

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

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| WEST SEATTLE DEFENSE FUND, |) | Case No. 95-3-0073 |
| NEIGHBORHOOD RIGHTS |) | (WSDF III) |
| CAMPAIGN, AND CHARLES |) | ORDER PARTIALLY GRANTING |
| CHONG, |) | PETITIONS FOR |
| Petitioners, |) | RECONSIDERATION |
| v. |) | |
| CITY OF SEATTLE, |) | |
| Respondent. |) | |
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I. Procedural Background

On October 5, 1995, the Central Puget Sound Growth Management Hearings Board (**CPSGMHB** or the **Board**) received a Petition for Review from West Seattle Defense Fund, Neighborhood Rights Campaign, and Charles Chong (hereafter referred to as **WSDF**). **WSDF** claimed that specified amendments to the City of Seattle (**Seattle** or the **City**) comprehensive plan — adopted in Ordinance 117735 in response to a remand order from this Board — are not in compliance with the Growth Management Act (**GMA** or the **Act**).

On April 2, 1996, the Board entered a Final Decision and Order in this case.

On April 5, 1996, **WSDF**'s "Request for Clarification pursuant to WAC 242-02-830 (2)" (**WSDF's Request for Clarification**) was filed with the Board. The Board treats it as a petition for reconsideration.

On April 12, 1996, the "City of Seattle's Petition for Reconsideration" (**Seattle's Petition for Reconsideration**) was filed with the Board.

On April 17, 1996, the Board entered an "Order Requiring Answer to [Seattle's] Petition for Reconsideration."

On April 24, 1996, "**WSDF's Answer to Petition for Reconsideration**" was filed with the Board.

II. DISCUSSION

A. WSDF's Request for Clarification

WSDF has requested that the Board invalidate the entire Seattle Comprehensive Plan (the **Plan**). WSDF's Petition for Review, at 4 ¶ F, and WSDF's Opening Brief, at 21. The Board's Final Decision and Order inadvertently omitted a response to this request. Therefore, WSDF filed a Request for Clarification asking the Board to address the invalidation issue.

RCW 36.70A.300 provides in part:

(2) A finding of noncompliance and an order of remand shall not affect the validity of comprehensive plans and development regulations during the period of remand, 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; ...

The Board holds that WSDF has not carried its burden of proving that the continued validity of the Plan will substantially interfere with the fulfillment of the goals of the Act.

WSDF's main basis for seeking invalidation is its claim that the City's capital facilities plan and transportation elements are incomplete. Because the Board's Final Decision and Order in this case remanded Ordinance No. 117735 in order for the City to comply with the Act's public participation requirements, the Board did not address Legal Issues Nos. 3 and 4, which deal with the alleged noncompliance of the Plan's capital facilities and transportation elements, respectively. The Board notes that, until it reaches a decision regarding these elements to the contrary, they are presumed valid. *See* RCW 36.70A.320.

Furthermore, the Board holds that WSDF has not met its burden of showing why the Plan should be invalidated in its entirety because the Board has found that the City did not comply with the Act's public participation requirements when it adopted the remand amendments in this case. In order to invalidate, the Board must determine that an enactment would substantially interfere with the fulfillment of the GMA's goals. Major portions of the Plan have already been found by the Board to comply with the Act. *See West Seattle Defense Fund v. Seattle (WSDF I)*, CPSGMHB Case No. 94-3-0016 (April 3, 1995).

B. Seattle's Petition for Reconsideration

Public Participation

In the Final Decision and Order in this case (at 15), the Board announced the following test:

The Board holds that, in cases where a GMA enactment is remanded but not declared invalid, the following test will be applied to determine how much public participation was appropriate under the circumstances. The Board will apply the following factors to the facts:

1) the *general public's expectation* of the public participation process that would apply

- on remand, based on: a) the locally established public participation program and; b) actual past practice in conformance with that program;
- 2) the *amount of time* given to a jurisdiction to comply;
 - 3) the *scope of the remand*;
 - 4) the *nature of the corrective action* that must be taken to bring an enactment into compliance; and
 - 5) the *level of discretion* afforded a jurisdiction in taking actions to bring an enactment into compliance.

