

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

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|---------------------------|---|------------------------------------|
| JODY L. McVITTIE, ET AL., |) | |
| |) | |
| Petitioners, |) | Case No. 00-3-0006c |
| |) | |
| v. |) | |
| |) | |
| SNOHOMISH COUNTY, |) | <i>(McVittie IV)</i> |
| |) | |
| Respondent, |) | |
| |) | |
| and |) | |
| |) | |
| SNOHOMISH COUNTY-CAMANO |) | ORDER ON DISPOSITIVE MOTION |
| ASSOCIATION OF REALTORS, |) | |
| |) | |
| Intervenor. |) | |
| |) | |

I. Procedural Background

On March 23, 2000, the Central Puget Sound Growth Management Hearings Board (the **Board**) issued its “Order on Consolidation, Order on Intervention and Amicus Curiae and Prehearing Order” (**PHO**). The PHO consolidated three different Petitions for Review (**PFR**) filed by Petitioner McVittie and established the schedule for this case, including deadlines for filing dispositive motions. The PFRs filed by Petitioner McVittie are: PFR 00-3-0001 (*McVittie II*), PFR 00-3-0003 (*McVittie III*) and PFR 00-3-0006 (*McVittie IV*). These three PFRs were ultimately consolidated into CPSGMHB Case No. 00-3-0006c (*McVittie IV*).

On April 6, 2000, the Board received “Snohomish County’s Dispositive Motion,” with four attached exhibits ^[1] (**County Motion**) and “Realtor’s Joinder in County’s Dispositive Motion” (**Realtor Motion**). Snohomish County (the **County**) and the Realtors seek to have the Board dismiss PFR 00-3-0001 (*McVittie II*).

On April 18,2000, the Board received Petitioner McVittie’s “Response to Dispositive Motion” (**McVittie Response**).

On April 21, 2000, the Board received “Snohomish County’s Reply Brief in Support of Its Dispositive Motion” (**County Reply**) and “Realtor’s Reply RE: Dispositive Motion to Dismiss McVittie II” (**Realtor Reply**).

The Board did not hold a hearing on the dispositive motions.

II. PREFATORY NOTE

The Board acknowledges that two of the three PFRs filed by Petitioner McVittie challenge the County’s adoption of Ordinance No. 99-092, which adopted Snohomish County’s 2000-2005 Capital Plan Detail (**2000-2005 CIP**). PFR 00-3-0001 (*McVittie II*) and PFR 00-3-0006 (*McVittie IV*), although filed on two different dates, challenge the same action and raise virtually the same Legal Issues. The County agrees that the latter challenge (PFR 00-3-0006 (*McVittie IV*)) is timely. County Motion, at 3, footnote 7. In reviewing the PHO, the Board notes that Legal Issue 4 is the only issue from PFR 00-3-0001 that is not reiterated in the unchallenged PFR 00-3-0006.

III. FINDINGS OF FACT

The Board finds:

1. The County adopted Ordinance No. 99-092 on November 22, 1999. PFR 00-3-0001, at 1; PFR 00-3-0006, at 1.
2. Ordinance No. 99-092 adopted, and incorporated by reference, the County’s 2000-2005 CIP. PFR 00-3-0001, at 1; PFR 00-3-0006, at 1.
3. The County published its Notice of Action on Ordinance No. 99-092 in Everett’s The Herald on December 16, 1999 and December 23, 1999. County Motion, at 2.
4. Petitioner filed PFR 00-3-0001 with the Board on January 24, 2000. The PFR challenged the actions taken by the County Council on November 22, 1999, regarding the 2000-2005 CIP. PHO, at 1.
5. On February 22, 2000, the Board received Petitioner’s “Amended Petition for Review,” amending PFR 00-3-0001. PHO, at 2.
6. Prior to February 22, 2000, Petitioner notified the County that the 2000-2005 CIP document adopted by reference in Ordinance No. 99-092, that was printed and distributed by the County, did not accurately reflect the actions taken by the County Council on November 22, 1999; the document made available and distributed with the County’s

publication of notice of action was the wrong document. February 24, 2000 transmittal letter for Snohomish County's Index of the Record RE: County's Adoption of Amended Ordinance 99-092 and Amended Motion Nos. 99-400 & 99-404, at 1; PHO, at 2; County Motion, at 2. Notwithstanding this error in publication, PFR 00-3-0001 (*McVittie II*) challenged the correct 2000-2005 CIP document, the document adopted by the Council on November 22, 1999.

