

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

JODY L. McVITTIE,)	
)	Case No. 01-3-0002
)	
Petitioner,)	<i>(McVittie VI)</i>
)	
v.)	ORDER ON MOTIONS
)	
SNOHOMISH COUNTY,)	
)	
Respondent.)	
)	
)	
)	

I. PROCEDURAL BACKGROUND

On July 25, 2001, the Central Puget Sound Growth Management Hearings Board (the **Board**) issued its Final Decision and Order (the **FDO**) in the above captioned matter.

On August 6, 2001, the Board received from Petitioner Jody McVittie a “Motion for Reconsideration” (**Petitioner’s Motion**) that asked the Board to reconsider the FDO. On this same date, the Board received from the Respondent “Snohomish County’s Request for Expedited Reconsideration” (the **County’s Motion**).

On August 13, 2001, the Board received the County’s “Reply to Petitioner’s Motion for Reconsideration” (the **Reply**).

The Board did not receive a pleading from Petitioner in reply to the County’s Motion.

On August 24, 2001, the Board issued a “Notice of Partial Reconsideration and Notice of Schedule for Board to Rule on Remaining Issues” (the **Notice of Partial Reconsideration**).

II. MOTIONS FOR RECONSIDERATION

Both the County and Petitioner have filed Motions for Reconsideration pursuant to WAC 242-02-832, which provides:

(1) After issuance of a final decision any party may file a motion for reconsideration with a board in accordance with subsection (2) of this section. Such motion must be filed within ten days of service of the final decision. The original and three copies of the motion for reconsideration shall be filed with the board. At the same time, copies shall be served on all parties of record. Within five days of filing the motion for reconsideration, a party may file an answer to the motion for reconsideration without direction or request from the board. A board may require other parties to supply an answer. All answers to motions for reconsideration shall be served on all parties of record.

(2) A motion for reconsideration shall be based on at least one of the following grounds:

(a) Errors of procedure or misinterpretation of fact or law, material to the party seeking reconsideration;

(b) Irregularity in the hearing before the board by which such party was prevented from having a fair hearing; or

(c) Clerical mistakes in the final decision and order.

(3) In response to a motion for reconsideration, the board may deny the motion, modify its decision, or reopen the hearing. A motion is deemed denied unless the board takes action within twenty days of filing the motion for reconsideration. A board order on a motion for reconsideration is not subject to a motion for reconsideration.

(4) A decision in response to the petition for reconsideration shall constitute a final decision and order for purposes of judicial review. Copies of the final decision and order shall be served by the board on each party or the party's attorney or other authorized representative of record.

A. County's Motion

Discussion

The County raised two Reconsideration Issues. First, the County requested that the Board amend Paragraph 1 of the FDO to revise the compliance deadline and to adopt additional language regarding notice and hearings required on remand. County's Motion, at 3-9. The Board granted this portion of the County's Motion in its August 24, 2001 Notice of Partial Reconsideration.

The County's second reconsideration issue raised questions regarding how notices must be drafted in order to comply with the FDO. County's Motion, at 6 and 9-11. The Board turns now to that request.

The County focuses on language in the FDO to frame its concerns. The County's Motion provides:

The Board's decision in this case effectively requires published notices for a proposed ordinance to "clearly and concisely" summarize any "fundamental and pervasive" policy changes that would result from adoption of the ordinance. *See McVittie VI*, at 9-10. In the capital facilities context, the order makes clear that changing LOS standards and designating facilities as necessary for development constitute "fundamental and pervasive" policy changes." County's Motion, at 9.

The County identifies concerns with what it perceives to be a requirement for more detail than is practical or necessary. It states:

What the County finds problematic, however, is not the requirement that published notices identify and summarize significant policy changes, but rather the implication that the summary of those changes must contain essentially the same degree of detail as the ordinance itself. County's Motion, at 9. Emphasis added.