The Board stated that “ [W]hile the first two factors are objective in nature, the next three are more subjective.” Final Decision and Order, at 18 (under discussion of Factor 3). In its Petition for Reconsideration, the City questions how objective “the general public’s expectations” can be. The City raises a legitimate point. Therefore, the Board clarifies its discussion of the first factor. While the general public’s expectations cannot be easily objectively quantified, the locally established public participation program itself and a jurisdiction’s actual past practice in conformance with that practice can be more objectively quantified. The Final Decision and Order is clarified accordingly.

Second, the City requests reconsideration of the Final Decision and Order’s language (at 16-17) that the Board “assumes” that amendments to the Plan are “Type V” legislative actions pursuant to Seattle Municipal Code (SMC) 23.76.004. The City states:

... The City’s zoning ordinance is a development regulation, it is not a comprehensive plan.... While Type V decisions include amendments to the zoning ordinance which are legislative in character, such as a zoning code text amendment, not all legislative decisions which the Council makes are therefore Type V decisions.... Seattle’s Petition for Reconsideration, at 2.

The Board does not disagree with the City that a zoning ordinance is a development regulation and not a comprehensive plan. However, the GMA enactment before the Board in this case is Ordinance No. 117735, an amendment to the City’s Plan. RCW 36.70A.030(4) defines comprehensive plan as follows:

"Comprehensive land use plan," "comprehensive plan," or "plan" means a generalized coordinated land use policy statement of the governing body of a county or city that is adopted pursuant to this chapter.

Seattle’s Plan was adopted pursuant to the GMA; it is a generalized coordinated land use policy statement. SMC 23.76.004(C), classifies Type V decisions as “... legislative decisions made by the Council in its capacity to establish policy and manage public lands.” However, Chapter 23.76 SMC comprises the “Land Use Code of the City of Seattle.” The Board need not decide whether this SMC provision is applicable to the remand amendments to the Plan. Whether these provisions apply to Plan amendments, or whether the City violated these provisions if they do apply, is not the relevant question before the Board. Instead, what the public’s expectations were is at issue. The City also maintains (*see* Seattle’s Petition for Reconsideration, at 3) that the following statement in the Final Decision and Order is incorrect:

The record before the Board conclusively proves that ... the City Council itself [did not] conduct a public hearing...Final Decision and Order, at 17.

The Board agrees that the statement is incorrect and needs clarification.SMC 23.76.062(A) requires that:

The Council shall itself conduct a public hearing for each Type V (legislative) land use decision....

The City Council, as a committee of the whole, indeed did not conduct a public hearing on the remand amendments.*See* Final Decision and Order, at 9, Finding of Fact No. 29.However, a committee of the City Council, with one councilmember present, did hold a public hearing on the remand amendments.*See* Final Decision and Order, at 7, Finding of Fact No. 18.Therefore, the Board’s statement quoted above is technically incorrect.Accordingly, the Board modifies the statement as follows by adding the word “full”:

The record before the Board conclusively proves that ... the full City Council itself [did not] conduct a public hearing...

The Board agrees with the City that not all its councilmembers must be present at *publichearings*. The City has the authority to delegate its hearing function.Moreover, as long as a quorum is present at a *public meeting* of the council to take an official action, the fact that all members of a city council were not present at a public hearing or were only present for a portion of that hearing is irrelevant.That was not the issue before the Board, however.

Importantly, it is the context of the Board’s statement that must be examined.The quotation above comes from that portion of the Final Decision and Order where the Board was discussing the first factor in its five-part test: the public’s expectation based upon the City’s public participation program and its actual past practice.Two paragraphs above the quoted text, the Board noted that with initial adoption of the Plan, the City Council itself (not a committee) held three public hearings.*See* Final Decision and Order, at 17, citing to *WSDF I*, at 71-73.^[1] Thus, the Board’s point was that the public’s expectation, based on prior experience, was that the full City Council would conduct a public hearing on the remand amendments to the Plan.The public’s expectation was not that one councilmember would hold the hearing.

