CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON

BENNETT, et al.,	)	
Petitioners,	)	**Consolidated Case No. 01-3-0022c**
v.	)	**FINAL DECISION AND ORDER**
CITY OF BELLEVUE,	)	
Respondent.	)	

I. BACKGROUND

On September 25, 2001, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for Review (**PFR**) from Renay Bennett, Jan Benson and Fiscal Accountability Involving Residents (**FAIR**). These petitioners are referred to collectively as **Bennett**. The matter was assigned Case No. 01-3-0021 and captioned ***Bennett v. Bellevue.*** Bennett alleged that City of Bellevue (**Bellevue** or the **City**) Ordinance No. 5308 failed to be guided by the goals of the Growth Management Act (**GMA** or the **Act**) and does not comply with certain GMA requirements. Bennett also asked that Board enter a finding of invalidity with respect to Ordinance No. 5308. Bennett PFR, at 3.

On September 27, 2001, the Board received a PFR from the East Bellevue Community Municipal Corporation (**EBCMC**). The matter was assigned Case No. 01-3-0022 and captioned ***EBCMC v. City of Bellevue***. The EBCMC PFR also challenged Bellevue Ordinance No. 5308, alleging that the City failed to comply with certain requirements of the GMA and the State Environmental Policy Act (**SEPA**). The EBCMC PFR also alleged that the City's actions did not comply with certain provisions of WAC 365-195 (Procedural Criteria) and WAC 197-11 (the SEPA Rules). In addition to a finding of noncompliance with both the GMA and SEPA, EBCMC requested that the Board require the City to repeal Ordinance 5308. EBCMC PFR, at 10.

On November 9, 2001, the Board issued an "Order of Consolidation and Prehearing Order" (the **Consolidation and Prehearing Order or PHO**). The PHO consolidated the Bennett and EBCMC cases into a single consolidated case numbered 01-3-0022c and captioned *Bennett, et al., v. City of Bellevue*, and set forth the legal issues and schedule.

On December 3, 2001, the Board received from the City a "Motion to Continue Date for Filing Motions in East Bellevue Community Municipal Corporation v. Bellevue" (the **Motion for Continuance**) together with the "Declaration of Elaine L. Spencer in Support of Motion to Continue" (the **First Declaration of Elaine L. Spencer**).

On December 4, 2001, the Board received "EBCMC's Response to City's Motion to Continue Date for Filing Motions" together with the "Declaration of Carol A. Morris in Support of EBCMC's Response to Motion for Continuance" (the **Declaration of Carol Morris**).

On December 10, 2001, the Board received a letter dated December 7, 2001 from counsel for EBCMC regarding the outcome of a proceeding before Judge Richard Eadie in King County Superior Court on December 7, 2001. Also on December 10, 2001, the Board received from the City a "Motion to Dismiss Case No. 01-3-0022" (the **City's Motion to Dismiss**) together with the "Declaration of Elaine L. Spencer in Support of Motion to Dismiss Case No. 01-3-0022" (the **Second Declaration of Elaine L. Spencer**). The City's Dispositive Motion and the Second Declaration of Elaine L. Spencer were transmitted by a cover letter from counsel for the City requesting permission to file the motion pursuant to WAC 242-02-532.

On December 14, 2001, the Board issued an "Order Granting Leave to File Dispositive Motion and Amending Final Schedule" which authorized the late filing of the City's Dispositive Motion and set a schedule for EBCMC to file a Response to the City's Dispositive Motion and the City to Reply to the EBCMC Response.

On December 24, 2001, the Board received "East Bellevue Community Municipal Corporation's Response to City's Motion to Dismiss" (the **EBCMC's Response**) together with Exhibits A through E.

On December 31, 2001, the Board received the "Reply of the City of Bellevue" (the **City's Reply**) together with Exhibits A through D.

On January 7, 2002, the Board issued "Order on City's Dispositive Motion" which denied the City's Motion to Dismiss.

On January 22, 2002, the Board received "Opening Brief of Petitioners Renay Bennett and Jan Benson" (the **Bennett PHB**).

On January 24, 2002, the Board received "Petitioner East Bellevue Community Municipal Corporation's Opening Brief" (the **EBCMC PHB**).

On February 5, 2002, the Board received "Response of the City of Bellevue" (the **City PHB**).

On February 11, 2002, the Board received "Reply Brief of Petitioners Renay Bennett and Jan Benson**"** (the **Bennett Reply**.)

On February 12, 2002, the Board received "Petitioner East Bellevue Community Municipal Corporation's Reply Brief" (the **EBCMC Reply**).

The Board conducted the hearing on the merits beginning at 10:00 a.m. on February 21, 2002 in Suite 1022 of the Financial Center, 1215 Fourth Avenue, Seattle, WA. Present for the Board were members Edward G. McGuire, Lois H. North and Joseph W. Tovar, presiding officer. Also present were the Board's legal interns Heather Cowdery and Gary Watkins. Representing Bennett was J. Richard Aramburu, representing EBCMC was Carol Morris and representing the City was Elaine L. Spencer. Court reporting services were provided by Scott Kindle of Mills and Lessard in Seattle. No witnesses testified. Following the hearing, the preparation of a Transcript (***Transcript***) was ordered.

