

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

**JOHN WALLOCK,
Petitioner,
v.
CITY OF EVERETT,
Respondent.**

Case No.96-3-0025

FINAL DECISION AND ORDER

I. PROCEDURAL HISTORY

A. General Procedures

On June 6, 1996, the Central Puget Sound Growth Management Hearings Board (the Board) received a Petition for Review from John Wallock (Wallock). The matter was assigned Case No.96-3-0025, and titled *Wallock v. Everett*. Petitioner Wallock challenges the City of Everett's, a "home rule" charter city, (the City) Ordinances 2143-96 and 2144-96 (the Ordinances) governing adult use businesses. Petitioner alleges that the Ordinances are not in compliance with Growth Management Act (GMA or the Act), *Vision 2010*, the Regional Growth Strategy and Transportation Plan mandated by the GMA, and the Snohomish County Countywide Planning Policies (CPPs); and are inconsistent with the City of Everett Comprehensive Plan (the Plan).

On July 16, 1996, the Board held the prehearing conference. Board member Joseph W.

Tovar, Presiding Officer in this matter, conducted the conference. Petitioner was represented by Jack Bums. Appearing for the City were Eric Laschever and James Iles. Court reporting services were provided by Duane Lodell of Robert H. Lewis & Associates, Tacoma.

There being no objection from the City, the Presiding Officer orally granted the "Motion for Approval of Non-Attorney Representation" submitted on June 5, 1996, by R. Bruce McLaughlin.

On July 18, 1996, the Board received from Petitioner Wallock an " Amended Petition for Review" which contained revised legal issues.

On July 22, 1996, the Board received "City of Everett's Comments on Petitioner's Statement of Issues. "

On July 25, 1996, the Board entered a Prehearing Order outlining the motion, briefing and hearing schedule and setting forth the Statement of Legal Issues. Ten Legal Issues (1 through 10, inclusive) were set forth in the Prehearing Order.

On July 26, 1996, the Board issued a Corrected Prehearing Order changing a filing date. On July 29, 1996 the Board issued a second Corrected Prehearing Order correcting a statutory citation.

On September 13, 1996, the Board entered an Order Amending the Prehearing Order (time of hearing) and Requiring Petitioner's Address and Phone Number (for service).

On September 19, 1996, the Board received Petitioner's address and phone number .

B. Motions Regarding the Record

On July 31, 1996, the Board received "Petitioner's Motion In Limine" (to Exclude Portions of the Index and Record); "Petitioner's Motion for Clarification and to Strike Portions of the Index and Record"; "Petitioner's Motion for an Evidentiary Hearing and to Supplement the Record"; and "City of Everett's Motion Regarding the Record."

On August 7, 1996, the Board received "City of Everett's Response to Petitioner's Motion In Limine"; "City of Everett's Response to Petitioner's Motion for Clarification and to Strike Portion of the Index and Record"; "City of Everett's Response to Petitioner's Motion for Evidentiary Hearing and to Supplement the Record"; and "Petitioner's Response to City's Motion Regarding the Record."

On August 12, 1996, the Board received "Petitioner's Rebuttal Brief in Support of Motion In Limine"; "Petitioner's Rebuttal Brief in Support of Motion for Clarification and to Strike"; "Petitioner's Rebuttal Brief in Support of Motion for Evidentiary Hearing and to Supplement the Record"; "Petitioner's Second Motion to Supplement the Record"; and "Petitioner's Third Motion to Supplement the Record."

On August 12, 1996, Board Member McGuire assumed the role of presiding officer in the above captioned case.

On August 19, 1996, the Board received "City of Everett's Motion to Strike Evidence Introduced in Petitioner's Rebuttal Brief in Support of Motion for Clarification and to Strike."

On August 29, 1996, the Board entered its Order on Motions Regarding the Record and Hearing.

On October 23, 1996, the Board received the City of Everett's "Second Motion Regarding the Record. "

C. Dispositive Motion

On July 31, 1996, the Board received Petitioner's "Motion for Summary Disposition on Enactment Grounds" (Wallock Motion to Dismiss), urging the Board to find that the Ordinances were improperly enacted (Legal Issues No.1 and No.2); the Board also received Respondent's "Motion to Dismiss" (City Motion to Dismiss), urging the Board to dismiss Legal Issues 4, 6, 7, 9 and part of 8.