The City also complains that the language in the Final Decision and Order (at 19) that persons who attended the Council’s public hearing on the remand amendments “... would not have been given copies of the proposal to review...” was inconsistent with Finding of Fact No. 18.The Board agrees with the City that a clarification is necessary.Therefore Finding of Fact No. 18 is re-worded as follows:

18) On July 12, 1995, the City Council’s Planning and Regional Affairs Committee held a public hearing on the draft remand 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.Councilmember Jim Street chaired the hearing and was the only member of the committee present.Copies of the draft amendments and a related packet of information were not available outside Council chambers in advance for the general public to review. Upon oral request just minutes before the beginning of the hearing, City

staff provided their personal copies of a packet of information on the proposed amendments to the Plan to members of WSDF ~~with~~, which included the Mayor's Report and the June 29, 1995 cover memorandum from Tom Tierney to Councilmember Jim Street discussed in Finding of Fact No. 15 above. Four members of the public testified including Charles Chong, a named Petitioner in this case and President of WSDF, and Julie Brown, a member of WSDF. Declaration of Charles Chong, at 3-4 [Attachment 2-III to WSDF's Opening Brief]; and Declaration of Julie Brown, at 3 [Attachment 2-IV to WSDF's Opening Brief]; *see also* Exhibit A to Declaration of Charles Chong and Exhibit A to Declaration of Julie Brown for a partial transcript of the hearing.

Next, the City claims that all members of the public had to do to ascertain when the City Council was going to take final action on the proposed amendment was to call the City Council. Although the Board will not dispute the fact that any person who intends to discover information can do it by making the requisite number of telephone calls, under the City's theory, there would never be any need for publication of notice of meetings or notice of adoption; a citizen could always simply have called up and asked. The Board rejects this argument. It squarely violates the Act's requirement for early and continuous public participation and a local jurisdiction's obligation to broadly disseminate information. *See* RCW 36.70A.140.

Moreover, the Board's complaint with the City's process on this issue was not the fact that the City sent out notice to those persons on the City Council's mailing list that the Council was scheduling a meeting. Instead, the Board criticism is based on the fact that the City failed to provide any notice whatsoever specifically advising the public when the City contemplated taking action on the Plan amendments. *See* Findings of Fact Nos. 24 and 25.

Neighborhood Planning

Positions of the Parties

Seattle

The City makes two fundamental arguments: (1) that the Board's construction of RCW 36.70A.080 is erroneous as a matter of law; and (2) that no policy in the GMA requires the incorporation of municipal plans into the comprehensive plan; the GMA requires only that plans be consistent with the comprehensive plan. Within these two basic arguments, the City advances a number of sub-arguments and questions.

The City argues that RCW 36.70A.070 only requires that a city include in its comprehensive plan (i.e., incorporate within the text of the plan) the listed "mandatory" elements such as land use, housing, transportation, capital facilities and utilities. In contrast, Seattle points to the section heading of RCW 36.70A.080, "Optional Elements," and contends that the elements listed thereafter are to be included in a plan only at the discretion of the legislative body. The City focuses on the words "may include" and "where appropriate" to buttress its argument that the Act is permissive rather than mandatory regarding the subject of including such elements in the plan.

City Motion, at 6. The City argues that there is no ambiguity in RCW 36.70A.080 and cautions the Board against making a policy decision to make mandatory what the legislature only made discretionary.

The City makes many arguments under the umbrella of the contention that there is no explicit policy in the Act that requires incorporation of “municipal plans” into the comprehensive plan. It agrees that subarea plans, such as the neighborhood plans that it actually discussed in the Plan, must be consistent with the Plan, but that this duty is created by RCW 36.70A.120. It argues that:

The key to integrated planning prescribed by the Act is the explicit consistency requirement of RCW 36.70.120^[1], not the imaginary incorporation “requirement” promoted by WSDF. City Motion, at 10.

