CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

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

I. PROCEDURAL HISTORY

On November 6, 2000, the Central Puget Sound Growth Management Hearings Board issued an Order on Motions in this case. The Order provided in relevant part:

> 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**.

WHIP v. City of Covington, CPSGMHB Case No. 00-3-0012, Order on Motions (Nov. 6, 2000), at 9.

On November 15, 2000, the Board issued "Scrivener's Error Corrections to Order on Motions" which corrected the dates for the City to comply with the Board's Order on Motions and to submit a Statement of Actions Taken to Comply.

On November, 16, 2000, the Board received: 1) "Respondent City of Covington's Motion for Reconsideration, to Rescind Order of Invalidity and to Deny WHIP's Dispositive Motion on Public Participation, or in the Alternative, for an Order Rescinding the Board's Determination of Invalidity Pursuant to RCW 36.70A.302(6)," 2) "City of Covington's Memorandum in Support of Motion for Reconsideration, or, in the Alternative, for Rescission of Determination of Invalidity," 3) "Declaration of William Kennedy in Support of City of Covington's Motion for Reconsideration," 4) "Intervenor Clark and Dabestani's Motion for Reconsideration," 5) "Intervenor Clark and Dabestani's Memorandum in Support of Motion for Reconsideration," and 6) "Declaration of Charles E. Maduell."

On November 21, 2000, the Board received "Petitioner's Response to Respondent City of Covington's and Intervenors Clark and Dabestani's Motions for Reconsideration" and the "Declaration of Jennifer A. Dold."

On November 29, 2000, the Board received "Intervenor Lee J. Moyer's Joinder to City of Covington's Motion for Reconsideration, Motion to Rescind Order of Invalidity, and Motion to Deny WHIP's Dispositive Motion on Public Participation or in the Alternative, for an Order Rescinding the Board's Determination of Invalidity Pursuant to RCW 36.70A302(6) Notice of Participation."

On December 1, 2000, the Board received "City of Covington's Rebuttal to Petitioners' Response to Motions for Reconsideration" and "Declaration of Duncan C. Wilson in Support of City of Covington's Rebuttal to Petitioner's Response to Motions for Reconsideration."

On December 4, 2000, the Board issued the "Order on Motions for Reconsideration," which denied Covington's Motion for Reconsideration, denied Clark's Motion for Reconsideration, and affirmed the findings and conclusions of the November 6, 2000 Order on Motions.

On January 10, 2001, the Board received Covington's "Statement of Actions Taken to Comply with the Board's November 6, 2000 Order" (**SATC**).

On January 24th, 2001, the Board issued a "Notice of Compliance Hearing."

On February 8, 2001, the Board received WHIP's "Petitioners' Pre-Compliance Hearing Brief." Attached to this Brief was the "Declaration of Jennifer A. Dold" and the "Declaration of Freelon Hunter."

On February 14, 2001, the Board received Covington's "Respondent City of Covington's

Compliance Hearing Brief" with the "Declaration of William Kennedy" attached therein.

On February 15, 2001, beginning at 10:00 a.m. the Board held a Compliance Hearing in this matter in Suite 1022 of the Financial Center, 1215 Fourth Avenue, Seattle, Washington. Present for the Board were members Lois H. North, Edward G. McGuire, and Joseph W. Tovar, presiding officer. Also present for the Board was legal intern Brian R. Norkus. Representing WHIP was Jennifer A. Dold. Representing the City was Duncan C. Wilson. No witnesses testified at this hearing.

II. DISCUSSION

On December 19, 2000, pursuant to the Board's Order on Motions, the City adopted Ordinance Nos. 33-00, 34-00, 35-00, 36-00, 37-00, 38-00, 39-00, 40-00, 41-00, and 42-00, which repealed Ordinance Nos. 05-00, 06-00, 07-00, 08-00, 09-00, 10-00, 11-00, 12-00, 13-00, and 14-00. SATC at 1. Additionally, the City adopted Ordinance No. 32-00, which establishes the City's formal public participation program in accordance with RCW 36.70A.035 and 36.70A.140. SATC, at 2. These Ordinances were adopted on December 19, 2000. Notice of hearings regarding these Ordinances was provided, pursuant to RCW 36.70A.035, by posting of the City Council meeting agenda on the City's website, at the City Hall, in the Council chambers, in the display case outside those chambers, and at the Covington Library. *Id*.