On August 7, 1996, the Board received "City of Everett's Response to Petitioner's Dispositive Motion and Cross Motion to Dismiss Issues 1 and 2"; the Board also received Petitioner's "Response to City's Motion to Dismiss" (Legal Issues 4, 6, 7, 9 and part of 8).

On August 12, 1996, the Board received "Petitioner's Rebuttal Brief in Support of Summary Disposition (issues 1 and 2); the Board also received "City of Everett's Rebuttal to Petitioner's Response to City's Motion to Dismiss (issues 4,6,7,9, and part of8).

On August 19, 1996, the Board received Respondent's "Motion to Submit Rebuttal to Petitioner's Response to City's Cross Motion to Dismiss."

In its August 29, 1996 "Order on Motions Regarding the Record and Hearing," the Board denied Petitioner's Motion in Limine; denied Petitioner's Motion for Clarification and to Strike Portions of the Index and Record; denied Petitioner's request for an evidentiary hearing; and granted the City's request to strike certain evidence introduced in Petitioner's rebuttal brief. The Board also stated: "The Board received Dispositive Motions from both Petitioner Wallock and Respondent City of Everett. The Board is presently considering these motions and may rule on them by Friday, September 6, 1996; otherwise, they will be addressed in the Board's Final Decision and Order."

On September 4, 1996, the Board received Petitioner Wallock's "Motion to Abate,"¹ requesting that the Board "abate its consideration of Issues 3 through 10, inclusive, and to presently adjudicate only Issues 1 and 2."

On September 5, 1996, the Board received Respondent "City of Everett's Response to Motion to Abate," requesting the Board to deny Petitioner's Motion to Abate.

On September 5, 1996, the Board entered its Order of Dismissal [with prejudice] of Issues 3 through 10 Inclusive, and Amendment of Schedule in Prehearing Order. The hearing on the merits for Issues 1 and 2 was rescheduled to October 29, 1996.

¹ "Abate" is defined as "To throw down, to beat down destroy, quash." Black's Law Dictionary 15 (4th ed. 1968); and "To put an end to. . . . To make void." *Webster's II New Riverside University Dictionary* 66 (1988).

D. Prehearing Briefs

On September 9, 1996, the Board received "Petitioner's Initial Prehearing Brief" (Wallock PHB) and "Petitioner's Notice of Filing Exhibits."

On September 17, 1996, the Board received a facsimile of Petitioner's "Motion for

Enlargement of Time in which to File Reply Brief and in which to File Respondent's Prehearing Brief." Petitioner requested that the Board extend, by one week, the deadlines for filing Respondent's Prehearing Brief and Petitioner's Response Brief.

On September 23, 1996, the Board issued an Order Denying the Motion for Enlargement of Time in which to File Reply Brief and in which to File Respondent's Prehearing Brief.

On September 23, 1996, the Board received "City of Everett's Response to Petitioner's Prehearing Brief" (the City PHB).

On September 30, 1996, the Board received "Petitioner's Rebuttal Prehearing Brief" (Wallock Rebuttal).

The Board held a hearing on the merits beginning at 10:00 a.m. on Wednesday, October 29, 1996, in the Board's conference room at 2329 One Union Square in Seattle, Washington. Board Members Chris Smith Towne, Joseph W. Tovar and Edward G. McGuire, Presiding Officer, were present for the Board. John Carroll represented Wallock, and the City of Everett was represented by Eric Laschever and James Iles. Court reporting services were provided by Jean M. Ericksen of Robert H. Lewis & Associates, Tacoma.

II. ORDER ON SUPPLEMENTAL EXHIBITS

At the hearing on the merits, the Presiding Officer orally ruled on the City's October 23,

1996, "Second Motion Regarding the Record." The Board takes official notice of Ordinances 2177 -96 and 2178-96, passed by the Everett City Council on October 16, 1996 (Exhibits 142 and 143, respectively). The portion of the motion that offered proposed exhibits "Declaration of Alan Griffen" and "Letter from John Wallock to Fluke Corporation" is denied. The proposed exhibit "Certified Copy of proposed ordinance subject of May 1, 1996 first reading" is admitted (Exhibit 144).