WSDF

WSDF points out that urban village neighborhood plans are “the core concept” of Seattle’s Plan and are “relied upon by the City Plan to fulfill GMA requirements.” WSDF accuses the City of wanting to have it both ways -- to use the urban villages concept in its Plan, yet be relieved of any responsibility to ever include the plans for urban villages in the Comprehensive Plan, thereby insulating them from review by the Board. WSDF Answer, at 15.

WSDF disputes the City’s assertion that the “plain meaning” of RCW 36.70A.080 is readily apparent. It argues that the ambiguity of RCW 36.70A.080 requires the Board to consider the purposes and policies behind the GMA, citing in support of this proposition a recent Washington Supreme Court case:

If the statute is ambiguous, the courts must construe the statute so as to effectuate the legislative intent. In so doing, we avoid a literal reading if it would result in unlikely, absurd or strained consequences. The purpose of an enactment should prevail over express but inept wording. The court must give effect to legislative intent determined within the context of the entire statute. Statutes must be interpreted and construed so that all language used is given effect, with no portion rendered meaningless or superfluous. The meaning of a particular word in a statute is not gleaned from that word alone, because our purpose is to ascertain legislative intent of the statute as a whole. [Citations omitted.] *Whatcom County v. City of Bellingham*, ___ Wn. 2d ___, 909 P.2d 1303, 1996 WL 42550 (1996).

WSDF argues that where a local jurisdiction elects to adopt subarea plans to fulfill GMA requirements, the subarea plans must be adopted or incorporated into the comprehensive plan. It argues that this is the only reading of the GMA as a whole that makes sense -- taking into account Comprehensive Plan requirements in RCW 36.70A.070, RCW 36.70A.080 and the GMA’s requirements for consistency and Board review on appeal.

Discussion

Legal Issue No. 2 before the Board in this case asks:

Does Seattle Comprehensive Plan Land Use Policy L127 comply with the GMA’s

requirements at RCW 36.70A.020(1), (4), (7), (11) and (12), and RCW 36.70A.070?

Plan Policy L127 provides:

Generally, Council approval of a plan or program that lacks city-wide application will not be included within, or entail amendment of, the Comprehensive Plan. However, when the Plan is amended, plan maps or text may be updated to reflect Council action, as appropriate. For example, when the Council approves a local plan, such as that for an urban village, the final boundaries for the village may be depicted on Plan maps. Attachment 1 to City's Statement of Compliance, at 2.

In answering Legal Issue No. 2 in the negative, the Board held that:

From prior cases, the Board is aware that cities (e.g., Bothell, Redmond, and Bellevue) frequently use the term "neighborhood plan" while counties (e.g., King, Pierce and Snohomish) often use the term "community plan" to connote a geographic subset of the entire city or county and have characterized those "plans" as, essentially, localized land use policy documents. The Board concluded that "neighborhood plans" and "community plans" are "subarea plans" within the meaning of RCW 36.70A.080(2).

Accordingly, the Board holds that, by whatever name (e.g. neighborhood plan, community plan, business district plan, specific plan, master plan, etc.), a land use policy plan that is adopted after the effective date of the GMA and purports to guide land use decision-making in a portion of a city or county, is a subarea plan within the meaning of RCW 36.70A.080. While a city or a county has discretion whether or not to adopt such optional enactments, once it does so, the subarea plan is subject to the goals and requirements of the Act and must be consistent with the comprehensive plan. Final Decision and Order, at 25.

