

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

WILDLIFE HABITAT INJUSTICE	)	
PREVENTION, BRUCE DIEHL, ED	)	<b>Case No. 00-3-0012</b>
NICHOLAS, PAMELA YAGER,	)	<i>(WHIP, et al.)</i>
JOEL and GINA GUDDAT, B.W.	)	
ABBOTT, TERRI R. SAPP , JON	)	<b>ORDER ON MOTIONS</b>
OWENS, PATTI MELTON, MARK	)	
LANZA and SUSAN FENDERSON,	)	
	)	
Petitioner(s),	)	
	)	
v.	)	
	)	
CITY OF COVINGTON,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
LEE J. MOYER, JACK D. CLARK	)	
AND ALAYAR DABESTANI,	)	
	)	
Intervenors.	)	

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**I. Background**

On July 31, 2000, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Wildlife Habitat Injustice Prevention, (**WHIP**) Bruce Diehl, Ed Nichols, Pamela Yager, Joel and Gina Guddat, B.W. Abbott, Teri R. Sapp, Jon Owens, Patti Melton, Mark Lanza and Susan Fenderson (**Petitioners** or **WHIP**). The matter was assigned Case No. 00-3-0012, and is hereafter referred to as ***WHIP, et al., v. City of Covington.*** Petitioners challenge the City of Covington’s (**Respondent** or the **City**) adoption of Ordinance Nos. 05-00, 06-00, 07-00, 08-00, 09-00, 10-00, 11-00, 12-00, 13-00, 14-00 (collectively, the **challenged ordinances**) and the accompanying State Environmental Policy Act determinations. The basis for the challenge is noncompliance with various provisions of the Growth Management Act (**GMA or Act**).

On August 10, 2000, the Board issued a “Notice of Hearing” (the **Notice**) in this case. The Notice established September 1, 2000 as the date for the prehearing conference and included a Tentative Schedule for the filing of pleadings and motions.

On August 18, 2000, the Board issued “Notice of Amended Date for Prehearing Conference and Amended Tentative Schedule” (the **Notice of Amended Schedule**).

On August 25, 2000, the Board received “Lee J. Moyer’s Motion to Intervene” (the **Moyer Motion to Intervene**) together with “Memorandum in Support of [the Moyer] Motion to Intervene.”

On September 5, 2000, the Board received “WHIP Dispositive Motion on Public Participation and Request to be Heard at Prehearing Conference” (**WHIP’s Dispositive Motion on Public Participation**).

On September 7, 2000, the Board received “Jack D. Clark and Alayar Dabestani’s Motion to Intervene” (the **Clark Motion to Intervene**) together with a “Memorandum in Support of [the Clark] Motion to Intervene.”

On September 11, 2000, the Board received the “City of Covington’s Response to WHIP Dispositive Motion on Public Participation and Request to be Heard at Prehearing Conference,” together with “Respondent City of Covington’s Motion to Dismiss for Lack of Subject Matter Jurisdiction” (**Covington’s Motion to Dismiss**) and “Respondent City of Covington’s Brief in Support of Motion to Dismiss for Lack of Subject Matter Jurisdiction” (**Covington’s Brief in Support of Motion to Dismiss**).

On September 13, 2000, the Board conducted the prehearing conference in this matter in Room 1022 of the Financial Center, 1215 Fourth Avenue, Seattle. Present for the Board was presiding officer Joseph Tovar. Representing the Petitioner was Jennifer Dold, representing the City was Duncan Wilson and representing proposed intervenors Moyer and Clark were Dennis Reynolds and Charles Maduell, respectively. The presiding officer indicated that no dispositive motion would be ruled upon before the dates shown in the tentative schedule. In response to concerns about the record and the timing for the disposition of motions, the presiding officer adjusted the proposed final schedule. After a discussion of the proposed legal issues, the presiding officer ordered the Petitioner to file a Restatement of Legal Issues by September 18, 2000 and ordered each proposed Intervenor to subsequently file a notice of which of the legal issues it intends to brief and argue.

On September 18, 2000, the Board received from WHIP a “Revision of Petitioners’ Issues.”

On September 22, 2000, the Board issued “Prehearing Order and Order on Motions to

Intervene” (the **PHO**) which established a schedule for the filing of briefs and motions, set forth the legal issues in this case, and granted intervention to Lee J. Moyer, Jack D. Clark and Alayar Dabestani.

On October 2, 2000, the Board received “Intervenors Jack D. Clark and Alayar Dabestani’s Motion to Dismiss” (**Intervenor Clark’s Motion to Dismiss**).

