

for Lack of Standing” and “City’s Motion to Dismiss Andrus SEPA Issue” with one attachment and an appended “Declaration of Kathy Cook,” which supported both motions to dismiss.

Also on September 18, 1998, the Board received “Motion to Supplement the Record (Andrus, et al.).”

On September 22, 1998, the Board received a “Preliminary List of Exhibits (Andrus, et al.).”

On September 29, 1998, the Board issued an “Order Granting Settlement Extension and Amending Prehearing Order - Final Schedule.”

On October 6, 1998, the Board received a “Motion by Andrus Petitioners for Leave to File Response to City’s Dispositive Motions Out of Time (By One Day)” with an attached “Affidavit of J. Kirkham Johns,” and “Andrus Petitioners Response to City’s Motion to Dismiss for Lack of Standing and Andrus SEPA Issue.”

On October 9, 1998, the Board received “City’s Reply to Andrus Petitioners’ Response to Motions to Dismiss.”

On October 13, 1998, the Board received “Andrus Petitioners’ Reply to City’s Response to Motion to Supplement Record” with an attached “Affidavit of J. Kirkham Johns.”

On October 16, 1998, the Board issued an “Order on Motions to Supplement the Record” and an “Order on Dispositive Motions,” granting the City’s motion to dismiss certain petitioners in the Andrus case and the City’s motion to dismiss Andrus’ SEPA issue, Issue No. 7.

On December 17, 1998, the Board received a letter from RBI withdrawing its PFR. On December 28, 1998, the Board issued an “Order Dismissing Appeal of Rural Bainbridge Island,” which dismissed Case No. 98-3-0020 and re-captioned the case as Case No. 98-3-0030, *Andrus, et al., v. Bainbridge Island*.

On January 19, 1999, the Board received “Petitioners’ Prehearing Brief” (**Andrus PHB**).

On February 6, 1999, the Board received “Respondent’s Prehearing Brief” (**City Response**).

On February 16, 1999, the Board received a letter from Andrus requesting an extension of time to file its reply brief to February 17; the letter indicated the City had acquiesced in its request.

On February 17, 1999, the Board received “Petitioners’ Reply Brief” (**Andrus Reply**).

On February 18, 1999, the Board held a hearing on the merits at the Financial Center, Seattle. Board Members Joseph W. Tovar, Edward G. McGuire and Chris Smith Towne, presiding

officer, appeared for the Board. Andrus was represented by J. Kirkham Johns; Rosemary Larson represented the City. Court reporting services were provided by Robert Lewis, Robert H. Lewis & Associates, Tacoma.

II. FINDINGS OF FACT

1. The City of Bainbridge Island is an island community encompassing approximately 28 square miles. Ex. 3, Land Use Element, at 6. The City has a population of approximately 18,000. *Id.* at 7. The most densely developed portion of the City is the Winslow area. Commercial development is mainly concentrated in the Winslow area and in three neighborhood service centers. *Id.* at 36.

2. The Bainbridge Island City Council (the **Council**) adopted its comprehensive plan (the **Plan**) on September 1, 1994. Ex. 3.

3. The Plan designated the Winslow area, formerly the City of Winslow, as a Mixed-Use Town Center (**MUTC**), with five overlay districts. Ex. 3, Land Use Element, at 2. The MUTC includes approximately 258 acres. Ex. 42, at 31-32.

4. One such overlay district, the Ferry Terminal Overlay District (**FTOD**) adjacent to the Washington State Ferry Terminal, was further designated as a “special planning area.” Ex. 3, Land Use Element, at 2.

5. The MUTC designation carried with it a requirement for the development of a master plan. Ex. 3, Land Use Element, at 2, 56.

6. The Draft Winslow Master Plan and Integrated Final Environmental Impact Statement was presented to the Council on December 10, 1997 (**December 1997 Master Plan**), following three years of meetings, hearings, evaluation, and deliberations, first by the Winslow Master Plan Committee and then by the Planning Commission. Ex. 42.

7. The City mailed a flyer announcing the April 16, 1998 City Council public meeting and stating that written comments must be received by April 17, 1998. Ex. 93. The City stated that its “usual practice is to mail notices and flyers advertising public hearings at least ten days in advance of the hearing,” although the record contains no affidavit of mailing to verify that the usual practice was observed in this case. City’s Response, at 31. The record shows that a flyer was received by at least one interested citizen group on April 10, six days before the Council’s public hearing. *See* Ex. 100 (letter from the Municipal League of Bainbridge Island).

8. On April 11, 1998, the Bainbridge Review published an article on the upcoming April 16 City Council public meeting on the Winslow Master Plan (**WMP**). Ex. 95.