Further, the Board held that:

... While the Board has made reasonable allowance for cities and counties to make limited and diminishing use of pre-GMA subarea plans, both common sense and the Act's goals and requirements oblige cities and counties to treat new localized land use policy enactments as subarea plans within the meaning of RCW 36.70A.080(2). **The Board holds that the discretion conferred upon cities and counties by RCW 36.70A.080(2) is the discretion to undertake new detailed subarea land use policy plans. If they do so, such plans must be adopted as part of the comprehensive plan; the GMA has removed the discretion of cities and counties to undertake new localized land use policy exercise disconnected from the city-wide, regional policy and state-wide objectives embodied in the local comprehensive plan.** Final Decision and Order, at 26.

These holdings were derived from the arguments presented by the parties, and the Board's reading of the Act. Certain terms are defined at RCW 36.70A.030, while other terms are

effectively defined in other substantive sections of the Act.^[1] Still other terms have commonly held meanings in the theory and practice of land use law or land use planning. The Board examined these terms, and the relationship between them in the Final Decision and Order:

The GMA defines the term "comprehensive plan" at RCW 36.70A.030(4), which provides:

"Comprehensive land use plan," "comprehensive plan," or "plan" means a generalized coordinated land use policy statement of the governing body of a county or city that is adopted pursuant to this chapter. Emphasis added.

The GMA also contemplates that a jurisdiction may elect to have a "land use policy statement" for a smaller portion of its geographic area, as evidenced by RCW 36.70A.080 which authorizes subarea plans. While the term "subarea plan" is not defined in the Act, it appears as an "optional element" of comprehensive plans at RCW 36.70A.080, which provides:

(2) A comprehensive plan may include, where appropriate, subarea plans, each of which is consistent with the comprehensive plan. *WSDF III*, at 22.

The Board disagrees with the City's argument that RCW 36.70A.080 is unambiguous. *WSDF* sets forth an alternative and opposing reading of that provision that the Board finds ultimately far more compelling, both as a matter of law and as a matter of policy. The discretion that the legislature reserved to the City is the discretion to undertake subarea planning or not. The Board stands by its earlier holdings that the City has no discretion to adopt land use policy plans except as GMA enactments and if it elects to do so for geographic subdivisions of the jurisdiction, these subarea plans must be included within its GMA-required comprehensive plan or incorporated by reference in that document.

Curiously, in referring to "integrated planning" as the ultimate aim of comprehensive planning, the City unwittingly undercuts its own position. The word "comprehensive" as an approach, is conceptually synonymous with "integrated," which in turn is synonymous with "incorporated." Wordsmithing aside, the Board concludes that the "integration" that the City purports to achieve via its preferred approach i.e., have independent subarea/neighborhood plans that are not a part of the GMA policy framework, but instead are only measured for consistency is ephemeral. The City's proposed "integration" would not be true integration, would not achieve the comprehensive consideration of and linkage between plan elements (e.g., land use and capital facilities) where most local land use decision-making has historically been done, at the neighborhood level.

Nor would it be likely that the GMA's required balancing of state, regional, city-wide and local interests would be achieved if the land use policy plans at the subarea level do not *begin*, as opposed to *finish*, with an acknowledgment of a broader policy context. Nothing in the City's argument suggests that the type of consistency that the City espouses between its new non-GMA subarea plans and its GMA Comprehensive Plan would do more than keeping one document from "thwarting" the achievement of the other's aims.

The Board rejects the notion that the City's non-GMA neighborhood plans must simply avoid getting in the way of some policy objective articulated in its adopted GMA plan. The Act's requirements for coordination and consistency demand more from subarea (i.e., neighborhood) plans. The GMA requires that the local land use policies articulated in subarea plans actively work to advance the policy objectives adopted in the broader policy documents: the City's Plan, the Countywide Planning Policies, and the statewide interests articulated in the planning goals. The

only practical way to achieve this effect is if the subarea plans are incorporated within the City's comprehensive plan, either in the body or by reference. Giving the relevant portions of the statute, including RCW 36.70.080, this reading removes the ambiguity in a manner that best serves the legislature's intent that Washington's communities engage in comprehensive land use planning to achieve coordinated and planned growth. *See* RCW 36.70A.010.