7. In response, the County reviewed the 2000-2005 CIP and discovered that it did not accurately reflect the legislative decisions of the County Council made on November 22, 1999. The County subsequently "withdrew" publication of the incorrect 2000-2005 CIP document and published a new Notice of Action indicating that the errors in the 2000-2005 CIP document had been corrected. The new Notice of Action was published in the Everett Herald on February 28, 2000 and March 6, 2000. County Motion, at 2 and attachments 1 through 4; PHO, at 2.
8. At the March 9, 2000 Prehearing Conference (PHC), the County questioned the validity of Petitioner's PFR 00-3-0001 (*McVittie II*), since the County had "withdrawn" its publication of the 2000-2005 CIP. The possibility of filing a new PFR was discussed and the PHC was continued until March 16, 2000. PHO, at 3.
9. Petitioner filed an additional PFR [PFR 00-3-0006 (*McVittie IV*)] on March 13, 2000. This PFR also challenged the Council's November 22, 1999 action of adopting Ordinance No. 99-092 that adopted the 2000-2005 CIP. Virtually the same issues were raised in PFR 00-3-0001 and PFR 00-3-0006. Petitioner did not withdraw PFR 00-3-0001. PHO, at 3-4.
10. On March 22, 2000, the Board received Petitioner's "Amended Petition for Review," amending PFR 00-3-0006. PHO, at 5.
11. It is undisputed that the County's Notice of Action published on February 28 and March 6, 2000, extends the period within which the County's November 22, 1999 action can be challenged until May 5, 2000.
12. There is no evidence provided in the briefs or exhibits, that the County Council took any legislative action to repeal, revise or amend Ordinance 99-092 or the 2000-2005 CIP after November 22, 1999. There is no evidence to suggest that the County Council took any action to correct or withdraw publication of the action it took on November 22, 1999. Based on the record before the Board, the only legislative action taken by the County Council regarding Ordinance No. 99-092 adopting the 2000-2005 CIP occurred on November 22, 1999.
13. It is undisputed that the 2000-2005 CIP adopted by Ordinance No. 99-092 on November

22, 1999, by the County Council, is Snohomish County's 2000-2005 CIP.

IV. APPLICABLE LAW AND DISCUSSION

The Act provides, in relevant part:

All petitions relating to whether or not an adopted comprehensive plan, development regulation, or amendment thereto, is in compliance with the goals and requirements of [the GMA] must be filed within sixty days after publication by the legislative bodies of the county or city.

RCW 36.70A.290(2) (emphasis supplied).

County Motion:

The County poses the following question for the Board in its motion: "Does the Board have the jurisdiction to hear a petition that is prematurely filed pursuant to RCW 36.70A.290(2)?" The County answers "No." County Motion, at 3.

The County contends:

It is undisputed that the County withdrew its publication of Amended Ordinance 99-092 and the incorrect 2000-2005 CIP because it did not reflect the legislative decisions of the County Council with regard to its six-year financial plan. Because the later publication was intended to "trigger" the necessary statute of limitations clock for the correct 2000-2005 CIP, all petitions filed before said publication would not meet the very plain language of RCW 36.70A.290(2). Since *McVittie II* (as amended) [PFR 00-3-0001] was filed before the correct document was published, this Board does not have the jurisdiction, pursuant to the GMA, to review the challenges set forth in that petition as they relate to the correct 2000-2005 CIP.

County Motion, at 5.

The County erroneously assumes that a jurisdiction can unilaterally control when a petition for review can be filed with the Board through this publication requirement. The County's assertion also infers that publication may allow a jurisdiction to control whether a petition for review may even be filed with the Board. Under the County's interpretation, a jurisdiction could be insulated from challenge until it decided, if it decided, to publish notice of its action. Further, once it did publish, challenges could only be brought within the sixty-day appeal period, not before. Based on the County's view, once a jurisdiction takes a GMA action, the action may *only* be challenged

after the jurisdiction publishes and then *only* within the sixty-day window opened by publication. The County's interpretation is in error.

RCW 36.70A.290(2) limits the time within which a jurisdiction is exposed to a potential GMA challenge. However, it is the jurisdiction's legislative action of adopting or amending its Plan, development regulations or taking other GMA actions to implement its plan that "triggers" the possibility of challenge or opens the window for petitioning the Board. To close the window, RCW 36.70A.290(2) requires a jurisdiction to publish notice of its GMA action. Publication puts the public on notice that the opportunity to appeal will close in sixty-days. RCW 36.70A.290(2) enables a jurisdiction to establish a date certain, after which its GMA actions will not be subject to challenge.