The County agrees that the LOS standards implicated by the remanded ordinances are "fairly straightforward" but worries that, in certain situations it would be impossible to set forth a concise description of the "magnitude of modifications being considered." County's Motion, at 10. The County complains:

To explain in numeric terms (i.e., "HOW MUCH") the degree to which a LOS standard may change requires explaining the standard itself in some detail and in many contexts, such as sub-area plans, for example, this simply cannot be done with the clear concision required by the Board's order . . .

. . . .

The notice standard imposed by the Board should not be so exacting that the legislative body is absolutely constrained to taking one action, such as changing a LOS standard from C to D, unless it publishes additional notices and hold additional hearings. If every single modification to a proposal must result in a new notice and hearing process, the already cumbersome legislative process will grind to a halt . . .

Id.

The County asks that the Board allow jurisdictions to explain "in general terms" the fundamental

policy shifts that are being considered, and provides an example for what public notice for change in transportation concurrency might look like:

“The County is considering lowering LOS standards for 164th Street SE. Under the Growth Management Act, a lowering of LOS standards for transportation facilities would allow the County approve more development than would be allowed under current LOS standards without significant road improvements.” County’s Motion, at 11.

The County argues that a notice such as this would ensure that fundamental policy shifts in LOS standards would be described upfront in a “clear and concise” manner while avoiding the “exacting detail” that it finds problematic. *Id.*

The Petitioner did not file a reply to the County’s Motion.

Conclusions regarding County’s Motion

The nature of the County’s Reconsideration Issue 2 is that of a request for clarification. The County is, in effect, seeking to have the Board clarify that a more general, rather than more specific, notice is appropriate and sufficient when fundamental policy changes are being considered. While the Board declines to craft a more detailed holding, it may provide some measure of the clarification requested to comment on several of the County’s arguments.

The County correctly points out that, ultimately, the legal standard against which any notices would be measured is found at RCW 36.70A.035(1), which provides in relevant part:

The public participation requirements of this chapter shall include notice procedures that are reasonably calculated to provide notice to property owners and other affected and interested individuals, tribes, government agencies, businesses, school districts, and organizations of proposed amendments to comprehensive plans and development regulation. Emphasis added.

Thus, the Board’s evaluation of a challenge to the adequacy of any notice, including those regarding LOS, will necessarily be a case-specific fact-based inquiry. By speaking in the FDO about the need to “clearly and concisely describe the nature or magnitude of modifications being considered” for changes in LOS, the Board was recognizing that this important subject matter tends to be both technical and quantitative. In order to be cognizable by the lay public, it is therefore necessary for a local government to make the notice as clear and concise as possible to assure that it is reasonably calculated to apprise the public of the nature and extent of the changes

proposed.

The County expressed a fear of “the implication that the summary of those [LOS] changes must contain essentially the same degree of detail as the ordinance itself.” County’s Motion, at 9. To clarify, the Board did not intend that the degree of detail of the notice mimic the actual ordinance. The “reasonable notice” standard of .035 presumes that the County will exercise some judgment about what the essential features of the Ordinance are that require summarization in the notice. The example provided by the County would meet the reasonably calculated standard because it alerts citizens to the nature of the change (a lowering of the standard) and the likely consequence (approval of more development than would otherwise be allowed). This would be more meaningful to the lay public than a technically precise phrase such as “the change in LOS will be from .076 V/C to .074 V/C.” However, to the extent that the changes contemplated in LOS can be expressed with commonly used terminology (e.g., a change from LOS “C” to LOS “D” it would be appropriate to include such information in the notice.

To the extent that Reconsideration Issue 2 of the County’s Motion asked for clarification, the Board **grants** that request with the foregoing clarification.

B. Petitioner’s Motion

Discussion

Position of Petitioner

The Petitioner raises three Reconsideration Issues in her Motion.