9. The City submitted a public service announcement regarding the April 16 City Council public meeting to Bainbridge Broadcasting. The public service announcement was to air beginning April 13, 1998. Ex. 97.

10. On April 15, 1998, the Bainbridge Review listed the April 16 City Council public meeting in the “Calendar” section of the newspaper. Also on April 15, a legal notice of the April 16 City Council public meeting was published in the Bainbridge Review. Ex. 96.

11. On April 16, 1998, following review by the Council, two Committees of the Council, and a Capital Facilities Task Force formed by the Council, the Council held a public hearing to discuss the December 1997 Master Plan and proposed revisions.

12. The record does not show that the City explicitly extended the April 17, 1998 deadline for submitting written comments to the City regarding the WMP.

13. On May 21, 1998, the Council adopted Ordinance No. 98-11, amending the City’s comprehensive plan, including the adoption of the WMP. The Ordinance was approved by the Mayor on May 28, 1998, and notice of adoption was published on May 30, 1998.

III. GENERAL DISCUSSION

Andrus alleges that the City’s May 21, 1998 adoption of the WMP under Ordinance 98-11 failed to comply with the goals and requirements of the GMA because changes to the proposed WMP were introduced and adopted towards the end of the planning process, depriving the public of an opportunity to participate in the City Council’s consideration of these modifications. Andrus PHB, at 4. Specifically, Andrus objects to changes to the proposed WMP that affect the FTOD within the Winslow area.

Of the seven legal issues identified in the Prehearing Order, one issue ^[1] was dismissed. *See* Order on Dispositive Motions, at 6. In addition, Andrus failed to brief four issues. ^[2] These issues are deemed abandoned and will not be discussed. *See* WAC 242-02-570(1). Two legal issues remain, Issues 1 and 2.

jurisdiction

The Board finds that the Andrus PFR was timely filed, pursuant to RCW 36.70A.290(2); that the remaining petitioners ^[3] have standing before the Board, pursuant to RCW 36.70A.280(2); and that the Board has subject matter jurisdiction over the Legal Issues, pursuant to RCW 36.70A.280(1)(a).

standard of review

The City's action, amending its comprehensive plan by adopting the WMP, is presumed valid. RCW 36.70A.320(1). The burden is on Petitioners to demonstrate that the City's action was not in compliance with the requirements of the GMA. RCW 36.70A.320(2). The Board "shall find compliance unless it determines that the action by [the City] is clearly erroneous in view of the entire record before the board and in light of the goals and requirements of [the GMA]." RCW 36.70A.320(3). For the Board to find the City's action clearly erroneous, the Board must be "left with the firm and definite conviction that a mistake has been made." *Dep't of Ecology v. PUD 1*, 121 Wn.2d 179, 201 (1993).

IV. DISCUSSION AND CONCLUSIONS

LEGAL ISSUE NO. 1

1. Did the City fail to comply with the public participation requirements of RCW 36.70A.070 (Preamble), .130(1) and (2)(a) and .140 and the public participation procedures of its Comprehensive Plan, and fail to be guided by RCW 36.70A.020(11) when it adopted the Master Plan?

Applicable Law and Discussion

Applicable Law

RCW 36.70A.020(11) provides:

Citizen participation and coordination. Encourage the involvement of citizens in the planning process and ensure coordination between communities and jurisdictions to reconcile conflicts.

RCW 36.70A.140 provides:

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. . . . 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.

RCW 36.70A.070(Preamble) provides in part:

The comprehensive plan of a county or city that is required or chooses to plan under RCW 36.70A.040 shall consist of a map or maps, and descriptive text covering objectives, principles, and standards used to develop the comprehensive plan. The plan shall be an internally consistent document and all elements shall be consistent with the future land use map. A comprehensive plan shall be adopted and amended with public participation as provided in RCW 36.70A.140.

RCW 36.70A.130 provides in part:

(1) Each comprehensive land use plan and development regulations shall be subject to continuing review and evaluation by the county or city that adopted them. Not later than September 1, 2002, and at least every five years thereafter, a county or city shall take action to review and, if needed, revise its comprehensive land use plan and development regulations to ensure that the plan and regulations are complying with the requirements of this chapter. The review and evaluation required by this subsection may be combined with the review required by subsection (3) of this section.

Any amendment or revision to a comprehensive land use plan shall conform to this chapter, and any change to development regulations shall be consistent with and implement the comprehensive plan.

(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: . . .