Also at the hearing on the merits, Petitioner provided Exhibit 137, Tape of City Council

5/1/96.

III. FINDINGS OF FACT

1. In 1986, in response to public concerns regarding adult use businesses, the City of

Everett began investigating options and developing regulations to address these public concerns. It formed an "Adult Use Citizens Committee" which produced a July 3, 1986 Report to the City Council. The Report recommended development of

regulations that provided: 1) a classification scheme for adult use businesses; 2)

identification of sensitive uses; 3) 1000' buffer between adult use businesses and sensitive uses; 4) 500' buffer between adult use businesses; 5) 500' buffer between adult use businesses and establishments serving or selling alcohol; and 6) a procedure for amortizing noncomplying adult use businesses over 2 years. Exhibit (Ex.) 16.

2. The Everett City Council responded to these recommendations in October 1986 by

passing Resolution 2768, authorizing the adoption of an Adult Use Business Zoning Ordinance and passing Ordinance 1303-86 adopting an Adult Use Business Zoning Ordinance, which included each of the Committee's recommendations. Exs. 17, 18.

3. In 1987, the Council amended the Nonconforming Use provisions of its Adult Use

Ordinance by adopting Ordinance 1384-87. Ex. 19.

4. In 1989, the City adopted a new City of Everett Zoning Code and Zoning Map, Title

19 of the Everett Municipal Code. Ex. 20, Ordinance 1671-89.

5. During 1992 and 1993, the City adopted zoning controls in response to a Washington

Supreme Court decision, *World Wide Video v. Tukwila*, 117 Wn. 2d, 382 (1991).

First, the City adopted interim zoning for adult bookstores from February through December 1992. Ex. 23, Ordinance 1860-92. Next, the City extended the interim zoning twice so that it continued through December 1993. Ex. 24, Ordinance 1911-92; Ex. 25, Ordinance 1946-93. Finally, the City adopted Ordinance 1978-93 on December 8, 1993, amending the zoning code for adult use businesses. Ex.26.

6. In August 1994, the City Council adopted Ordinance 2021-94, adopting the "City of

Everett Comprehensive Plan." The 1994 Comprehensive Plan did not explicitly address adult use businesses in any of the Land Use Goals, Objective or Policies. Ex. 14.

7. In early 1995, John Wallock began a state court action, *Wallock v. City of Everett*,

challenging the City of Everett's Adult Use Business Regulations. The Superior Court of Washington for Snohomish County granted the City's motion for partial summary judgment, finding that the City's Adult Use regulation "is a narrowly tailored, content-neutral time, place and manner regulation that serves a substantial and compelling government interest." Ex. 139. However, the summary judgment did not resolve the Petitioner's claim that the City's zoning code effectively precluded siting an adult use business. City PHB, at 3.

8. On April 12, 1996, Judge Anita Farris offered an oral ruling in *Wallock v. City of*

Everett. Ex. 31.

9. Judge Farris found that "pursuant to the Growth Management Act. . . the

Comprehensive Plan takes priority over the Zoning Code. All zoning codes and developments are required by law to be consistent with the Comprehensive Plan." Ex. 31, at 8-9. After reviewing numerous land use designations and policies in the Plan,

which generally protected industrial land from conversion to nonindustrial uses, Judge Farris concluded that "Since adult business uses cannot, pursuant to the Comprehensive Plan, locate on any of those sites [various industrial land use designations] without violating the plan, which has priority over the Zoning Code, there is, in effect, no site in the City of Everett where they are able to locate." Ex. 31, at 12.

10. Judge Farris also addressed the use matrix system (setback and distance requirements)

used in the Zoning Code and found that "the zoning use matrix for those zones in which the City has indicated the only lots left are available, does not permit adult business uses as a matter of right at this time, only as a matter of discretion by the Planning Director." Ex. 31, at 20-21.