On October 6, 2000, in response to a request from WHIP, the Board issued an “Order Amending Schedule for Motions to Supplement the Record.”

On October 9, 2000, the Board received “Petitioners’ Motion to Supplement the Record,” (**WHIP’s Motion to Supplement**) and “Petitioner’s Response to City of Covington’s Motion to Dismiss for Lack of Subject Matter Jurisdiction and Intervenors Clark and Dabestani’s Motion to Dismiss” (**WHIP’s Response to Motions to Dismiss**) together with a “Declaration of Jennifer A. Dold” which has eight attached exhibits.

On October 12, 2000, the Board received the following pleadings: “Respondent City of Covington’s Amended Index;” “City of Covington’s Reply to Petitioners’ Response to Motions to Dismiss for Lack of Subject Matter Jurisdiction;” and “Petitioner’s Reply in Support of Dispositive Motion on Public Participation” (**WHIP’s Reply on Dispositive Motion on Public Participation**) together with a “Declaration of Jennifer A. Dold” which has three attached exhibits.

On October 25, 2000, the Board issued an “Order Amending Schedule for Board to Issue Order on Motions.”

## **II. WHIP’S MOTION TO SUPPLEMENT**

WHIP has moved to supplement the record before the Board with four items, noted below. Neither the City nor intervenors filed a pleading in response to WHIP’s Motion to Supplement.

	<b>Proposed Exhibit: Documents</b>	<b>Ruling</b>
1.	City of Covington’s Ordinance No. 17-97 “adopting by reference Title 21A of the King County Code as interim zoning regulations of the City “ 9Jul. 15, 1997) and City of Covington Ordinance NO. 18-97 “adopting by reference Title 20, Planning, of the King County Code as an interim regulation of the City” (Ju. 16, 1997).	<b>Board takes official notice</b>
2.	City of Covington Ordinance 28-97 (Aug. 5, 1997) creating the City of Covington Planning Commission and setting forth its duties.	<b>Board takes official notice</b>

3.	June 1, 2000 memorandum from Planning Director William C. Kennedy to Mayor and City Council entitled “Use of State Environmental Policy Act.”	<b>Admitted</b>
4.	June 22, 2000 memorandum from Kelli O’Donnell, City Clerk, to City of Covington Ordinance Distribution List with a revised Ordinance No. 11-00 attached.	<b>Admitted</b>

### **III. DISPOSITIVE MOTIONS**

#### **A. Prefatory Note**

The two dispositive motions filed in this case (Covington’s and Clark’s Motions to Dismiss and WHIP’s Motion on Public Participation) deal with different but inter-related matters. The arguments for and against each motion illuminate both the questions of the Board’s jurisdiction and the City’s compliance.

The Board will first address Covington’s Motion to Dismiss and Clark’s Motion to Dismiss. If the Board were to agree that it lacks jurisdiction in this matter, the appropriate action would be to dismiss the PFR immediately and strike the briefing and hearing schedule. In such a circumstance, the Board would not rule on either WHIP’s Dispositive Motion on Public Participation or its Motion to Supplement. Conversely, if the Board were to reject the City’s jurisdictional argument, it would then be appropriate to take up WHIP’s Dispositive Motion on Public Participation and Motion to Supplement. If the Board were to grant WHIP’s dispositive motion, it would immediately remand the City’s actions for compliance with the provisions of the GMA, and strike the briefing and hearing schedule. If the Board were to deny WHIP’s dispositive motion, the case would proceed according to the briefing and hearing schedule set forth in the PHO.

#### **B. Covington’s Motion to Dismiss and Clark’s Motion to Dismiss**

##### **1. Covington’s and Clark’s Arguments**

Covington points out that RCW 36.70A.280<sup>[1]</sup> limits matters subject to board review. The City argues that, because the challenged ordinances were adopted under the authority of a Chapter 35A RCW rather than the GMA or the Shoreline Management Act, the Board lacks jurisdiction. The City maintains that its adoption in 1997 of its comprehensive plan was a non-GMA action, quoting the first section of Ordinance 16-97 as follows:

Section 1. Authority to Adopt Interim Comprehensive Plan. Pursuant to RCW 35A.63, the

City adopts King County’s 1994 Comprehensive Plan (...) as the Interim Comprehensive Plan, and King County’s Comprehensive Plan Land Use Map delineating the City of Covington as the Interim Land Use Map (...) [emphasis added] Covington’s Brief in Support of Motion to Dismiss, at 2.