The GMA “[e]ncourage[s] the involvement of citizens in the planning process.” RCW 36.70A.020 (11). To achieve this goal, the Act requires cities and counties to have a public participation program that provides for “early and continuous public participation in the development and amendment of comprehensive land use plans” and for “broad dissemination of proposals and alternatives, opportunity for written comments, public meetings after effective notice.” RCW 36.70A.140; *see also*, RCW 36.70A.070(preamble) and RCW 36.70A.130(2)(a). It is axiomatic that without effective notice, the public does not have a reasonable opportunity to participate; therefore, the Act requires local jurisdictions’ notice procedures to be “reasonably calculated to provide notice to property owners and other affected and interested individuals,” RCW

[4]

36.70A.035(1). Examples of reasonable notice provisions include :

Publishing notice in a newspaper of general circulation in the county, city, or general area where the proposal is located or that will be affected by the proposal; [and]

Notifying public or private groups with known interest in a certain proposal or in the type of proposal being considered;

RCW 36.70A.035(1)(b) and (c).

When a change is proposed to an amendment to a comprehensive plan, the public must have an opportunity to review and comment on the proposed change before the legislative body votes on the proposed change. RCW 36.70A.035(2)(a); *see also*, RCW 36.70A.130(1). However, additional opportunity for public review and comment is not required if (1) the proposed change is within the range of alternatives considered in the EIS; (2) the proposed change is within the scope of alternatives available for public comment; or (3) the proposed change only corrects typographical errors, corrects cross-references, makes address or name changes, or clarifies language of a proposed ordinance or resolution without changing its effect. RCW 36.70A.035(2)(b)(i), (ii), and (iii).

Finally, the GMA provides that “[e]rrors in exact compliance with the established [public participation] 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.” RCW 36.70A.140.

Discussion

The City’s subarea planning for the Winslow area began in 1995, when the City formed the Winslow Master Plan Committee. Ex. 109, at 2; Ex. 124. This planning process involved numerous public hearings and opportunities for public comment. Ex. 109, at 2-3. The Committee then forwarded a draft WMP to the Planning Commission. Ex. 109, at 3.

The Planning Commission held a public hearing and accepted oral and written comment on a draft WMP. The Planning Commission forwarded a draft WMP to the City Council in the fall of 1997. Ex. 109, at 3. The City Council and several Council committees, including the Land Use Committee, reviewed the draft. *Id.* The result was the December 1997 Master Plan. Ex. 42. Notice of availability of the December 1997 Master Plan was published in the Bainbridge Review. Ex. 44. The Land Use Committee recommended further changes to the December 1997 Master Plan, discussing these changes at several public meetings (January 20, February 3, February 10 and March 24, 1998). Exs. 55, 56, 57 and 243.

The Land Use Committee’s recommendations were presented to the City Council on March 30, 1998. Ex. 88. The recommendations applicable to the FTOD included modifications to the

December 1997 Master Plan:

- (1) delete the requirement that all non-residential uses be located on the ground floor;
- (2) increase the number of rooms allowed in a hotel or inn from 24 units to 55 units, and allow the hotel or inn to be located anywhere within the FTOD, rather than only south of Winslow Way;
- (3) eliminate specific limitations on office space and “use base and maximum commercial base FARs to establish the amount of commercial development”;
- (4) allow “commuter retail” along Winslow Way, and 200 feet from Winslow Way up Cave and Ferncliff Avenues, rather than allowing it only along Winslow Way; and
- (5) permit additional parking of 225 spaces, rather than 150 spaces, for use by non-commuter ferry passengers.

Ex. 88, Attachment 1, at 2-3.

On April 16, 1998, the Council held a public hearing on the December 1997 Master Plan, with revisions. The City asserts that it notified the public of the April 16 hearing: (1) by flyers mailed to everyone who had previously submitted comments to the City on any of the drafts of the WMP; (2) by a television public service broadcast; and (3) by newspaper – one article and one legal notice (along with appearing in the “Calendar” section of the newspaper). The City stated that its “usual practice is to mail notices and flyers advertising public hearings at least ten days in advance of the hearing,” although the record contains no affidavit of mailing to verify that the usual practice was observed in this case. City’s Response, at 31. The record shows that a flyer was received by at least one interested citizen group on April 10, six days before the Council’s public hearing. *See* Ex. 100 (letter from the Municipal League of Bainbridge Island). The flyer stated:

The Bainbridge Island City Council Will Hold A Public Meeting [on April 16, 1998] on the Draft Winslow Master Plan/FEIS and the Council’s Recommended Revisions to the Plan.