On February 25, 2002, the Board received from the City a copy of an additional segment of the record, coming from Index No. 5, pages 536 to 548.

II. FINDINGS OF FACT

1. The City of Bellevue adopted its GMA comprehensive plan on December 6, 1993, including a Transportation Element. Ex. 33.

2. The Transportation Element establishes fourteen "Mobility Management Areas" (MMAs) in the city, including East Bellevue. Table TR.1 lists the "Roadway Average Level of Service" for East Bellevue (Area 9) as "D+." Ex. 33, page 2145.

3. Table TR.1 references Transportation Element Policy TR-20 which provides:

> Implement the level of service standards and other mobility targets for major transportation modes within each Mobility Management Area, as shown in Table TR.1, recognizing each area's needs as well as its relationship with other areas. Monitor the adopted mobility targets and adjust programs and resources as necessary to achieve scheduled progress on all modes.
>
> Ex. 33, page 2130.

4. The City of Bellevue's Traffic Standards Code (**TSC**) is found in Bellevue City Code Chapter 14.10. Ex. 20.

5. Bellevue Ordinance 5081, adopted in 1998, set forth a "Level-of-service standard[s]" for the East Bellevue Mobility Management Area, expressed as a Volume/Capacity ratio of "0.850." Ex. 20, page 1802.

6. Section 3(I) of Ordinance 5081 provided:

> Exemptions. The portion of any project used for any of the following purposes is exempt from the requirements of this chapter:
>
> 1. Child care facility for children, as defined in Land Use Code 20.50.014, if not operated for profit;
> 2. Public transportation facilities;
> 3. Public parks and recreation facilities;
> 4. Privately operated not-for-profit social service facilities recognized by the Internal Revenue Service under Internal Revenue Code Section 501(c)(3);
> 5. Affordable housing, which is defined as housing which is affordable to persons whose income is below 80 percent of the median income for persons residing in the Seattle Metropolitan Statistical Area;
> 6. Public libraries;
> 7. Publicly-funded educational institutions;
> 8. Hospitals, as defined in Bellevue City Code (Land Use Code) 20.50.024 if not operated for profit.
>
> Notwithstanding the exemptions hereunder provided, the traffic resulting from an exempt use shall nonetheless be included in computing background traffic for any nonexempt project.

Ex. 20, page 1801.

7. The Bellevue City Council adopted Ordinance No. 5308 on July 30, 2001, amending the Traffic Standards Code. The title block of Ordinance No. 5308 reads:

> AN ORDINANCE relating to the Traffic Standards code (TSC) and amending Section 2 (part) of Ordinance No. 4823 and Section 14.10.020I of the Bellevue City Code; creating an additional exemption from the TSC for Neighborhood Shopping Centers which meet specific criteria.

Id.

8. One of the Whereas clauses of Ordinance No. 5308 summarizes the rationale for the City's action as follows:

> WHEREAS, inclusion of a narrowly tailored exemption to the TSC is appropriate for

> neighborhood shopping center redevelopment projects that will create a net community benefit, including not only reducing the numbers and lengths of shopping trips from neighborhoods, but also preventing deterioration of neighborhood shopping centers which would eventually become a blight on the surrounding neighborhood;

Id.

9. Section 1 of Ordinance No. 5308 amended the Exemptions section of 14.10.020(I) as follows:

> Exemptions: The portion of any project used for any of the following purposes is exempt from the requirements of this chapter: . . .
>
> 9. Neighborhood Shopping Center Redevelopment Projects, defined as a project located in a Commercial Business (CB) or Neighborhood Business (NB) land use district surrounded by Residential land use districts on a site not greater than eight (8) acres in size that is proposed to accommodate a total Floor Area Ratio (FAR) not to exceed 0.6 and a mix of NB and CB uses. This exemption applies only to those uses that are included as a component of a Neighborhood Shopping Center Redevelopment Project and are permitted outright in the NB land use district.

10. The City issued a Determination of Non-significance (DNS) for Ordinance 5308 and published notice of the DNS. Ex. 43, page 3714, Ex. 44, page 4199.

11. The date noted for the appeal of the DNS was June 21, 2001. Ex. 43, page 3715, Ex. 44, page 4200.

12. The Lake Hills Shopping Center is located within Mobility Management Area (MMA) 9. Ex. 4, page 245.

13. A May 16, 2001, City staff report recommending approval of the Lake Hill Shopping Center Rezone describes the operation of the City's Traffic Standards Code with respect to the proposed redevelopment. It states:

> Because the level of traffic in MMA 9 exceeds the 1-hour standard due to increasing volume, future additional development of this site may not be permitted even with the proposed modification of the concomitant agreement. For that reason, a related, but separate process is being initiated by the City to amend the Traffic Standards Code (TSC). The amendment would exempt traffic from being counted when determining the applicability of the city's concurrency standards if generated by specified neighborhood-serving uses located in neighborhood shopping centers.

