

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

BENNETT, et al.,)	
)	
Petitioners,)	Consolidated Case No. 01-3-0022c
)	
v.)	ORDER FINDING CONTINUING
)	NONCOMPLIANCE AND
CITY OF BELLEVUE,)	INVALIDITY AND SCHEDULING
)	SECOND COMPLIANCE HEARING
Respondent.)	
)	
)	
)	

I. PROCEDURAL HISTORY

On April 8, 2002, the Central Puget Sound Growth Management Hearings Board (the **Board**) issued its Final Decision and Order (the **FDO**) in the above captioned case.

On May 28, 2002, the Board received from the City of Bellevue (the **City** or **Bellevue**) an “Application for Direct Review” (the **Application**). The Application asked the Board to issue a Certificate of Appealability with the Superior Court of Washington for King County certifying the Board’s FDO for direct review by the Court of Appeals.

On June 7, 2002, the Board issued “Order Granting Certificate of Appealability.”

On July 1, 2002, the Board received from the City a “Statement of Actions Taken to Comply” (the **SATC**).

On July 8, 2002, the Board received “East Bellevue Community Municipal Corporation’s Motion for Extension of Time to File Response to the City’s Statement of Actions Taken to Comply”. The Presiding Officer orally granted the Motion extending the deadline for filing of Petitioner Responses by one day.

On July 9, 2002, the Board received “East Bellevue Community Municipal Corporations Response to the City’s Statement of Actions Taken to Comply” (the **EBCMC Response**); and from Petitioner Bennett “Petitioners’ Response to Statement of Actions Taken to Comply” (the **Bennett Response**).

On July 12, 2002, the Board received “Reply of the City of Bellevue Regarding Statement of Actions Taken” (the **City’s Reply**).

On July 15, 2002, 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 and Joseph W. Tovar, presiding officer. Also present for the Board was legal extern Staci Smith. Representing Petitioner Bennett was J. Richard Aramburu. Representing the City of Bellevue was Elaine L. Spencer. Court Reporting services were provided by Scott Kindle of Mills & Lessard of Seattle, Washington. No witnesses testified. After hearing argument from the parties, the presiding officer orally authorized a schedule for the submittal of post-compliance hearing briefs on a narrow issue.^[1] Following the compliance hearing, the Board ordered a transcript of the proceedings (the **Transcript**).^[2]

On July 18, 2002, the Board received from Bennett “Petitioners’ Supplemental Brief Concerning Board Authority.”

On July 19, 2002, the Board received “Reply of City of Bellevue Regarding the Board’s Authority to Order Repeal.”

II. Findings of Fact

1. The FDO provided in 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. 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.

FDO, at 17-18.

2. The City has taken no legislative action since the issuance of the FDO to comply with the goals and requirements of the Growth Management Act. SATC, at 2.

III. APPLICABLE LAW AND DISCUSSION

A. Noncompliance, Invalidity and Sanctions

Once the Board finds a jurisdiction is not in compliance with the GMA and remands the matter back to the jurisdiction, the Board must specify the compliance period in its FDO. RCW 36.70A.300. The Act prescribes a limited period to achieve compliance; it provides in relevant part:

[In the FDO], [t]he board shall specify a reasonable time *not in excess of one hundred eighty days*, or such longer period as determined by the board in cases of unusual scope or complexity, within which the . . . city shall comply with the requirements of this chapter.

RCW 36.70A.300(3)(b) (emphasis supplied).

In the Board's FDO, June 19, 2002 was established as the compliance date by which Bellevue was required to take legislative action to repeal the non-compliant and invalid Ordinance No. 5308.

RCW 36.70A.330 provides, in relevant part:

(1) After the time set for complying with the requirements of this chapter under RCW 36.70A.300(3)(b) has expired, or at an earlier time upon the motion of a . . . city subject to a determination of invalidity under RCW 36.70A.300 [now RCW 36.70A.302], the board shall set a hearing *for the purpose of determining whether the . . . city is in compliance with the requirements of this chapter.*

(2) *The board shall conduct a hearing and issue a finding of compliance or noncompliance* with the requirements of this chapter and with any compliance schedule established by the board in its final order. . . .

(3) If the board after a compliance hearing finds that the . . . city is not in compliance, *the board shall transmit its finding to the Governor.* The board *may* recommend to the Governor that the sanctions authorized by this chapter be imposed. *The board shall take into consideration the . . . city's efforts* to meet its compliance schedule in making the decision to recommend sanctions to the Governor.

...

(5) The board shall schedule additional hearings as appropriate pursuant to subsections (1) and (2) of this section.

(Emphasis supplied.)