Discussion Will Focus on Land Use and Capital Facilities Issues. This is the last chance for public comment before adoption of the Master Plan. If you are unable to attend the meeting, written comments may be submitted to the Department of Planning and Community Development Written comments must be received by Friday, April 17, 1998.

Ex. 93.

The article in the Bainbridge Review was published on April 11, 1998, five days before the Council's public hearing, and provided general information on the WMP, and stated the time and place of the Council meeting. The article contained no mention of a deadline for public comment other than to say that the Council anticipated adoption of the WMP at its May 7, 1998 meeting. Ex. 95.

The legal notice was published in the Bainbridge Review on April 15, 1998, one day before the Council's public hearing, and stated only that "The agenda will include: . . . 2nd Reading – Ordinance No. 98-11, Winslow Master Plan/Land Use Portion & Capital Facilities Plan." Ex. 96. The "Calendar" section of the newspaper contained more information, stating: "Last chance for public to comment on the Land Use and Capital Facilities issues of the draft Winslow Master Plan at 7 p.m. April 16 Written comments accepted until Friday, April 17" Ex. 96.

At best, the public was notified of the City's consideration of revisions to the December 1997 Master Plan between April 10 and April 15 – as early as six days and as late as one day prior to the April 16 public meeting. A citizen receiving all forms of notice published by the City would reasonably conclude that no comments would be accepted after the April 17 deadline. Although the April 16 meeting was continued, no explicit revision of the April 17 deadline for written comments was issued by the City, and the record does not show that the City indicated by any means that it would accept written comments during the time between the announced April 17 deadline and the May 21, 1998 adoption of the WMP. In other words, a citizen wanting to comment on the City's proposed changes to the December 1997 Master Plan would believe he had only until April 17 to comment. Depending on whether the citizen received notice on April 10 or 16, he would have had seven days at best, two days at worst, to review and prepare written comment on the WMP, including proposed revisions; that citizen would have one less day to review and prepare oral comment. Thus, the question becomes, did the public have a reasonable opportunity to review and comment on the proposed changes to the December 1997 Master Plan?

The Summary of the Draft Winslow Master Plan (**Summary**) is the document that shows the proposed revisions to the December 1997 Master Plan. Ex. 92. The City's notices advised the public where they could obtain copies of the Summary. Only after that review could the citizen offer meaningful comments, at the April 16 hearing, or in writing not later than April 17. The Summary contains revisions to many areas of the Winslow MUTC, including the FTOD. A citizen who received notice and obtained a copy of the Summary would have less than a week to review that document and determine the impact of the proposed revisions on the entire MUTC or a

[5] portion of it. While the Summary is clearly written, it is twenty-seven pages long, including maps and tables. This strongly suggests that a citizen wishing to comprehend the proposed revisions would have to give more than a cursory read to a brief document. Under the facts of this case, the Board concludes that the opportunity provided for public review and comment on the proposed revisions to the December 1997 Master Plan was not reasonable. Therefore, the City's

actions regarding public participation on the proposed revisions to the December 1997 Master Plan were clearly erroneous.

Issue No. 1 Conclusion

Under the facts of this case, the Board concludes that the opportunity provided for public review and comment on the proposed revisions to the December 1997 Master Plan was not reasonable. Therefore, the City's actions regarding public participation on the proposed revisions to the December 1997 Master Plan were clearly erroneous.

LEGAL ISSUE NO. 2

2. Did the City fail to comply with RCW 36.70A.470 by involving and incorporating individual project review considerations and decisions in its adoption of the Master Plan?

Applicable Law and Discussion

Applicable Law

RCW 36.70A.470 provides:

(1) Project review, which shall be conducted pursuant to the provisions of chapter 36.70B RCW, shall be used to make individual project decisions, not land use planning decisions. If, during project review, a county or city planning under RCW 36.70A.040 identifies deficiencies in plans or regulations:

- (a) The permitting process shall not be used as a comprehensive planning process;
- (b) Project review shall continue; and
- (c) The identified deficiencies shall be docketed for possible future plan or development regulation amendments.

(2) Each county and city planning under RCW 36.70A.040 shall include in its development regulations a procedure for any interested person, including applicants, citizens, hearing examiners, and staff of other agencies, to suggest plan or development regulation amendments. The suggested amendments shall be docketed and considered on at least an annual basis, consistent with the provisions of RCW 36.70A.130.

(3) For purposes of this section, a deficiency in a comprehensive plan or development regulation refers to the absence of required or potentially desirable contents of a comprehensive plan or development regulation. It does not refer to whether a development regulation addresses a project's probable specific adverse environmental

impacts which the permitting agency could mitigate in the normal project review process.