11. Judge Farris held that her "decisions regarding the Comprehensive Plan and use matrix

issues are dispositive in this case. However, since the Everett Council could easily amend the Comprehensive Plan and the Zoning Code use matrix to remedy these constitutional deficiencies. . . I am also going to make findings of fact and conclusions of law regarding. . . whether or not. . . there are. . . a reasonable number of sites available for adult business uses." Ex. 31, at 21. Judge Farris went on to find that "there are 24 parcels or lots to chose from; that with the setbacks between adult business users, six adult businesses could be sited in the City of Everett, if you take away the Comprehensive Plan problem and if you take away the use matrix problem. There is a need for three sites. This Court finds that this is constitutionally sufficient if the other problems had been taken care of. However, they were not. This Court declares the Zoning Code and the Comprehensive Plan, only as it applies to adult business uses, to be unconstitutional." Ex. 31, at 39.

12. On April 12, 1996, the Everett City Council adopted Ordinance No.2138-96,

"establishing a moratorium on acceptance of applications for or issuance of any license, permit or approval for public places of adult entertainment, and adult use businesses in order to allow study of this issue." Ex. 45, at 2, item I.

13. On April 12, 1996, as soon as Judge Farris announced her decision, John Wallock

attempted to apply for an adult entertainment business license at the Everett Municipal Building, but was told applications were not being accepted because the City had just passed a moratorium on adult entertainment business licenses. Ex. 45. at 3.

14. On April 24, 1996, the City received a transcript of the proceedings of Judge Farris'

, oral decision of April 12, 1996, for the purpose of determining the nature of the changes required to be made to the City's regulations to address the issues raised in the Judge's oral ruling. Ex. 45, at 2-3, item L.

15. On April 26, 1996, an environmental checklist was prepared for draft ordinances

2143-96 (plan) and 2144-96 (zoning); the checklist was submitted on April 30, 1996, and, on that same day, a DNS was issued. Exs. 34,35.

16. On April 27, 1996, the *Everett Herald* published notice of the Planning Commission's

May 7, 1996 meeting and public hearing on amendments to the comprehensive plan and zoning code related to adult use businesses. Exs. 32, 33.

17. At the May 1, 1996 City Council meeting, both proposed ordinances were introduced

for First Reading; they were not scheduled for public hearing at that meeting. The draft Ordinances were available at that time. Exs. 134, 136, 144.

18. On May 4, 1996, the *Everett Herald* published the "Everett City Council Preliminary

Agenda for the 8:30 a.m., Wednesday, May 8, 1996 Meeting." Both proposed ordinances regarding the amendments to the Comprehensive Plan and the Zoning Code, as they relate to Adult Use Businesses, were indicated as scheduled for public hearing. Ex. 36.

19. At the May 7, 1996 Planning Commission meeting, both ordinances were explained

and public testimony was taken. John Carroll, from the Law Offices of Burns and Hammerly (representing Petitioner in this case) testified on behalf of Petitioner. Mr. Carroll asked the Commission to allow his firm a reasonable amount of time to review the amendments and prepare a response to them before a recommendation was made to the Council. After closing the public hearing and discussing the proposals, the Commission unanimously recommended approval of the proposed ordinances. Exs. 37,39.

20. At the May 8, 1996 City Council meeting, the Council adopted Resolution 4264,

which set forth findings and conclusions for the interim ordinances. Ex. 45. The Council also adopted Ordinance 2143-96, " Amending Exhibit A of Ordinance 2020-94, the City of Everett Comprehensive Plan, and in particular, the Land Use Element Policies as they Relate to Adult Use Businesses, Providing an Interim Designation, and Declaring an Emergency to Exist," Ex. 46; and Ordinance 2144-96, " Amending the City of Everett Zoning Ordinance 1671-89, as amended, Related to Adult Use Businesses, Providing an Interim Designation, and Declaring an Emergency to Exist." Ex. 47. Resolution 4264 was incorporated by reference in both ordinances (§ 5 in Ordinance 2143-96, and § 17 in Ordinance 2144-96).

21. On August 30, 1996, the Everett City Attorney's Office notified the Petitioner's

attorney that the City had scheduled a public hearing before the Planning Commission on September 10, 1996, regarding a six month extension to both the interim comprehensive plan and interim zoning code regulation (Ordinances 2143-96 and 2144-96). It was further anticipated that the City Council would consider the proposed extensions at its October 16, 1996 Council meeting. Ex. 141.