Similarly, the City maintains that its 1997 adoption of its development regulations, was also a non-GMA action, quoting the first section of Ordinance 17-97 as follows:

Section 1. Authority to Adopt Interim Zoning Code. Pursuant to RCW 35A.63, the City adopts Title 21A (...) as the Interim Zoning Code, and the Interim Zoning Map (...) [emphasis added] *Id.*

Likewise, the City states that when it adopted the challenged ordinances in May of 2000, the Covington City Council amended the Interim Comprehensive Plan, the Interim Zoning Code, the Interim Zoning Map and the Interim Land Use Map. *Id.* The City points to language in each of the ordinances that reference the authority of Chapter 35A RCW and points out that they contain absolutely no reference to the Growth Management Act or Chapter 36.70A RCW. Covington’s Brief in Support of Motion to Dismiss, at 13.

In addition, the City cites to the Board’s *Happy Valley*<sup>[2]</sup> and *Northgate*<sup>[3]</sup> cases arguing that the Board has already concluded that it has no jurisdiction over plans adopted under non-GMA statutes.

In *Happy Valley* the Board stated, “the Board’s jurisdiction is limited to planning documents, such as comprehensive plans and development regulations, that were adopted in an effort to comply with the requirements of the GMA [emphasis added].” Covington’s Brief in Support of Motion to Dismiss, at 6. Also, *Northgate* added, “if a local jurisdiction adopts a land use planning document (be it a policy document or a regulation) under authority other than the GMA, this Board has repeatedly indicated that it lacks the requisite subject matter jurisdiction to review the matter for compliance with the Act.” Covington’s Brief in Support of Motion to Dismiss, at 8.

Covington contends that until a municipality formally adopts a comprehensive plan that is “intended to comply with the requirements of the GMA” no such document exists. Covington’s Brief in Support of Motion to Dismiss, at 8. The City notes that in *Happy Valley* the Board was persuaded by the text of the Ordinance itself, which indicated that a Comprehensive Plan had been adopted pursuant to authority subsequent to GMA. *Id.*, citing *Happy Valley*, at 12.

Similarly, the City cites *Lakehaven Utilities District*<sup>[4]</sup> where the Board emphasized the significance of language used in an ordinance’s title, recitals, or sections in determining whether

it was adopted in an effort to comply with GMA. *Id.*, citing *Lakehaven*, at 2. Like the County in *Happy Valley*, the City reasons that since it has not yet adopted its own Comprehensive Plan, the Ordinances passed on May 24<sup>th</sup> were not GMA implementing Development Regulations. Covington’s Brief in Support of Motion to Dismiss, at 11. In essence, the City has relied on the notion that since GMA provides for “phased, not instantaneous, implementation,” they, in the interim, were acting under some other authority, in this case RCW 35A.63. *Id.*, at 8- 9.

Intervenor Clark joins in the City’s arguments.

## 2. WHIP’s Arguments

WHIP disagrees with Covington’s position that its adoption of King County’s 1994 Comprehensive Plan and Development Regulations as their own, were not GMA actions and thus the May 2000 Ordinances are also not GMA actions. WHIP’s Response to Motions to Dismiss, at 2. WHIP has argued that the City had an obligation to comply with GMA upon its incorporation in 1997. *Id.*, at 5. To distinguish the present circumstances with those in *Happy Valley*, WHIP noted that the Board’s lack of jurisdiction was based on the fact that the actions in question could not have been adopted pursuant to GMA because King County’s GMA Comprehensive Plan had not even been adopted yet. *Id.*, citing *Happy Valley* at 305. When GMA was originally enacted in 1990, King County already had a “fully established and elaborate” land use planning process, and “transition to the GMA planning process was not entirely smooth.” *Id.*, at 6, citing *Happy Valley* at 311. WHIP observed that Covington was not incorporated out of King County lands “at the beginning of the world of GMA,” but rather at a time when the County was already in compliance with GMA and the City had their Comprehensive Plan and Development Regulations to use. *Id.*, at 6 – 7.