Id.

III. STANDARD OF REVIEW/BURDEN OF PROOF

Pursuant to RCW 36.70A.320, comprehensive plans and development regulations, and amendments thereto, adopted pursuant to the Act, are **presumed valid** upon adoption. The **burden is on the Petitioner** to demonstrate that any action taken by the respondent jurisdiction is not in compliance with the Act.

The Board "shall find compliance with the Act, unless it determines that the [City's] action[s are] **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 actions 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).

Pursuant to RCW 36.70A.3201 the Board will grant deference to Bellevue in how it plans for growth, consistent with the goals and requirements of the GMA. However, as our State Supreme Court has stated, "Local discretion is bounded, however, by the goals and requirements of the GMA." *King County v. Central Puget Sound Growth Management Hearing Board*, 142 Wn.2d 543, 561 (2000) (***King County***). Further, Division II of the Court of Appeals has stated, "Consistent with *King County*, and notwithstanding the 'deference' language of RCW 36.70A.3201, the Board acts properly when it foregoes deference to a . . . plan that is not 'consistent with the requirements and goals of the GMA." *Cooper Point Association v. Thurston County*, No. 26425-1-II (Court of Appeals, Div. II, September 14, 2001), 108 Wn. App. 429 (2001).

IV. LEGAL ISSUES

A. PREFATORY NOTE

As this Board has never before addressed the question of exemptions from the GMA's concurrency provisions, this is a case of first impression. Legal Issues 1, 2 and 4 contain the substantive heart of the petitioners' allegations regarding the City's noncompliance with the Act's concurrency provisions. Therefore, the Board will group together review of these issues, including the parties' arguments and the Board's analysis and conclusions. The Board will similarly group its review of the issues that allege noncompliance with the Procedural Criteria (Legal Issues 6, 7, 8 and 9) and the issues that deal with SEPA (Legal Issues 10, 11, 12, 13, 14 and 15). Finally, the Board addresses the remaining legal issues (Legal Issues 3 and 5).

The PHO identified which of the petitioners were authorized to address which issues. These are shown in brackets following the issue statements below.

B. CONCURRENCY ISSUES

Legal Issue No. 1 ***Does Ordinance No. 5308 fail to comply with the requirements of RCW 36.70A.020(12)?*** [EBCMC AND BENNETT]

Legal Issue No. 2 ***Does Ordinance No. 5308 fail to comply with the requirements of RCW 36.70A.070(6)(b)?*** [EBCMC AND BENNETT]

Legal Issue No. 4 ***Does Ordinance No. 5308 fail to comply with the requirement of RCW 36.70A.070(6)(a)(iii)(B)?*** [BENNETT ONLY]

1. Applicable Law

RCW 36.70A.020(12) provides:

> Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

RCW 36.70A.070(6)(a)(iii) provides that a transportation element must include as a subelement "Facilities and services needs," which include:

> (B) Level of service standards for all locally owned arterials and transit routes to serve as a gauge to judge performance of the system. These standards should be regionally coordinated;

RCW 36.70A.070(6)(b) provides:

> After adoption of the comprehensive plan by jurisdictions required to plan or who choose to plan under RCW 36.70A.040, local jurisdictions must adopt and enforce ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development. These strategies may include increased public transportation service, ride sharing programs, demand

management, and other transportation systems management strategies. For the purposes of this subsection (6) "concurrent with the development" shall mean that improvements or strategies are in place at the time of development, or that a financial commitment is in place to complete the improvements or strategies within six years.

2. Discussion

a. Positions of the Parties

Petitioner Bennett argues that the City violated the prohibition requirement of RCW 36.70A.070 (6)(b) and failed to comply with the concurrency goal of RCW 36.70A.020(12) simply by adopting the exemption for neighborhood shopping centers, "no matter what amount of traffic is generated by these [shopping-center] projects, nor how much it will cause levels of service to be exceeded." Bennett PHB, at 7. Bennett notes that the amendment does not provide for traffic-reducing measures to mitigate project impacts on concurrency, creating a "blatant violation" of the City's obligation to limit development "until public facilities are in place." *Id*., at 9.

Petitioner EBCMC echoes this claim of non-compliance with the concurrency requirement by asserting that nothing in RCW 36.70A.070(6)(b) allows a city to exempt any development from its concurrency regulations, "with the arguable exception of those developments that are not associated with traffic impacts." EBCMC PHB, at 13.

Bennett also takes issue with the documented fact that the City initiated the amendment of the Traffic Standards Code specifically because it favored a project proposal that would violate the concurrency requirements of the Code then in place. Bennett PHB, at 7-9. This particular exemption, Bennett argues, creates a dichotomy of "haves" and "have-nots" among potential developers. *Id*., at 10. Developers whose projects fit the exemption criteria qualify for approval by the City and may have 'safe harbor' from traffic concurrency requirements; however, if they wish to develop in areas where the exemption does not apply, their traffic is counted and their projects are likely to be denied. *Id.*

Looking to the DCTED Regulations[1], EBCMC notes that the "administrative regulations implementing GMA acknowledge that local governments may design a concurrency system in a variety of ways, but none of the suggested approaches to concurrency include exemptions of any type." EBCMC PHB, at 11. Citing WAC 365-195-220, EBCMC denies that the City has discretion to exempt certain kinds of development based on its determination of "overall public benefit." *Id*., at 12.