The Board remanded the matter with direction to the City to repeal Ordinance No. 5308 by no later than June 19, 2002. FDO, at 18. The City took no legislative action to comply with the FDO. FoF 2.

B. Pleadings of the Parties

The City acknowledges that the Board has concluded that Ordinance No. 5308 does not comply with the GMA, stating “The City recognizes that by not repealing Ordinance 5308 at this time, the City will continue to be “not in compliance” with the GMA *in the eyes of the Board.*” SATC, at 2, emphasis added. After recounting the City’s disagreement with the Board’s reading of the law, Bellevue describes the steps it has taken for judicial review of the FDO. The balance of the City’s pleadings, including post-compliance hearing briefing, focus on the argument that the Board lacks authority to direct the City to repeal Ordinance No. 5308. Bellevue states:

On a more technical level, the City recognizes this Board’s power to remand an

ordinance that the Board finds to be non-compliant with directions to come into compliance. The City does not believe, however, that this Board has the authority to tell the City how that compliance must be achieved. Specifically, the City does not believe this Board can tell the City that it must repeal an ordinance . . . This Board can determine under RCW 36.70A.302 that an ordinance is invalid and therefore cannot be used to approve development, but it is only the City Council that can determine whether to repeal that ordinance.

SATC, fn 1, at 3.

The City urges the Board to set further compliance proceedings after final judicial resolution of its appeal of the FDO, and asks that the Board not recommend that the Governor impose financial sanctions against the City. “[W]e are concerned about this board recommending sanctions to the governor . . . We will argue to the governor that that would be disproportionate.” Transcript, at 15-16.

Petitioner Bennett contends that the City has decided to deliberately defy the Board. Bennett Response, at 1. Bennett argues that Bellevue’s mootness arguments are unsupported by any legal precedent, and warns that accepting the City’s reasoning would undermine the effective enforcement of the GMA:

[T]he City’s defiance creates an even more significant precedential issue for the Board. In most cases, judicial review of a Board’s decision . . . will be of longer duration than the Board’s established dates for compliance. If the City’s position is accepted, each local government ordered by the Board to comply with the GMA can argue that its judicial appeal would be moot if the Board’s actions are carried into effect by repeal or modification of comprehensive plans or development regulations. This would wreak havoc with an orderly process of compliance with this Board’s orders.

Bennett Response, at 3.

Bennett urges the Board to find that the City is in continuing noncompliance, but does not oppose giving the City more time in which to repeal Ordinance No. 5308. *Id.* See also Transcript, at 24-25.

Petitioner EBCMC disputes Bellevue’s claim that it has “taken all necessary steps” toward “the expeditious resolution of its disagreement with the Board.” EBCMC argues that the City could have, but did not, file a motion requesting that the Board either modify or rescind the FDO. EBCMC Response, at 2. EBCMC joins with Bennett in arguing that there is no legal authority

for the City's position regarding mootness, and complains:

No authority exists for [Bellevue's] position, so the City cites an unpublished Court of Appeals opinion. Citation to unpublished Court of Appeals opinions is prohibited under the court rules. RAP 10.4(h). This Board should not consider any unpublished opinion that cannot be cited to any court.

EBCMC Response, at 3.

IV. DISCUSSION AND CONCLUSIONS OF LAW

In the FDO, the Board not only found noncompliance, but also invalidated the City's adoption of Ordinance No. 5308. FoF 1. The City's non-compliance with the GMA's concurrency requirements is not one of minor degree. Rather, it is so fundamental and substantial that the Board concluded that its continued validity would substantially interfere with the fulfillment of the Act's goals.

The City made many arguments and assertions in its pleadings and at the compliance hearing. However, at no time did it assert that it has taken any legislative action to comply with the GMA or the FDO; instead, it has sought judicial review of the FDO. FoF 2. The Board need therefore not inquire further regarding the City of Bellevue's compliance with the Act. The Board concludes that the City continues not to comply with the goals and requirements of the GMA, specifically RCW 36.70A.020(12) and .070(6)(b), respectively. Therefore, **the Board will enter a Finding of Continuing Noncompliance and Invalidity**. This finding shall be transmitted to the Governor pursuant to RCW 36.70A.330(3).