Similar to *Happy Valley*, WHIP argued that the Board’s lack of jurisdiction in *Northgate*, to review planning documents enacted under some non-GMA authority, were subject to the circumstances surrounding the “transition period” between pre-GMA and GMA plans and regulations. *Id.*, at 7, citing *Northgate* at 326. That is, when jurisdictions were still required to plan under existing land use planning codes and ordinances before GMA had been implemented. *Id.* “Covington indeed recognized these plan provisions and development regulation.” *Id.*, at 12. Petitioner argues that Covington was not essentially starting from “square one” in its process of GMA compliance. *Id.*

### **Conclusion re: Covington’s and Clark’s Motions to Dismiss**

Covington is a jurisdiction within a county (King) that is required to plan under the GMA. RCW 36.70A.040. The Board understands the City’s argument that, because it incorporated in 1997, its deadline to adopt a GMA plan is not until August of 2001. An unspoken, but not implausible implication of Covington’s argument is that, until that deadline, it is free to adopt plans and

regulations, adopt capital budgets and issue permits that are completely contrary to the guidance and requirements of the Growth Management Act. The Board disagrees that the legislature contemplated such an outcome. The Board concludes that Covington has erroneously interpreted its duty under the Act to adopt plans and development regulations. The August, 2001 date upon which the City relies is simply the date by which the City must have adopted a GMA Plan and development regulations. It is not license to adopt plans and regulations totally detached from the goals and requirements of the Act.

The Board agrees with WHIP that the City's reliance on *Happy Valley* and *Northgate* is misplaced. In *Happy Valley*, the ordinance was not a GMA action because it was enacted pursuant to pre-existing, non-GMA related planning. Here, when Covington was incorporated in 1997, the "pre-existing" planning authority could only have been GMA. Not only did Covington have King County's GMA documents at its disposal, it also had several nearby, or comparative, municipalities to assist them in the "existing" world of GMA compliance.

There is but one way to adopt land use plans in the Central Puget Sound region. The Board has previously held:

[T]he Board holds, in the Central Puget Sound region, planning is now done exclusively under Chapter 36.70A RCW – the GMA. *West Seattle Defense Fund v. City of Seattle*, CPSGMHB Case No. 96-3-0033, Final Decision and Order, March 24, 1997, at 11.  
Footnote omitted.

The City of Covington is a GMA planning jurisdiction. It was under no obligation to adopt any amendments to the GMA plan and regulations that it adopted in 1997 as its own – having chosen to do so, the City must comply with the goals and requirements of the GMA. Because it has chosen to do so by adopting the challenged ordinances, it has taken actions that are subject to the goals and requirements of the GMA. Therefore, the Board concludes that, pursuant to RCW 36.70A.280, it has jurisdiction to hear and decide the PFR that has been filed by WHIP. Covington's Motion to Dismiss and Clark's Motion to Dismiss are therefore **denied**.

## **B. WHIP'S Dispositive Motion on Public Participation**

### 1. WHIP's Arguments

Petitioner alleges that the City did not comply with the GMA's requirements for public participation and asks that the Board invalidate the challenged ordinances. PFR, at 5. WHIP argues:

...based on the paucity of the City Index, WHIP requests that the Board find the City out of compliance with the public participation requirements of the Act because the City made

substantial changes to its comprehensive plan without “sufficient information and/or analysis in the record to support the changes: and without assuring that the “public had a reasonable opportunity to review and comment on the changes” [and] because such substantial changes have been made to the Comprehensive Plan without adequate public process, WHIP requests that the Board find both the new Interim Future Land Use map, and its implementing zoning map, out of compliance with the Act . . . WHIP’s Dispositive Motion on Public Participation, at 2-3.

WHIP complains that the City did not adopt any public participation program, as required by GMA, nor did it give public notice that it intended to adopt the challenged ordinances on May 24, 2000. WHIP’s Reply on Dispositive Motion on Public Participation, at 2-3. Petitioner argues that:

The Public was not notified about the City’s planned ordinances to amend the City’s existing comprehensive plan and development regulations, was not given reasonable opportunity to comment upon the ordinances, and the ordinances enacted significant change to the comprehensive plan and development regulations. *Id.*, at 4.

## 2. Covington’s Arguments

Covington offers no argument that it has complied with the GMA. The City’s position is consistent with its stated belief that the challenged ordinances were not GMA actions and that it therefore had no duty to comply with its provisions.

### **Conclusions re: WHIP’s Dispositive Motion on Public Participation**

WHIP argues that the City has violated the public participation goal of the GMA set forth in RCW 36.70A.020(11), and the public participation requirements of the GMA set forth in RCW 36.70A.035, .130, and .140, PFR, at 4. In rebutting these allegations, the City’s only defense is the jurisdictional attack that the Board has rejected above - namely, that the City was under no statutory duty to do so because these are not GMA actions.