Even if such an exemption could stand, EBCMC argues that an exemption for private commercial developments is inconsistent with the City's existing "public benefit" exemptions. *Id*. EBCMC

argues further that the Ordinance No. 5308 exemption is overbroad, exempting particular uses not tied to any particular site. *Id*., at 13. Because the exemption is not even limited to redevelopment of existing shopping centers, EBCMC asserts, new private developments might be able to take advantage of the exemption even if they provide no "public benefit." *Id*.

Both Petitioners cite to Western Washington Growth Management Hearings Board (the **Western Board**) cases giving negative treatment to concurrency-related exemptions, particularly *Progress Clark County v. Vancouver*, WWGMHB No. 99-2-0038c, FDO. *See*, EBCMC PHB, at 13-14; Bennett PHB, at 11-12.

Respondent Bellevue rejects Petitioners arguments at length. The City's overarching argument is that in order to fulfill a central GMA principle of growth accommodation, it must have discretion to adopt the concurrency exemption at bar. The City argues:

> The central principle of the Growth Management Act is the requirement that growth should be concentrated in cities. If the GMA's growth-concentrating goals are to be met in the Central Puget Sound region, they must be met in Bellevue, the fifth largest city in the state, and at the fulcrum of the "Eastside" region [i.e., east King County] that has mushroomed over the last 25 years.

City PHB, at 1-2.

The City complains that the Board's acceptance of Petitioners' interpretation of .070(6)(b) would require a complete prohibition of development that will cause LOS to decline, and thereby impermissibly "amend" the GMA's statutory text to require that local jurisdictions "adopt and enforce ordinances which prohibit <u>all</u> development approval if the development causes the level of service…to decline." City PHB, at 13.

Thus, the City argues, while Ordinance No. 5308 complies with the statutory requirement that the city "adopt and enforce ordinances which prohibit development approval…," the Petitioners ask the Board to find that the *terms* of Ordinance No. 5308 (specifically, its exemptions) violate a requirement of *absolute* prohibition that the legislature has not included in the statutory text. City PHB, at 13.

Bellevue notes that other "Eastside" municipalities have concurrency exemptions in their development regulations. City PHB, at 13. In particular, the City looks to Redmond's exemptions, similar to Bellevue's, for facilities such as schools that are "essential to the health of the community." *Id*., at 14. Construing RCW 36.70A.070(6)(b) to require strict concurrency, the City argues, will have serious negative consequences. The City alleges that:

> [T]o require denial of all development will clearly affect those four Eastside jurisdictions, and will limit the ability of Redmond and Kirkland, as well as Bellevue, to build important community infrastructure.

The City contends that the legislature must have intended to allow some exemptions, particularly for essential public facilities, and the use of exemptions is a matter of the local jurisdictions' discretion, as guided by the GMA. *See Id*. The City argues that its own exemptions reflect a proper balancing of GMA goals. *Id*.

In the alternative, Bellevue argues that even if .070(6)(b) should be read as requiring complete prohibition of non-concurrent development, the exemption for neighborhood shopping centers does not violate that requirement. City PHB, at 15-16. Rather than allowing development that will cause actual decline in the level of service, the City asserts that the shopping-center exemption corrects for inadequacies in the Bellevue traffic model, which cannot account for the unique traffic patterns generated by such projects. *Id*., at 15-17.

Finally, the City also argues that the Western Board cases cited for support by Petitioners are inapposite and would not be binding precedent anyway. City PHB, at 17, 19. In any case, the City argues, even if *Progress Clark County* were read (incorrectly) as a blanket ruling that exemptions are not allowed in concurrency ordinances, such a ruling could not attain in the Central Puget Sound region. *Id*., at 20. The City contends that "Progress on [other GMA] goals cannot be allowed to come to a halt because a jurisdiction cannot conquer regional traffic woes." *Id*.

b. Analysis

The Board's analysis begins with a brief recap of two significant holdings from previous cases bearing on the GMA's concurrency provisions. In its first case addressing the subject, the Board held that a local government may adopt and amend levels-of-service to allow greater levels of congestion. The Board stated:

> Establishing level of service (LOS) methodology for arterials and transit routes, like calibrating a thermometer, is simply an objective way to measure traffic. That is all the Act requires establishing; it does not dictate what is too congested. Under the GMA, *setting the desired level of service standard is a policy decision left to the discretion of local elected officials*.

West Seattle Defense Fund, v. City of Seattle, [***West Seattle***] *CPSGMHB Case No. 94-3-0016, Final Decision and Order, April 4, 1995, at 60.* Emphasis added.

In a more recent case, the Board examined the interplay between the Act's concurrency requirements and its concurrency goal, and held:

> While Board review of a challenge to RCW 36.70A.070(3) or (6) focuses on the specific requirements of the section, the Board's review must be done in light of Goal 12, not in lieu of Goal 12.