If notice of the GMA action is not published, there is no closure of the appeal period and no protection provided by RCW 36.70A.290(2). However, once published, the protection provided by RCW 36.70A.290(2) is available. That protection is a limitation on the appeal period. Publication establishes the sixty-day deadline beyond which petitions may not be filed with the Board, thereby providing certainty to the jurisdiction regarding its exposure to GMA challenges. The quicker a jurisdiction publishes notice of its GMA action, the shorter the timeframe for appeal, thus limiting the jurisdiction's GMA exposure.

In other words, the County's legislative action starts the clock for filing appeals to the Board. Publication by the County of notice of its legislative action establishes the date the clock stops.

Here, it is undisputed that Snohomish County's 2000-2005 CIP is the one adopted on November 22, 1999. The GMA actions taken by the Council on November 22, 1999, opened the appeal window. Publication of notice of the Council's action on December 23, 1999 established a February closure date for appeal. It is also undisputed that Petitioner filed PFR 00-3-0001, challenging the County's November 22, 1999 legislative action, before the appeal period closed. The County's "withdrawal" of publication did not close this appeal period or remove it; the appeal period remained open. However, the County's wise decision to re-publish its notice of action after recognizing its error *extended* the appeal period. Further, the County's administrative printing error and decision to "withdraw" publication did not negate, cancel or otherwise affect, the County's November 22, 1999 legislative action adopting the County 2000-2005 CIP. That action remains the subject of Petitioner's challenges as set forth in PFR 00-3-0001^[2] and subject to further challenge until the appeal period closes in May. The Board has jurisdiction to review the challenges raised in PFR 00-3-0001; the County's motion to dismiss PFR 00-3-0001, as invalid since it was prematurely^[3] filed, is **denied**.

Realtors' Motion:

The Realtors join the County in its dispositive motion and further ask the Board to:

“[D]ismiss the Petition for Review filed in *McVittie II* [PFR 00-3-0001], because there is no document serving as the basis of the appeal. In [PFR 00-3-0001] petitioner appealed the County’s incorrectly published capital facilities plan, prior to republication of the corrected document. . . . That case [PFR 00-3-0001] is moot for lack of a document to review.”

Realtors Motion, at 1. In PFR 00-3-0001 (*McVittie II*), Petitioner appeals the November 22, 1999 2000-2005 CIP, not the document incorrectly printed by the County. As discussed above, the County Council took no legislative action to alter their decisions of November 22, 1999, thereby raising the possibility of mootness. It is noteworthy that Petitioner is the one that pointed out to the County the errors in the incorrectly printed County 2000-2005 CIP. The Realtors’ motion to dismiss PFR 00-3-0001 (*McVittie II*), as moot, is **denied**.

V. Order

Based upon review of the PFRs, PHO, briefs and exhibits submitted by the parties, the Act, and prior decisions of this Board, the Board enters the following ORDER:

Respondent Snohomish County’s Dispositive Motion to dismiss Petitioner’s PFR 00-3-0001 (*McVittie II*), as invalid since it was prematurely filed, is **denied**.

Intervenor Snohomish County-Camano Association of Realtors motion to dismiss PFR 00-3-0001 (*McVittie II*), as moot, is **denied**.

So ORDERED this 25th day of April, 2000.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

Edward G. McGuire, AICP
Board Member

Lois H. North

Board Member

Joseph W. Tovar, AICP
Board Member

Note: This Order constitutes a final order as specified in RCW 36.70A.300 unless a party files a motion for reconsideration pursuant to WAC 242-02-832.

[1] The four exhibits are: Notice of Action for Ordinance No. 99-092 (Ex. 40); Notice of Enactment for Ordinance No. 99-092 (Ex. 39); Affidavit of Publication for Ordinance No. 99-092 (Ex. 42); and Affidavit of Publication for Ordinance No. 99-092 (Ex. 41).

[2] The Board notes that the Legal Issue 4 is the *only* issue raised in PFR 00-3-0001 that was not also raised in Petitioner's PFR 00-3-0006. PHO, at 13, and Order Amending Legal Issues in Prehearing Order (Apr. 3, 2000), at 3.

[3] The only premature filing the Board can conceive of is: one that is filed *before* a jurisdiction's legislative body takes the *final action* of adopting legislation regarding a GMA matter. However, this is not the case here.