22. On October 16, 1996, the Everett City Council adopted Ordinance 2177-96,

"extending the interim comprehensive plan policies related to adult use businesses, amending Ordinance 2143-96," and Ordinance 2178-96, "extending the interim zoning regulations related to adult use businesses, amending Ordinance 2144-96. "

IV . STANDARD OF REVIEW

Comprehensive plans and development regulations are presumed valid upon adoption.

This presumption can be overcome by a preponderance of the evidence that a local government "erroneously interpreted or applied" the Act. RCW 36.70A.320(1) provides:

Except as provided in subsection (2) of this section, comprehensive plans and

development regulations, and amendments thereto, adopted under this chapter are presumed valid upon adoption. In any petition under this chapter, the board, after full consideration of the petition, shall determine whether there is compliance with the requirements of this chapter. In making its determination, the board shall consider the criteria adopted by the department under RCW 36.70A.190(4). The board shall find compliance unless it finds by a preponderance of the evidence that the state agency- county or city erroneously interpreted or applied this chapter.

(1995 c 347 § 111; 1991 sp.s. c 32 § 13.] (Emphasis added.)

To successfully challenge a local government's GMA actions, a petitioner must first

demonstrate that the local government had a duty to act under the GMA and then must show, by a preponderance of the evidence, how the City violated that duty . In addressing the legal issues in the present case, the Board will first determine whether Wallock has identified a GMA-imposed duty that the City was required to meet. Where such a duty is demonstrated, the Board will then determine whether the petitioner has proven, by a preponderance of the evidence, that the City has breached that duty. *Litowitz v. Federal Way*, CPSGMHB Case No.96-3-0005, Final Decision and Order (July 22, 1996), at 5.

V. DISCUSSION AND CONCLUSIONS

LEGAL ISSUE NO. 1

Did the City fail to comply with the requirements of RCW 36. 70A,130(2)(b)2 for

enacting an emergency amendment to its comprehensive plan?

Positions of the Parties

Petitioner moved for "Summary Disposition on Enactment Grounds" on July 31, 1996.

Petitioner challenged the enactment of Ordinance 2143-96 (interim plan amendments) and argued that there was not a bona fide emergency; the City had not defined emergency in its Plan; emergencies are limited to physical problems; the need for this enactment was not sudden and unexpected; and the findings of fact and conclusions of law in Resolution 4264 did not support the emergency enactment. Wallock Motion to Dismiss. Petitioner carried these arguments forward in the prehearing brief and further argued the GMA supersedes the City's Charter. *See Wallock PHB and Wallock Rebuttal*.

2 The Prehearing Order cited RCW 36.70A.130(b).The correct citation is RCW 36.70A.130(2)(b). The parties correctly cited the statute in their briefs.

The City of Everett responded to petitioner's dispositive motion and filed a "Cross Motion

to Dismiss Issues 1 and 2" on August 7, 1996. Everett argued that the emergency enactment was done pursuant to its home rule Charter and is beyond the Board's jurisdiction; the petitioner had not identified a GMA duty to define an emergency or limit it to physical problems; and had failed to sustain the burden of proof City Motion to Dismiss. In its prehearing brief, the City carried these arguments forward. City PHB.

The Board's September 5, 1996 Order Dismissing Legal Issues 3-10 indicated that Legal

Issues 1 and 2 would be considered at the hearing on the merits and would therefore be resolved in the Final Decision and Order.

Discussion

The Board's jurisdiction is set forth in RCW 36.70A.280, which provides, in pertinent

part, as follows:

RCW 36.70A.280 Matters subject to board review.

(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 RCW 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 RCW; 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. (Emphasis supplied.)

The crux of petitioner's argument is that an emergency did not exist; therefore the interim

ordinance amending the plan was invalid. The thrust of the City's response is that the Board does not have jurisdiction to review a local government's declaration of emergency. The Board agrees with the City of Everett.