McVittie v. Snohomish County, [*McVittie*] CPSGMHB Case No. 99-3-0016c, Final Decision and Order, February 7, 2000, at 22.

The Board's review of the arguments presented in Legal Issues 1, 2 and 4 takes place against the backdrop of these precedents. For example, the parties cited to *West Seattle* for several propositions. Significantly, this is not a case that addresses setting or amending level of service standards. Bellevue previously adopted such standards. *See*: Finding of Fact 2. Therefore, the Board must find that the City has complied with RCW 36.70A.070(6)(a)(iii) and dismiss Legal Issue No. 4.

Turning to Legal Issues 1 and 2, the Board begins with the City's stated intent as reflected in the "whereas" clauses of the challenged ordinance. Here, the City clearly states its policy objective: to hasten a hoped-for increase in the likelihood of neighborhood shopping center revitalization and the long term maintenance of surrounding residential areas by accepting as a tradeoff a greater degree of traffic congestion in the vicinity. *See*: Finding of Fact 8. Notably, the arguments advanced by Petitioners focus not just on the merits of this *policy objective* but on the *mechanism* chosen by the City to effectuate that choice (*i.e.*, the creation of an exemption to the TSC concurrency requirements). This is a significant distinction, one that ultimately is fatal to the GMA compliance of Ordinance 5308.

In focusing on Legal Issues 1 and 2, the Board finds it is significant that Bellevue was aware of its option, as described in *West Seattle*, to amend its Plan to adjust the level of service standard for East Bellevue, but specifically chose not to do so. Transcript, at 49. Instead, without revision to previously-adopted LOS for East Bellevue set forth in the Plan and again in the TSC (*See*: Finding of Fact 5), the City simply exempted from its locally-adopted concurrency requirements what can only be described as a potentially very considerable amount of commercial development.

Much of the City's argument ostensibly rests on two growth management principles set forth in the Act and in Board precedent – first, that in order to protect the rural area from sprawl, growth must be directed to urban areas; second, that local governments have broad discretion to balance the Act's goals in making policy choices. It is true that cities have an important GMA duty to

accommodate growth and, in previously urbanized areas, this will often take the form of redevelopment or revitalization. *See*: *Hensley v. Woodinville; See also*: *Benaroya v. Redmond*. [2] Bellevue correctly points out that the Act creates many duties with which local governments must comply, and some of these duties will be in tension if not outright conflict.

The City justifies Ordinance 5308 as the City's attempt to reconcile a conflict between the Act's anti-sprawl goals (RCW 36.70A.020(1) and (2) and its concurrency goal (RCW 36.70A.020 (12)). However, this is an incomplete and inaccurate characterization. The actual conflict here is between Bellevue's preferred *mechanism* to achieve its redevelopment objective and the Act's concurrency requirements. In crafting development regulations, local governments may choose to give greater weight to one GMA goal than to another GMA goal. However, such a local goal preference does not remove the duty to comply with a specific and unequivocal GMA requirement. Furthermore, conflicts, if any, between a general GMA goal and a specific GMA requirement must be resolved in favor of the latter. *See generally*: *Green Valley v. King County*, CPSGMHB Case No. 98-3-0008c, Final Decision and Order, July 29, 1998.

Petitioners correctly point out that the Act makes no mention of "exemptions" from the requirement that a local ordinance, such as Bellevue's TSC, "*prohibit* development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan . . ." RCW 36.7A.070(6)(b).[3] Emphasis added. Petitioner Bennett complains that if such exemptions are permitted by the GMA, then nothing bars a local government from exempting other facilities, private or public, from the Act's concurrency requirements. Transcript, at 84. This is a troubling prospect.

The Board declines the City's invitation to construe the GMA in a manner that, as a matter of law, would give broad license to local governments to craft exemptions from the Act's concurrency requirements. The GMA's concurrency requirements represent a challenge to local governments, to be sure, however an important one that must be grappled with rather than "exempted" away. The importance of the GMA's concurrency provisions were underscored by a recent Court of Appeals decision which commented on RCW 36.70A.070(6)(b):

> The Growth Management Act . . . *requires* that the City prohibit development that causes a decline in level of service standards. An action-forcing ordinance of this type is known as a concurrency ordinance because its purpose is to ***assure*** *that development permits are denied* unless there is concurrent provision for transportation impacts . . . *Montlake Community Club v. Central Puget Sound Growth Management Hearings Board*, Slip Opinion Docket No. 46708-5-I, Court of

Appeals, Div. I, April 1, 2002. Emphasis added.