First, Petitioner argues that Board must review and rule on an issue that was listed in the PFR [Issue 4.b in the PFR]^[1], but not included in the PHO.^[2] Petitioner’s Motion, at 1-2. Petitioner argues:

The wording of Legal Issue (4b then 5) never changed through the PFR, the amendment of the PFR or the restatement of the legal issues. That it was omitted in the prehearing order was a Board error. That the error was not caught by the Petitioner was a Petitioner error . . . The Petitioner should not be penalized. The Board should honor this request for reconsideration and review the issue. Petitioner’s Motion, at 2.

Second, Petitioner argues that the Board is legally required to address her argument concerning the adequacy of the County’s transportation concurrency ordinance and that the FDO fails to do so. Petitioner’s Motion, at 3. Petitioner states:

The question before the Board, which the Board is legally required to address, is “Did the County fail to be guided by Goal 12 in adopting Ordinances 00-74 and 00-75?” Specifically, the Petitioner questioned whether the County’s claim that its regulatory mechanism (SCC 26B) which permits development to occur when the County knows that the road is well below the established minimum standard of service and has no funds to remedy the problem programmed for 6 years meet the requirements of Goal 12? *Id.*

Third, the Petitioner argues that the FDO leaves ambiguity about what facilities are required in a CFE. Petitioner’s Motion, at 4-8. Petitioner states:

It would be clearer if the Board stated that a CFE must include those public facilities needed to provide the services defined in RCW 36.70A.030(12), those public owned facilities needed to provide the services defined in RCW 36.70A.030(13) and those additional publicly owned facilities defined by the jurisdiction in its own comprehensive plan needed to accommodate growth into the community. Petitioner’s Motion, at 6.

In addition, Petitioner argues that, contrary to the holdings in the FDO, the County does not have standards for the facilities required by the Act. She argues:

The Board must take the next logical step in its ruling and in its remand order, insist that the County include clearly visible minimum standards for the facilities in the Capital Facilities Plan. *Id.*

Position of the County

The County responds to Petitioner’s Reconsideration Issue 1 by pointing to the Board’s Rules which state that “[t]he order shall control ensuing proceedings unless modified for good cause by a subsequent order” and the requirement that objections to the PHO should have been made within seven days of its issuance. WAC 242-02-558(10). The County argues that because the Petitioner filed no objection prior to her post-hearing motion, she has not demonstrated good cause for amending the PHO. Reply, at 2. In any case, the County argues that the Board substantively addressed the heart of PFR issue 4.b in its answer to Legal Issues 2 and 3. The County argues:

A comparison of the Prehearing Order with the Amended PFR shows that the Board’s statement of legal issues captures all of Petitioner’s allegations, albeit in a more consolidated fashion . . . The fact that the Board chose to divide the component parts

of Petitioners consistency challenge and group them into separate legal issues does not, contrary to Petitioner's characterization, constitute Board error. Reply, at 3.

In responding to Petitioner's Reconsideration Issue 2, the County argues that the FDO did address in a sufficient manner those portions of Petitioner's Goal 12 argument that have not been addressed in earlier litigation. The County states:

[T]he Board's discussion of Petitioner's goal 12 arguments address what the GMA legally requires it to address: whether the County's presumptively valid amendments to its CFE are clearly erroneous in view of the entire record before the Board. See RCW 36.70A.320. Nothing in the GMA requires the Board to engage in lengthy analysis of each and every argument raised in a brief. Reply, at 4.

In reply to Petitioner's Reconsideration Issue 3, the County disagrees that the FDO is unclear with respect to the requirements for facilities to be included in the CFE. It argues:

Petitioner's Motion restates her arguments concerning LOS standards . . . While the Board held that the County's public notices failed to sufficiently address changes in LOS standards, it clearly found that Petitioner had failed to demonstrate that the standards themselves were clearly erroneous. Reply, at 6.

Conclusions regarding Petitioner's Motion

With respect to the Petitioner's Motion, the Board concludes that the Petitioner has not presented clear evidence of an error of procedure or misinterpretation of fact or law. The Petitioner's Motion is therefore **denied**.