Ordinance Nos. 41-00 and 42-00 repealed Ordinance No. 13-00 (the City's 'noncompliant' Zoning Map) and No. 14-00 (the City's 'noncompliant' Land Use Map). SATC at 3. The effect of this action was to reinstate the King County Zoning and Land Use Maps as the City's Zoning and Land Use Map. *Id*. The City has concluded that these maps are not "interim" because those maps were part of the King County Comprehensive Plan, which the City adopted in whole on July 15, 1997. *Id*. at 4. **The Board agrees.**

On December 19, 2000, the City also adopted three interim controls, pursuant to RCW 36.70A.302(5). These interim controls included: Ordinance Nos. 43-00 (relating to site development requirements), 44-00 (relating to transportation projects), and 45-00 (relating to SEPA procedures). SATC at 2. WHIP raised no objection to the re-adoption of the three interim ordinances in its brief or at the compliance hearing. Having reviewed these interim ordinances, pursuant to RCW 36.70A.302(5), the Board has determined that **these three interim controls do not substantially interfere** with the fulfillment of the goals of this chapter, and **comply** with the requirements of the Act.

The City Council is currently considering the adoption of ordinances similar in substance to the remaining repealed ordinances. After passage of the City's Public Participation Ordinance, the

City's Planning Commission held two public hearings on January 4 and January 8, 2001 to reconsider Ordinance Nos. 33-00, 34-00, 35-00, 36-00, 37-00, 38-00, 39-00 and 40-00, which effectively would re-adopt Ordinance Nos. 05-00, 06-00, 07-00, 08-00, 09-00, 10-00, 11-00 and 12-00 respectively. City's Compliance Hearing Brief at 2. The Commission provided a recommendation to the City Council on January 11, 2001, and the Council itself held a public hearing on January 23, 2001, where it took public comment. *Id*. The City Council is set to discuss the Commission recommendation and public testimony on February 20, 2001. *Id*. At the time of the Board's compliance hearing, the City had not yet acted on any of the pending ordinances or considered the planning commission recommendations. However, the Board notes that the City did repeal the non-complying ordinances as directed.

RCW 36.70A.330(5) enables the Board to schedule additional hearings as appropriate during the compliance phase of a proceeding. Here, WHIP requests the Board to continue jurisdiction over the repealed, but "pending," ordinances until they are adopted. Petitioner's Pre-Compliance Hearing Brief at 6. In essence, WHIP is apprehensive that the City will re-adopt the same ordinances and WHIP wants the Board to review the substance of those ordinances in a compliance proceeding. WHIP points to the City Planning Commission recommendation to the City Council that, "[t]he City would be best served and litigation avoided if the substantive issues raised in the WHIP appeal <u>and by city residents</u> could be addressed and changes, if necessary, incorporated into the plan." *Id*. at 5. Also, WHIP holds out a warning that if these ordinances are re-adopted, "incompatible and unlawful commercial development could vest throughout the City." *Id*. at 7.

Noting that their substantive challenges to "these ordinances" have been in existence since July 31, 2000, WHIP notes that the originally petitioned Ordinances "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." Petitioner's Pre-Compliance Hearing Brief at 2, 9. In response, the City has asserted that the City Council's potential interest was to "reconsider" the ordinances as soon as possible. While WHIP is correct, that the substance of these ordinances was challenged in the original PFR, pursuant to WHIP's motion, the Board found them noncompliant and invalid based on the lack of a GMA public participation process. The Board then remanded the matter to the City for corrective action. Consequently, the Board never addressed, nor did it need to address, the substance of the challenged ordinances.

The Board's November 6, 2000 Order is clear. It instructed the City as follows: "If the City wishes to subsequently re-adopt the substance of these [invalidated] ordinances, it must do so under the authority and subject to the goals and requirements of chapter 36.70A RCW." Order on Motions at 9.

The repealed ordinances have been placed before the public for comment at the aforementioned

public hearings of the Planning Commission and the City Council. City's Compliance Hearing Brief at 3. The City's continuing consideration of the ordinances previously invalidated on public participation grounds **is not in violation of the Board's Order or the GMA.** Once the City acts to adopt "something" (the same, revised, or entirely different ordinances), WHIP can challenge such action, as it deems necessary. However, the Board no longer has jurisdiction over the substance of the challenged ordinances because the challenged ordinances have been repealed.

Since repealed Ordinances have no force and effect of law, they can no longer substantially interfere with RCW 36.70A.020(11). Therefore, the Board will **rescind the determination of invalidity**.