In adopting its Interim Plan and amendments, the City has admitted that the related Ordinances contain no reference to the GMA or compliance with GMA. Covington’s Brief in Support of Motion to Dismiss, at 8. Instead, the City has explained that the Ordinances were intended to pre-date the City’s GMA Comprehensive Plan and implementing development regulations. *Id.*, at 10.

The Board agrees with WHIP that the City did not assure that the public had a “reasonable opportunity to review and comment on the changes.” Indeed, in view of the rigorous steps the City has taken not to cite to the GMA, the only facts before the Board are that Covington did not meet the Act’s requirements for notice and “early and continuous” public participation. The

Board finds that the City's actions adopting the challenged ordinances are **not in compliance** with the public participation requirements of the GMA, specifically RCW 36.70A.035, .130 and .140, and will **remand** them to the City with direction to repeal them, revise them or modify them.

#### **IV. INVALIDITY**

Having determined above that the City's challenged ordinances are not in compliance with the Act's requirements, the Board takes up WHIP's request that the Board enter a determination of invalidity. PFR, at 5. The Board may determine challenged amendments invalid if the Board concludes that their continued validity would substantially interfere with the fulfillment of the goals of the Act. RCW 36.70A.302(1)(b). In the present case, the Board finds that the evidence shows that substantial changes have been made to allowable uses and development standards in the land use districts affected by the challenged ordinances. These substantial changes create great potential that permit applications will vest to policies and regulations that were never subjected to the public's review pursuant to the goals and requirements of the GMA. Therefore, the Board concludes that the continued validity of the challenged ordinances would substantially interfere with the fulfillment of RCW 36.70A.020(11). The Board enters a **determination of invalidity** as to the challenged ordinances.

It should be noted that the Board has not reached the legal issues in the PFR which challenge the substantive compliance of any of the challenged ordinances with specific provisions of the GMA. Rather, the Board reaches only the public participation claim, and concludes that the City's failure to meet the public participation goals and requirements of the GMA is a fundamental and fatal flaw.

#### **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. Covington's Motion to Dismiss and Clark's Motion to Dismiss are **denied**.
2. WHIP's Dispositive Motion on Public Participation is **granted**:
  - a. City of Covington Ordinance Nos. 05-00, 06-00, 07-00, 08-00, 09-00, 10-00, 11-00, 12-00, 13-00, and 14-00 are **not in compliance** with the goals and requirements of the Growth Management Act, specifically RCW 36.70A.035, .130 and 140.
  - b. The Board has concluded that the continued validity of these non-compliant ordinances

would substantially interfere with the fulfillment of RCW 36.70A.020(11) and enters a **determination of invalidity** effective immediately

3. The Board **remands** City of Covington's Ordinance Nos. 05-00, 06-00, 07-00, 08-00, 09-00, 10-00, 11-00, 12-00, 13-00, 14-00 to the City with direction to repeal, revise or modify them by no later than **Monday, January 15, 2000**. If the City wishes to subsequently re-adopt the substance of these ordinances, it must do so under the authority and subject to the goals and requirements of Chapter 36.70A RCW.

4. The City is directed to file with the Board a "Statement of Actions Taken to Comply with the Board's November 6, 2000 Order" (the **SATC**), which shall include copies of all legal notices given and legislative actions taken to achieve compliance with the GMA as interpreted in this Order. The City shall provide four copies of the SATC to the Board and a copy to each of the parties by no later than **4:00 p.m., Monday, January 22, 2000**. The Board will subsequently schedule a compliance hearing.

5. The hearing on the merits and the briefing schedule set forth in the Prehearing Order are **stricken**.

So ORDERED this 6th day of November, 2000

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

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Edward G. McGuire, AICP  
Board Member

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Lois H. North  
Board Member

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Joseph W. Tovar, AICP  
Board Member

Note: This order constitutes a final order as specified by RCW 36.70A.300 unless a party files a motion for reconsideration.

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[1] RCW 36.70A.280(1) provides:

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.

[2] *Happy Valley, et al. v. King County*, CPSGMHB Case No. 93-3-0008c, Order Granting Respondent King County's Motion to Dismiss and Denying Happy Valley's Motion to Amend its Petition for Review, October 25, 1993.

[3] *Northgate Mall Partnership v. City of Seattle*, CPSGMHB Case No. 93-3-0009, Order Granting Seattle's Motion to Dismiss, and Denying Northgate Mall's Cross Petition, and Its Motion to Strike Statements, November 8, 1993.

[4] *Lakehaven Utility District v. City of Federal Way*, CPSGMHB Case No. 97-3-0031, Order on Dispositive Motions, March 6, 1998.