(4) For purposes of this section, docketing refers to compiling and maintaining a list of suggested changes to the comprehensive plan or development regulations in a manner that will ensure such suggested changes will be considered by the county or city and will be available for review by the public.

The GMA recognizes a distinction between specific project review and comprehensive land use planning. “Project review, which shall be conducted pursuant to the provisions of chapter 36.70B RCW, shall be used to make individual project decisions, not land use planning decisions.” RCW 36.70A.470(1). The Legislature intended this provision to provide for consideration of potential amendments to a local jurisdiction’s GMA plan and regulations identified or discovered during project review. *LMI v. Town of Woodway*, CPSGMHB Case No. 98-3-0012, Final Decision and Order (Jan. 8, 1999), at 10.

Discussion

The action challenged by Andrus was a legislative action involving comprehensive land use planning; the action was not a project review pursuant to Chapter 36.70B RCW. Petitioners have not explained how the City violated RCW 36.70A.470 when it adopted the WMP. Petitioners conclude that the changes to the December 1997 Master Plan “were driven by the interests of developers who were planning a major development in the heart of the [FTOD].” Andrus PHB, at 54. Petitioners make no attempt to explain how .470 precludes any citizen, including one with a pending development proposal, from commenting on proposed land use planning legislation; neither do Petitioners explain how .470 prohibits the City from considering comments from all citizens when it considers a proposed legislative action.

Petitioners have failed to meet their burden to demonstrate that the City’s action was clearly erroneous.

Legal Issue No. 2 Conclusion

Petitioners have failed to meet their burden to demonstrate that the City’s action was clearly erroneous.

V. ORDER

Having reviewed and considered the above-referenced documents, having considered the arguments of the parties, and having deliberated on the matter, the Board ORDERS:

1. The City of Bainbridge Island’s adoption of Ordinance No. 98-11, adopting the Winslow

Master Plan (WMP), specifically as it relates to the Ferry Terminal Overlay District (FTOD), **does not comply** with the GMA public participation requirements of RCW 36.70A.020 (11), .070(preamble), .130 and .140.

2.Ordinance No. 98-11, specifically as it relates to the FTOD in the WMP, is **remanded** to the City with directions to provide a reasonable opportunity for public review and comment.The City shall, through legislative action, reaffirm, amend or repeal the provisions of the FTOD in the WMP within the compliance period set out in this Final Decision and Order (**FDO**).

3.Pursuant to RCW 36.70A.300(1)(b), the Board directs the City to comply with the provisions of the GMA as set forth in this FDO by no later than September 24, 1999.The City shall provide a Statement of Actions Taken to Comply to the Board and the parties by no later than 4:00 p.m. on October 1, 1999; the Board will then promptly schedule a compliance hearing.

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So ORDERED this 31st day of March, 1999.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

Joseph W. Tovar, AICP
Board Member

[\[6\]](#)
Chris Smith Towne

Board Member

NOTICE: This is a final order for purposes of appeal. Pursuant to WAC 242-02-832, a Motion for Reconsideration may be filed within ten days of service of this final order.

[1]

Legal Issue 7 provided:

7. Did the City fail to comply with RCW 43.21C.030(2)(a) and (c) and .031(1) when it did not prepare an amended or supplemental Environmental Impact Statement (EIS) for the Master Plan?

[2]

Legal Issues 3, 4, 5, and 6 provided:

3. Did the City fail to comply with RCW 36.70A.070(Preamble) by adopting a Master Plan which does not reflect the objectives, principles and standards used to develop earlier drafts of the Master Plan?

4. Did the City fail to comply with RCW 36.70A.070(Preamble) because it lacked sufficient information and/or analysis to support revisions made on April 16 and May 21, 1998?

5. Did the City fail to comply with RCW 36.70A.070(Preamble), .080(2), .120 and .130(1) by adopting a Master Plan that is not consistent with the City's Comprehensive Plan?

6. Did the City fail to comply with RCW 36.70A.070(Preamble) by adopting a Master Plan that is internally inconsistent?

[3]

The Board previously found that a number of original petitioners in this case lacked standing. See Order on Dispositive Motions, at 5.

[4]

RCW 36.70A.035(1) provides five examples of reasonable notice provisions. Only two of these examples are relevant in this case.

[5]

Review of the reasonableness of the opportunity provided for review and comment is measured against all of the proposed revisions to the December 1997 Master Plan; it is not measured against only the proposed revisions to the FTOD.

[6]

Board Member Chris Smith Towne was previously assigned as presiding officer in this case. Her retirement from State service is effective on April 1, 1999.