The Board understands and respects the City's desire to facilitate redevelopment – however, it may not do so by carving out concurrency exemptions for the very kind of "development" permits that a concurrency ordinance must "assure" will be denied.[4] Without regard to the merits of the City's policy objective, or other exemptions in Bellevue or elsewhere,[5] the exemption adopted by Bellevue in Ordinance No. 5308 clearly violates the mandate of RCW 36.70A.070(6)(b). The argument that the challenged exemption is essential to achieve overall GMA compliance is particularly unpersuasive where, as here, there are other GMA-compliant avenues available to achieve the expressed policy objective.[6] For the Board to agree that a city can exempt from concurrency requirements commercial (re)development of the nature and order of magnitude described in this record, would eviscerate the concurrency requirement of the Act. This, the Board will not do. Ordinance No. 5308 fails to be guided by RCW 36.70A.020(12) and fails to comply with the requirements of RCW 36.70A.070(6)(b).

3. Conclusions re: Legal Issues 1, 2 and 4

The Board concludes that the City has met its duty under RCW 36.70A.070(6)(a)(iii) to adopt "level of service standards for all locally owned arterials and transit routes to serve as a gauge to judge performance of the system." The standards exist in the Plan and the TSC and were not amended by Ordinance No. 5308. The Board concludes that the ordinance does not fail to comply with the requirements of RCW 36.70A.070(6)(a)(iii) and **dismisses** Legal Issue No. 4.

The Board concludes that, with respect to Legal Issues Nos. 1 and 2, the Petitioners have carried their burden of showing that the City's adoption of Ordinance 5308 **failed to be guided by** RCW 36.70A.020(12) and **failed to comply** with the requirements of RCW 36.70A.070(6)(b). The Board concludes therefore that Bellevue's action was **clearly erroneous**, and will remand Ordinance No. 5308 to the City for repeal.

C. ISSUES RE: NONCOMPLIANCE WITH PROCEDURAL CRITERIA

Legal issues Nos. 6, 7, 8 and 9[7] presented by Petitioner EBCMC allege that Ordinance No. 5308 is inconsistent with certain provisions of the Procedural Criteria promulgated by the Office of Community Development. WAC 365-195. The Board is directed to consider these WACs when considering issues presented in a Petition for Review. RCW 36.70A.320(3).[8]

To the extent that arguments presented by EBCMC regarding Legal Issues 6, 7, 8 and 9 buttress

or clarify arguments presented by EBCMC as to Legal Issues 1, 2, 3, 4 or 5, the Board has given appropriate consideration to these WAC provisions. However, as framed, these four issues presume that the City also has an independent duty to be consistent with the cited WACs. This is incorrect. The Board has previously stated:

> While the Board is required to consider the criteria and standards adopted by [the Office of Community Development, formerly CTED], in prior cases, this Board has determined that the Procedural Criteria of Chapter 365-195 WAC are advisory only and that the GMA imposes no duty that local governments comply with the recommendations set forth in those guidelines.

Master Builders Association v. Snohomish County, CPSGMHB Case No. 01-3-0016, Final Decision and Order, at 7.

Therefore, to the extent that EBCMC asserts that Ordinance No. 5308 is *inconsistent* with provisions of WAC 365-195, the Board affirms its holding in *Master Builders*, and **dismisses** Legal Issues 6, 7, 8 and 9.

D. SEPA LEGAL ISSUES

Legal Issue No. 10 ***Is Ordinance No. 5308 inconsistent with WAC 197-11-060 (re: Content of Environmental Review)?***

Legal Issue No. 11 ***Is Ordinance No. 5308 inconsistent with WAC 197-11-070 (re: Limitation on actions during SEPA process)?***

Legal Issue No. 12 ***Is Ordinance No. 5308 inconsistent with WAC 197-11-080 (re: incomplete or unavailable information)?***

Legal Issue No. 13 ***Is Ordinance No. 5308 inconsistent with WAC 197-11-210 (re: SEPA/ GMA integration)?***

Legal Issue No. 14 ***Is Ordinance No. 5308 inconsistent with WAC 197-11-228 (re: Overall SEPA/GMA Integration procedures)?***

Legal Issue No. 15 ***Is Ordinance No. 5308 inconsistent with WAC 197-11-330 (re: Threshold determination process)?***

1. Discussion

a. Positions of the Parties

The City argues that the Board should dismiss all the SEPA issues raised by EBCMC for the simple reason that EBCMC has failed to exhaust its administrative remedies. Bellevue argues:

> Bellevue City Code Sec. 22,02.034 provides that "[a] threshold determination is a Process II decision governed by the procedures set out at LUC 20.35.200 et seq." Bellevue City Code Sec. 20.35.250 provides that a determination of nonsignificance may be appealed to the Bellevue Hearing Examiner. If the EBCMC wished to appeal the determination of nonsignificance, it was required to file an appeal to the Hearing Examiner. Having failed to do so, the SEPA issues raised here must be dismissed.

City PHB, at 27.

In reply, EBCMC argues that the SEPA claims are not subject to exhaustion because the City cannot demonstrate even a *prima facie* attempt to comply with SEPA. EBCMC Reply, at 14. Petitioner argues:

> The City believes it can ignore SEPA, and if no one appeals its SEPA determination, it can never be challenged again. This is not true. "The record of a government agency's negative threshold determination must demonstrate that environmental factors were considered in a manner sufficient to amount to a prima facie compliance with the procedural requirements of SEPA." *Gardner v. Pierce County Board of Commissioners*, 27 Wn. App. 241, 617 P.2d 743 (1980). SEPA requires "actual consideration" of environmental factors, not total avoidance to benefit a particular developer.