As to the City's argument that the Board lacks authority to order the repeal of Ordinance No. 5308, the Board notes that Bellevue raises this argument for the first time in the compliance phase of the case. ^[3] While the parties presented interesting argument on the narrow question of the Board's authority to specifically order repeal of an ordinance, the real issue here is the City's duty to comply with the goals and requirements of the GMA and to comply with the directions given by the Board to achieve compliance within a remand period. Bellevue appears, albeit in a footnote, to acknowledge that determining compliance and remanding ordinances that it determines not to be in compliance are within the Board's authority. ^[4] Therefore, to be perfectly clear about the Board's direction to the City, the Board will amend the FDO to clarify what the City must do to achieve compliance, will give the City additional time to achieve compliance with the GMA as interpreted and applied in the FDO, and will set a date for a Second Compliance Hearing.

The Board understands and respects the rights of a non-prevailing party to seek judicial review. Nevertheless, seeking judicial review does not constitute compliance with the goals and requirements of the GMA, nor with a Board remand order. Unless and until it is reversed, or a stay is entered, the FDO, as amended and clarified by this Order, remains the law of the case, and the City has a duty to comply with it. As to Bellevue's lament that repealing its non-compliant Ordinance would potentially moot its appeal, the City's argument is misplaced. If the City has a serious concern about that theoretical outcome, its recourse is to the courts via a motion for stay, not to this Board.

RCW 36.70A.330(3) enables the Board to make a recommendation to the Governor that the sanctions authorized by the Act be imposed upon the City of Bellevue. In view of the above clarification, and the additional time provided to the City to take legislative action to comply with the law, the Board does not conclude that it is appropriate, at this time, to recommend to the Governor that he consider imposing sanctions. The Board will provide clarification that the City is directed to take legislative action to achieve compliance with the goals and requirements of the Act in a manner consistent with the Board's findings and conclusions. If the City has taken no such legislative action by the new deadline, the parties will be asked to brief the question of whether the Board should subsequently recommend to the Governor that he consider the imposition of sanctions.

The matter of the City's compliance with the goals and requirements of the GMA, as set forth in the findings and conclusions of the FDO, and as amended by this Order, will be briefed by all parties after the City issues a Second Statement of Actions Taken to Comply (**Second SATC**) and the parties brief these questions prior to the Second Compliance Hearing.

VI. Order

Based upon the above referenced documents, the argument and briefing prepared by the parties, the Findings of Fact and Conclusions of Law set forth herein, the Board ORDERS:

The Board enters a **Finding of Continuing Noncompliance** for City of Bellevue Ordinance No. 5308.

The Board enters a **Finding of Continuing Invalidity** for City of Bellevue Ordinance No. 5308.

The Board amends the FDO to clarify what action is required by the City and establishes the following deadlines:

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 Monday, September 16, 2002** as the deadline for the City of Bellevue to take legislative action to achieve compliance with the Growth Management Act consistent with the findings and conclusions in the Board's April 8, 2002 Final Decision and Order.

3. By **Monday, September 23, 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 Second Statement of Actions Taken to Comply (the **Second SATC**). Attached to the SATC shall be a copy of any legislative action taken in response to this Order.

4. By **Monday, September 30, 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 Second SATC.

5. By **Friday, October 4, 2002, 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 Second SATC.

6. The Board schedules a **Second Compliance Hearing** in this matter for **10:00 a.m. on Monday, October 7, 2002**. The Compliance Hearing will be held in Suite 1022 of the Financial Center, 1215 Fourth Avenue, in Seattle.

7. As required by RCW 36.70A.330(3) the Board shall transmit to the Governor a copy of this Order Finding Continuing Noncompliance and Invalidity, and Scheduling Second Compliance Hearing.

So ORDERED this 31st day of July 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.

[1] The presiding officer stated that, by noon on July 18, 2002, the Petitioners may, at their discretion, submit to the Board a post-compliance hearing brief (**PCHB**) on the question of whether the Board has authority to compel the City to repeal Ordinance No. 5308. The Petitioners were directed to simultaneously serve a copy of any such brief on the City. Further, the City was directed to submit to the Board any response to any PCHB by no later than 4:00 p. m. on July 19, 2002. Transcript, at 27-28.

[2] Although he was not present at the compliance hearing, Mr. McGuire has reviewed the Transcript as well as the above cited pleadings.

[3] The Board notes that the City did not file a motion with the Board to reconsider the FDO, as it could have per WAC 242-02-832; nor did it move for the Board to clarify, modify or rescind the determination of invalidity, as provided in RCW 36.70A.302(6); nor did it propose to the Board an alternative compliance schedule; nor did it seek an alternative compliance schedule with the concurrence or agreement of the Petitioners. In fact, the Bellevue took **no** action at all to comply with the Growth Management Act as interpreted by the Board in the FDO.

[4] The Board notes that the City “recognizes this Board’s power to remand an ordinance that the Board finds to be non-compliant with directions to come into compliance.” SATC, at 3, fn. 1.