The Board understands the Petitioner's concern that the City may, in fact, adopt new ordinances that contain the same substance as the repealed ordinances. Nevertheless, the City has not yet taken such action. Until and unless it does so, there is simply no action for the Petitioner and for the Board to review

III. FINDINGS OF FACT

1. RCW 36.70A.330 requires the Board to conduct a compliance hearing. The Board conducted its compliance hearing on February 15, 2001.

2. The Board's November 6, 2000 Order on Motions directed the City to "repeal, revise or modify" Ordinance Nos. 05-00, 06-00, 07-00, 08-00, 09-00, 10-00, 11-00, 12-00, 13-00, and 14-00, by no later than Monday, January 15, 2000. Order on Motions at 9.

3. To comply with the Board's Order the City of Covington has separately repealed Ordinance Nos. 05-00, 06-00, 07-00, 08-00, 09-00, 10-00, 11-00, 12-00, 13-00, and 14-00, with respective Ordinance Nos. 33-00, 34-00, 35-00, 36-00, 37-00, 38-00, 39-00, 40-00, 41-00, and 42-00. See SATC at 1-2, and Exhibits "A" through "J."

4. The City of Covington established a formal public participation program as required by RCW 36.70A.035 and .140 through the adoption of Ordinance No. 32-00 on December 19, 2000. SATC, at 2.

5. At the December 19, 2000 City Council meeting, the City of Covington adopted Emergency Interim Ordinance Nos. 43-00, 44-00, and 45-00, to replace invalidated ordinances relating to site development requirements, transportation projects, and SEPA procedures. Public notice of these proposed ordinances was provided through the posting of the City Council's December 19, 2000 meeting agenda on the City's website, at City Hall, in Council chambers, in the display case

outside those chambers, and at the Covington Library. SATC at 2.

6. The Board's November 6, 2000 Order on Motions directed the City to file with the Board a "Statement of Actions Taken to Comply with the Board's November 6, 2000 Order," which "shall include copies of all legal notices given and legislative actions taken to achieve compliance with the GMA as interpreted in this Order."

7. On January 10, 2001, the Board received the Respondent City of Covington's "Statement of Actions Taken to Comply with the Board's November 6, 2000 Order."

IV. CONCLUSIONS OF LAW

The City's repeal of Ordinance Nos. 05-00, 06-00, 07-00, 08-00, 09-00, 10-00, 11-00, 12-00, 13-00, and 14-00, through respective Ordinance Nos. 33-00, 34-00, 35-00, 36-00, 37-00, 38-00, 39-00, 40-00, 41-00, and 42-00, **complies** with the GMA as set forth in the Board's November 6, 2000 Order. Repeal of these ordinances also removes the substantial interference with the public participation goal of the Act. Consequently, the determination of **invalidity is rescinded**.

The City's adoption of Ordinance No. 32-00 established public participation procedures that **comply** with the ***public notice and participation*** requirements of RCW 36.70A.035, .140, and the ***public participation goal*** of RCW 36.70A.020(11).

The Board has determined that the City's adoption of interim Ordinance Nos. 43-00, 44-00, and 45-00 do not substantially interfere with the fulfillment of the goals of the GMA, and **comply** with the requirements of the Act.

Regarding the pending ordinances, pursuant to RCW 30.70A.280, the Board no longer has jurisdiction to review the substance of ordinances that have been repealed in order to comply with the Act, as set forth in the Board's Order. Until such time as a new petition for review is filed, if ever, the Board is unable to review the substance of any "new" ordinances.

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V. INVALIDITY AND COMPLIANCE

Based upon a review of the Board's November 6, 2000 Order on Motions, the City's Statement of Actions Taken to Comply with the Board's November 6, 2000 Order, the Petitioner's Pre-Compliance Hearing Brief, the Respondent City of Covington's Compliance Hearing Brief, the oral arguments presented by the parties at the compliance hearing, and consideration of Findings of Fact 1-7, and Conclusions of Law, *supra*, the Board finds that the City has **complied** with the requirements of the GMA as set forth in the aforementioned Board Order. Likewise, the repeal of

the invalid ordinances removes the substantial interference with the public participation goal of the Act.

The Board **rescinds** the Determination of Invalidity as to the *WHIP v. City of Covington* case and issues this **Finding of Compliance** to the City of Covington in GPSGMHB Case No. 00-3-0012, *Wildlife Habitat Injustice Prevention, et al. v. City of Covington*.

So ORDERED this 6th day of March, 2001

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

_____

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.