Id.

In rebuttal, the City states:

> [T]he city code provides an administrative appeal to the Hearing Examiner of a determination of nonsignificance. The only two exceptions, one is an amendment to the comprehensive plan, the other the amendment to the Land Use Codes. The Traffic Standards Code is separate and it was clearly something that could be appealed to the Hearing Examiner . . . [T]he cite to [*Gardner*] was nobody did anything, it was nothing. Here, there was a SEPA checklist which was completed, it was reviewed by the city's responsible official, who issued a determination of nonsignificance which was published with the notice that an appeal was possible. That is absolutely a *prima facie* showing of compliance with SEPA.

Transcript, at 67-68

b. Analysis

This Board has followed the direction of the courts and has consistently required petitioners to exhaust a local jurisdiction's administrative SEPA appeal process before seeking SEPA review before the Board. *See Association of Rural Residents v. Kitsap County*, CPSGMHB Case No. 93-3-0010, Order Granting Dispositive Motions (Feb. 16, 1994); *West Seattle Defense Fund v. City of Seattle*, CPSGMHB Case No. 94-3-0016, Order Granting Seattle's Motion to Dismiss SEPA Claim (Dec. 30, 1994); *Benaroya v. City of Redmond*, CPSGMHB Case No. 95-3-0072, Order on Redmond's Dispositive Motions and Benaroya's Motion to Intervene as a Party (Jan. 9, 1996);. *Tulalip Tribes v. Snohomish County* [*Tulalip II*], CPSGMHB Case No. 93-3-0013, Final Decision and Order, Jan. 31, 2000, at 5-6.

The record shows no evidence that EBCMC availed itself of the opportunity to raise these issues through Bellevue's administrative appeal process. The Board agrees with the City that the facts here can be distinguished from the *Gardner* case. The City did prepare a checklist, the Responsible Official did issue a DNS, and notice of the DNS was published, which alerted interested parties of the opportunity to file an appeal. If the EBCMC had wished to appeal the DNS, it was free to do so. It did not. Therefore, the Board finds that EBCMC has failed to exhaust its administrative remedies and its SEPA claims must therefore be dismissed.

2. Conclusions re: Legal Issues 10, 11, 12, 13, 14 and 15

The Board concludes that EBCMC has failed to exhaust its administrative remedies under SEPA and therefore **dismisses** Legal Issues 10, 11, 12, 13, 14, and 15.

E. OTHER LEGAL ISSUES

Legal Issue No. 3 ***Does Ordinance No. 5308 fail to comply with the requirements of RCW 36.70A.100?*** [BENNETT ONLY]

Petitioner Bennett did not address this issue in its prehearing brief and agrees that it has been abandoned. Transcript, at 7.

Legal Issue No. 5 ***Assuming that exemptions to transportation levels of service are permissible, must such exemptions be adopted as part of the transportation level of service required by RCW 36.70A.070(6)(a)(iii) in the transportation element of the comprehensive***

plan? [BENNETT ONLY]

The only exemption explicitly authorized by Ordinance No. 5308 was paragraph 9 addressing "Neighborhood Shopping Center Redevelopment Projects." The Board has analyzed this specific exemption, *supra*, and concluded that it does not comply with the goals and requirements of the Act. As a result, the premise stated in the first clause to Legal Issue No. 5 is faulty and the Board therefore need not and will not reach the question of whether exemptions must be adopted as part of a transportation level of service in the transportation element of the comprehensive plan.

V. INVALIDITY

1. Applicable Law

RCW 36.70A.302 provides in relevant part:

> (1) A board may determine that part or all of a comprehensive plan or development regulations are invalid if the board:
> (a) Makes a finding of noncompliance and issues an order of remand under RCW 36.70A.300;
> (b) Includes in the final order a determination, supported by findings of fact and conclusions of law, that the continued validity of part or parts of the plan or regulation would substantially interfere with the fulfillment of the goals of this chapter; and
> (c) Specifies in the final order the particular part or parts of the plan or regulation that are determined to be invalid, and the reasons for their invalidity.

RCW 36.70A.020(12) provides:

> Public facilities and services. Ensure that those public facilities and services necessary to support development shall be adequate to serve the development at the time the development is available for occupancy and use without decreasing current service levels below locally established minimum standards.

2. Discussion

The Board concluded, *supra*, that the Petitioners have carried the burden of proof of showing that Bellevue Ordinance No. 5308 does not comply with the requirements of RCW 36.70A.070(6)(b)

and failed to be guided by RCW 36.70A.020(12). The Board has remanded the Ordinance for the City to repeal it.

Further, the Board finds that the continued validity of the Ordinance would allow additional vesting of permits to an inappropriate land use regulation, *i.e.*, the exemption of commercial redevelopment from the Act's concurrency requirements. Such inappropriate vesting would substantially interfere with the fulfillment of RCW 36.70A.020(12).