Here, petitioner has alleged that the City has not complied with the requirements of RCW

36.70A.130(2)(b). The Board must then determine the requirements of RCW

36.70A.130(2)(b). RCW 36. 70A.130(2) provides:

RCW 36.70A.130 Comprehensive plans--Amendments.

(2)(a) Each county and city shall establish and broadly disseminate to the public a

public participation program identifying procedures whereby proposed amendments or revisions of the comprehensive plan are considered by the governing body of the county or city no more frequently than once every year except that amendments may be considered more frequently under the following circumstances: (i) The initial adoption of a subarea plan; and (ii) The adoption or amendment of a shoreline master program under the procedures set forth in chapter 90.58 RCW. (b) All proposals shall be considered by the governing body

concurrently so the cumulative effect of the various proposals can be ascertained

However, after appropriate public participation a county or city may adopt amendments or revisions to its comprehensive plan that conform with this chapter whenever an emergency exists or to resolve an appeal of a comprehensive plan filed with a growth management hearings board or with the court.

(1995 c 347 § 106; 1990 1st ex.s. c 17 § 13.] (Emphasis supplied.)

Therefore, the requirement of subsection (2) is that a jurisdiction must establish a plan

amendment process. *Cole v. Pierce County*, CPSGMHB Case No.96-3-0009, Final Decision and Order (July 31, 1996), at 19. This plan amendment process must include (1) procedures for public participation; (2) procedures requiring that proposed amendments be considered no more frequently than once a year; and (3) procedures requiring that the proposed amendments be considered concurrently to ascertain their cumulative effects. In addition, this plan amendment process must be broadly disseminated to the public.

However, there are circumstances where not all of the requirements of the plan

amendment process apply. The once-a-year limit and concurrent review and consideration requirements do not apply to the initial adoption of a subarea plan, or to the adoption or amendment of a shoreline master program. All other aspects of the established public participation program continue to apply under these circumstances.

Additionally, the plan may be amended at any time "after appropriate public participation"

whenever an emergency exists or to resolve a plan appeal filed with a GMA board or a court. The Board notes that in these latter circumstances, only *appropriate* public participation is required before plan amendments may be adopted, in contrast to compliance with the established public participation program for all other plan amendments. **The Board holds that RCW 36.70A.130(2) requires local governments to establish a public participation process and procedure for plan amendments. Therefore, the Board holds that its jurisdiction in relation to RCW 36.70A.130(2) extends only to determining compliance with that requirement, not to reviewing the circumstances, situations or events that may precipitate a proposed amendment.**

In the present case, the Board notes that nowhere in the GMA is "emergency" defined,

nor is there a requirement for a jurisdiction to define an emergency in its plan. More directly on point, RCW 36.70A.130(2)(b) does not address the procedures for declaring an emergency, nor confer jurisdiction upon the Board to review such a declaration. The only germane requirement of RCW 36.70A.130(2)(b) as it applies to the present petition would be whether appropriate public participation occurred before the City adopted the plan amendment ordinance, Ordinance 2143-96. The Board notes that petitioner never addressed this question in briefing of Legal Issue 1.

Conclusion

The Board concludes that it does not have jurisdiction to review the City of Everett's

declaration of emergency as it relates to the adoption of Ordinance 2143-96. The

petitioner's motion for summary judgment on enactment grounds is denied. The City's

motion to dismiss Legal Issue No.1 is granted and Legal Issue No.1 is hereby dismissed with prejudice.

LEGAL ISSUE NO.2

Did the City fail to comply with, and are ordinances 2143-96 and 2144-96 inconsistent with RCW 36. 70A.140 with respect to public participation in the adoption process?

In petitioner's brief supporting the "Motion for Summary Judgment on Enactment

Grounds" and the prehearing brief, petitioner challenges both Interim Ordinances: Ordinance 2143-96, amending the City's Comprehensive Plan; and Ordinance 2144-96, amending the City's Zoning Code. However, petitioner fails to brief Legal Issue No.2 as it relates to Ordinance 2144-96. In fact, petitioner states "The City argues that it adopted Ordinances 2143-96 and 2144-96 as interim measures pursuant to RCW 36.70A.390. While that argument may have some merit with respect to Ordinance 2144-96, it is totally without merit as to Ordinance 2143-96." Wallock Rebuttal, at 14. The Board's rules provide: "Failure by. . . a party to brief an issue shall constitute abandonment of the unbriefed issue." WAC 242-02-570(1). Parties are reminded of this in the Prehearing Order, Part x. The Board holds that the petitioner has abandoned Legal Issue 2 as it relates to Ordinance 2144-96 amending the zoning code.

