's current political climate for instituting regulatory reform and making governmental efficiency a top priority. Nonetheless, until the legislature specifically expands the Board's jurisdiction or an appellate court informs the Board that it has erred on this point, this is the narrow road this Board will follow. *Tacoma v. Pierce County*, Order on Dispositive Motions, at 4. (emphasis added). See also *Gutschmidt*, Final Decision and Order, (March 16, 1993).

[6]

RCW 35A.63.010(7) defines "ordinance" as follows:

...a legislative enactment by the legislative body of a municipality; in this chapter "ordinance" is synonymous with the term "resolution" when "resolution" is used as representing a legislative enactment. Emphasis added.