The Board notes that Petitioner has again raised Goal 12 and .070(6) challenges to a more recent County action in Case 01-3-0017 (*McVittie VIII*).^[3] While the Board does not here conclude that the County's previous actions (i.e., adoption of Ordinances 00-074 and 00-075) constituted clear error as to Goal 12 and .070(6), this frankly was not an easy conclusion for the Board to reach. It would be a mistake, therefore, to perceive that the Board has spoken conclusively and finally on the scope and breadth of the Act's Capital Facilities requirements, or to cite *McVittie VI* as binding precedent in *McVittie VIII*.

In view of the issues framed in *McVittie VIII*, the Board looks forward to an opportunity to clarify and amplify on the Act's CFE requirements after which it will then review the County's most recently challenged actions for fidelity to those requirements.

III. ORDER

After a review of the FDO, the above referenced pleadings, and the relevant provisions of the GMA and the Board's Rules, the Board enters the following Order:

1. Reconsideration Issue 1 set forth in the County's motion was granted by the Board in the Notice of Partial Reconsideration.
2. Reconsideration Issue 2 in the County's Motion is **granted** in part. To the extent that the County requested clarification regarding notice requirements for changes in LOS standards, the Board has provided it.
3. Petitioner's Reconsideration Issues 1 ,2 and 3 are **denied**. The Board hereby closes CPSGMHB Case No. 00-3-0002.

So ORDERED this 11th day of October 2001

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 by RCW 36.70A.300 unless a party files a motion for reconsideration.

[1] Legal Issue 4.b in the PFR read:

Is the amended Comprehensive Plan internally consistent as related to capital facilities required by RCW 36.70A.070(preamble), RCW 36.70A.070(3)? Amended PFR, at 2.

[2] The Legal Issues set forth in the PHO were:

- 1. Did the adoption by Snohomish County (the County) of Ordinances 00-74 and 00-75 fail to be guided by RCW 36.70A.020(1), (9), (11), and (12)?*
- 2. Did the County's adoption of Ordinances 00-74 and 00-75 fail to comply with the requirements of RCW 36.70A.035, .070(preamble), and .140 and fail to be guided by RCW 36.70A.020(11)?*
- 3. Did the County's adoption of Ordinances 00-74 and 00-75 fail to comply with the requirements of RCW 36.70A.070(3) and fail to be guided by RCW 36.70A.020(11) and (12)?*
- 4. Is the County's Transportation Improvement Program (TIP), adopted by motion 00-364, inconsistent with the transportation element of the comprehensive plan and does it thereby fail to comply with the requirements of RCW 36.70A.120 and RCW 36.70A.070(6)(a)(iv)(B)?*

[3] The Legal Issues in *McVittie VIII* are:

- 1. Did Snohomish County fail to be guided by and or fail to substantively comply with the requirements of RCW 36.70A.020(3) and (12) when it adopted Ordinance 01-040?*
- 2. Did the County comply with the requirements of RCW 36.70A.070(6)(a)(iii)(C), (D) when it adopted Ordinance 01-040?*
- 3. Did the County comply with the requirements of RCW 36.70A.070(6)(a)(iv)(A,B,C) when it adopted Ordinance 01-040?*
- 4. Did the County comply with the requirements of RCW 36.70A.070(6)(c) when it adopted Ordinance 01-040?*
- 5. Did the County fail to comply with the County-wide Planning Policies consistency requirements of RCW 36.70A.210 (CPP TR7, TR8) and the internal consistency requirements of .070 (preamble) and .070(6) (as applied to CF 1, language in the transportation section of the GPP, TR 5, TR 8, TR 9, Capital Facility Plan, Transportation Element) when it adopted Ordinance 01-040 amending the Transportation Element of the Comprehensive Plan?*
- 6. Did the County fail to comply with the public participation requirements of RCW 36.70A.020 (11), .035, .070 (preamble) and .140 when it adopted Ordinance 01-040?*