Positions of the Parties

In relation to Ordinance 2143-96 (the plan amendment), petitioner argues that the full

scope of public participation as set forth in RCW 36. 70A.140 is required since there is no bona fide emergency. "Even if the full panoply of public participation (of RCW 36.70A.140) is waived in an 'emergency,' there still must be 'appropriate' public participation." Wallock PHB, at 17. Petitioner also argues that the Ordinances were not available for review until 14 hours before the City Council meeting; RCW 36.70A.390 does not apply to interim measures amending comprehensive plans; and subsequent and recent public hearings to extend both interim ordinances does not render the present challenge moot.

The City argues that since the ordinances were emergency enactments, the requirements of

RCW 36. 70A.140 do not apply; the public participation was appropriate for enactment of an emergency ordinance, an interim ordinance, or a regular ordinance amending the plan; and the issue is moot since subsequent public participation has occurred.

Discussion

Petitioner claims that the public participation provided for enactment of these ordinances

does not comply with the Act. The City's position is that the public participation requirements of .140 do not apply and the public participation provided does comply with the Act. The Board agrees with the City.

In answering Legal Issue 1, the Board concluded that it did not have jurisdiction to review

the City of Everett's declaration of emergency and dismissed Legal Issue 1. In its Motion to Dismiss, the City urged the Board to dismiss Legal Issue 2 since RCW 36.70A.140 does not apply to emergency enactments. RCW 36.70A.140 provides:

RCW 36.70A.140 Comprehensive plans -- Ensure public participation. Each county and city that is required or chooses to plan under RCW 36.70A.040 shall establish and broadly disseminate to the public a public participation program identifying procedures providing for early and continuous public participation in the development and amendment of comprehensive land use plans and development regulations implementing such plans. The procedures shall provide for broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice, provision for open discussion, communication programs, information services, and consideration of and response to public comments. In enacting legislation in response to the board's decision pursuant to RCW 36.70A.300 declaring part or all of a comprehensive plan or development regulation invalid, the county or city shall provide for public participation that is appropriate and effective under the circumstances presented by the board's order. Errors in exact compliance with the established program and procedures shall not render the comprehensive land use plan or development regulations invalid if the spirit of the program and procedures is observed. (1995 c 347 § 107; 1990 1st ex.s. c 17 § 14.)

This section of the GMA does not address the public participation requirements for a plan

amendment in an emergency situation. As discussed in Legal Issue No.1, *supra*, RCW 36.70A.130(2)(b) governs the nature and extent of public participation in emergencies, and clearly provides that in an emergency, "after appropriate public participation," a plan may be amended. The Board holds that the public participation requirements of RCW 36.70A.140 do not apply to plan amendments adopted in response to emergencies. Since .140 does not apply to the City's adoption of its emergency plan amendments, the City's challenged action has not violated RCW 36.70A.140.

Conclusion

The Board concludes that petitioner has abandoned Legal Issue No.2 as it relates to

Ordinance 2144-96. The Board further concludes that the public participation requirements force 36.70A.140 do not apply to plan amendments adopted pursuant to emergency situations, like the situation faced by the City when it adopted Ordinance 2143-96. Therefore, the City's motion to dismiss Legal Issue 2 is granted and Legal Issue 2 is hereby dismissed with prejudice. The petitioner's motion for summary judgment on enactment grounds as it relates to Legal Issue 2 is denied.

IV. ORDER

Having reviewed and considered the above-referenced documents, having considered the

arguments of the parties, and having deliberated on the matter, the Board finds that the City of Everett's interim plan and zoning code amendments are in compliance with the requirements of the Growth Management Act.

So ORDERED this 3rd day of December, 1996.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP

Board Member

Joseph W. Tovar, AICP

Board Member

Chris Smith Towne

Board Member

Note: This Final Decision and Order 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.