3. Conclusions re: Invalidity

The Board has found Bellevue's adoption of Ordinance No. 5308 is **noncompliant** with RCW 36.70A.070(6)(b). The Board concludes that to permit vesting to occur under the Ordinance would substantially interfere with the fulfillment of goal 12. Therefore, **the Board enters a determination of invalidity** for Ordinance No. 5308.

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VI. 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. Bellevue's adoption of Ordinance No. 5308 **does not comply** with the requirements of RCW 36.70A.070(6)(b) and **was not guided by** RCW 36.70A.020(12); the City's action was **clearly erroneous.** Furthermore, because the continued validity of Ordinance No. 5308 would substantially interfere with the fulfillment of RCW 36.70A.020(12), the Board enters a **determination of invalidity** for Ordinance No. 5308.
2. The Board establishes **4:00 p.m.** on **Wednesday, June 19, 2002** as the deadline for the City of Bellevue to **repeal** Ordinance 5308.
3. By **Monday, July 1, 2002**, at **4:00 p.m**., the City shall submit to the Board, with a copy to the other parties, an original and four copies of its Statement of Actions Taken to Comply (the **SATC**). Attached to the SATC shall be a copy of any legislative action taken in response to this Order.
4. By **Monday, July 8, 2002**, at **4:00 p.m.**, Petitioners Bennett and EBCMC shall submit to the Board, with a copy to the City, an original and four copies of any Response to the SATC.
5. By **Friday, July 12, at noon**, the City shall submit to the Board, with a copy to the other parties, an original and four copies of any Reply to the Responses to the SATC.
6. The Board schedules a **Compliance Hearing** in this matter for **10:00 a.m.** on **Monday, July 15, 2002**. The Compliance Hearing will be held in Suite 1022 of the Financial Center, 1215 Fourth Avenue, in Seattle.

So ORDERED this 8th day of April 2002.

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.

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[1] The administrative rules adopted by the DCTED in WAC 365-195 are also referred to as "Procedural Criteria."

[2] In two earlier cases involving "Eastside" jurisdictions, the Board described the duties cities face to accommodate growth and change. In a case involving the City of Woodinville, the Board held:

> [T]he Act creates an affirmative duty for cities to accommodate the growth that is allocated to them by the county. This duty means that a city's comprehensive plan must include: (1) a future land use map that designates sufficient land use densities and intensities to accommodate any population and/or employment that is allocated; and (2) a capital facilities element that ensures that, over the twenty-year life of the plan, needed public facilities and services will be available and provided throughout the jurisdiction's UGA. *Hensley v. City of Woodinville* ***[Hensley]***, CPSGMHB Case No. 96-3-0031, FDO, February 25, 1997, at 9. Footnote omitted.

In a case involving the City of Redmond, the Board held:

> The GMA requirement to "ensure neighborhood vitality and character" is neither a mandate, nor an excuse, to freeze neighborhood densities at their pre-GMA levels. The Act clearly contemplates that infill development and increased residential densities are desirable in areas where service capacity already exists, i.e., in urban areas — while also requiring that such growth be accommodated in such a way as to "ensure neighborhood vitality and character." *Benaroya v. City of Redmond* ***[Benaroya]***, CPSGMHB Case No. 95-3-0072, FDO, March 25, 1996, at 21.

[3] Bellevue strenuously argued that for the Board to read this section as an "absolute prohibition" would constitute an "impermissible amendment of the statute." The Board notes that the term "prohibition" is absolute by its own terms.

[4] The City admits that, but for the adoption of the challenged exemption, the operation of the City's concurrency requirements would prohibit the redevelopment of the Lake Hills Shopping Center. *See:* Findings of Fact 12 and 13. Thus, the redevelopment of the Lake Hills Shopping Center *would* "cause[s] the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan" contrary to the mandate of RCW 36.70A.070(6)(b).

[5] The fact that Bellevue has previously adopted eight other "exemptions" to concurrency, and points to similar actions by other jurisdictions, is of no consequence in the present case. None of those exemptions has ever been challenged, nor are they presently before the Board.

[6] As the Board held in *West Seattle*, a city may amend its Plan to revise levels of service. Moreover, RCW 36.70A.070(6)(b) states that options available include "transportation improvements *or strategies* to accommodate the impacts of development . . . concurrent with the development." Emphasis added .

[7]

Legal Issue No. 6 ***Is Ordinance No. 5308 inconsistent with WAC 365-195-835 (re: Concurrency)?***
Legal Issue No. 7 ***Is Ordinance No. 5308 inconsistent with WAC 365-195-760 (re: Integration of SEPA process with creation and adoption of Plans and Development Regulations)?***
Legal Issue No. 8 ***Is Ordinance No. 5308 inconsistent with WAC 365-195-510 (re: Concurrency)?***
Legal Issue No. 9 ***Is Ordinance No. 5308 inconsistent with WAC 365-195-325 (re: Transportation element requirements)?***

[8] RCW 36.70A.320(3) provides in relevant part:

> In making its determination, the Board shall consider the criteria adopted by the department under RCW 36.70A.190(4).