Finally, the Board declines to answer the series of questions posed by the City in its Petition for Reconsideration. The Final Decision and Order and this order provide sufficient guidance to the City to answer many of these questions. ^[1]

III. ORDER

Having reviewed the above-referenced documents and having deliberated on the matter, the Board enters the following order:

- 1) WSDF's Request for Clarification is **partially granted** to the extent that the Board agrees that the Final Decision and Order failed to address WSDF's request that the entire Plan be invalidated. However, WSDF's request for invalidation is **denied**.
- 2) Seattle's Petition for Reconsideration is **partially granted**. The Final Decision and Order is modified in three instances specified below. First, the following paragraph (Final Decision and Order, at 17) is modified by adding the word "full":

The record before the Board conclusively proves that the City did not publish notice of the actions to adopt the amendments in question here in its official newspaper (see Finding of Fact 26); nor did the City publish notice in DCLU's *Weekly Bulletin* (Finding of Fact 27); nor did the full City Council itself conduct a public hearing (see Findings of Fact 29 and 30). Accordingly, the general public's expectation of the City's public participation process was not met.

Second, Finding of Fact No. 18 (Final Decision and Order, at 7) is modified with the following underlined language added and language with a strikethrough deleted:

18) On July 12, 1995, the City Council's Planning and Regional Affairs Committee held a public hearing on the draft remand 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. Councilmember Jim Street chaired the hearing and was the only member of the committee present. Copies of the draft amendments and a related packet of information were not available outside Council chambers in advance for the general public to review. Upon oral request just minutes before the beginning of the hearing, City staff provided their personal copies of a packet of information on the proposed amendments to the Plan to members of WSDF ~~with~~, which included the Mayor's Report

and the June 29, 1995 cover memorandum from Tom Tierney to Councilmember Jim Street discussed in Finding of Fact No. 15 above. Four members of the public testified including Charles Chong, a named Petitioner in this case and President of WSDF, and Julie Brown, a member of WSDF. Declaration of Charles Chong, at 3-4 [Attachment 2-III to WSDF's Opening Brief]; and Declaration of Julie Brown, at 3 [Attachment 2-IV to WSDF's Opening Brief]; *see also* Exhibit A to Declaration of Charles Chong and Exhibit A to Declaration of Julie Brown for a partial transcript of the hearing.

Third, the Order specifying compliance deadlines (Final Decision and Order, at 29) is modified with the following underlined language added and language with a strikethrough deleted:

- ...
- 3) Pursuant to RCW 36.70A.300(1)(b), the Board directs the City to comply with this Final Decision and Order no later than: **4:00 p.m. on Monday, August 12, ~~July 1~~, 1996.**
 - 4) The City shall file by **4:00 p.m. on Monday, August 19, ~~July 8~~, 1996**, one original and three copies with the Board and serve a copy on WSDF of a statement of actions taken to comply with the Final Decision and Order. The Board will then promptly schedule a compliance hearing to determine whether the City has procedurally complied with this Order. If the Plan is amended, substantive compliance will not be determined until and unless new petitions for review are filed within 60 days of publication of notice of adoption of such Plan amendments.

So ordered this 14th day of May, 1996.

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 Partially Granting Petitions for Reconsideration constitutes a final order as specified by RCW 36.70A.300.

[\[1\]](#) The City Council held four public hearings on the Mayor's proposed comprehensive plan and three public hearings on its recommended plan. *WSDF I*, at 73.

[\[1\]](#) The Board assumes that the City intended to refer to RCW 36.70A.120 rather than RCW 36.70.120.

[1]

For example, the phrase “county-wide planning policies” is not defined in RCW 36.70A.030, but instead is effectively defined by the text of RCW 36.70A.210(1).

[1]

As to the suggestion in the City’s Motion that the Board’s holdings would result in petitions for review for such matters as dog-leash policies in city parks, the Board would view such a petition for review as frivolous. *See* RCW 36.70A.290(3).