

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

MICHAEL GAWENKA, HELEN)	CPSGMHB Case No. 02-3-0003
MILLER, JOANNE and DAVID)	
FORBES, JOHN and JENNIFER)	
DIDIO)	
)	<i>(Miller)</i>
Petitioners,)	
)	
v.)	
)	FINDING OF COMPLIANCE
CITY OF BREMERTON,)	
)	
Respondent.)	

I. Background

On, July 29, 2002, the Central Puget Sound Growth Management Hearings Board (the **Board**) issued its Final Decision and Order (**FDO**) in the matter of *Miller v. City of Bremerton (Miller)*, CPSGMHB Case No. 02-3-0003. The FDO remanded the City of Bremerton’s Ordinance Nos. 4771, 4783 and 4784 back to the City with direction to take the necessary legislative actions to comply with the Act. The FDO provided:

The City of Bremerton’s adoption of Ordinance Nos. 4771, 4783 and 4784 was **clearly erroneous** and did **not comply** with the single annual Plan amendment process and the concurrent and cumulative review requirements of RCW 36.70A.130.

The Board therefore, remands Ordinance Nos. 4771, 4783 and 4784 to the City with the following directions:

1. By no later than **October 28, 2002**, the City shall take appropriate legislative action to comply with the requirements of RCW 36.70A.130 as interpreted and applied in this FDO.

2. By no later than **November 4, 2002**, the City shall file with the Board an original and four copies of a Statement of Action Taken to Comply (**SATC**) with

the GMA, as set forth in this FDO. The SATC shall attach copies of legislation enacted in order to comply. The City shall simultaneously serve a copy of the SATC, with attachments, on Petitioners.

3. By no later than **November 11, 2002**, the Petitioners may file with the Board an original and four copies of Comments on the City's SATC. Petitioners shall simultaneously serve copies of their Comments on the City's SATC on the City.

4. By no later than **November 18, 2002**, the City may file with the Board an original and four copies of the City's Reply to Comments. The City shall simultaneously serve a copy of such reply on Petitioners.

Pursuant to RCW 36.70A.330(1), the Board hereby schedules the **Compliance Hearing** in this matter for **10:00 a.m. November 21, 2002** at the Board's offices. With the consent of the parties, the compliance hearing may be conducted telephonically.

FDO, at 13.

The City of Bremerton filed a motion for reconsideration proposing a course of action to achieve compliance. The City sought assurance that the proposed compliance action was acceptable. On August 26, 2002, the Board issued an "Order on Reconsideration" wherein the Board declined to offer the City advice and **denied** the motion for reconsideration.

On November 4, 2002, the Board received the "Respondent City's Statement of Actions Taken to Comply" (**SATC**) with the attached Ordinance No. 4815.

On November 12, ^[1] 2002, the Board received "Petitioner's Comments on Bremerton's SATC" (**Miller Comment**).

On November 18, 2002, the Board received "Respondent City's Reply to Petitioner's Comments" (**City Reply**) and "Declaration of Roger A. Lubovich" (**Declaration**), with three attachments. ^[2]

On November 16, 2002, the Board received a request from the City to conduct the compliance hearing telephonically. Upon being contacted by the Board, Petitioners declined the opportunity, and **did not consent** to conduct the compliance hearing telephonically. ^[3]

On November 21, 2002, the Board conducted the compliance hearing at its Seattle Office.

Present for the Board were Board Members Edward G. McGuire, Lois H. North and Joseph W. Tovar. Carol A. Morris and Roger A. Lubovich represented and appeared on behalf of the City of Bremerton. Petitioner Helen Miller appeared *pro se* on behalf of Petitioners. At the beginning of the compliance hearing Ms. Miller provided the Board and the City with copies of her “Petitioner’s Presentation Notes: ‘Comments’ – re: GMHB Case No. 02-3-0003” (**Presentation Notes**). The compliance hearing was recorded.

II. DISCUSSION

After providing notice and conducting three public hearings, on October 23, 2002, the City of Bremerton adopted Ordinance No. 4815. This Ordinance repealed Ordinance No. 4771^[4] and reaffirmed Ordinance Nos. 4783 and 4784.^[5] In its compliance review, the City concluded that Ordinance No. 4771, relating to front yard setbacks, was unnecessarily adopted as a Plan amendment. Consequently, as part of its compliance action, the City repealed it. SATC, at 4. Review of Ordinance No. 4815 confirms that Ordinance No. 4771 was repealed. *See*: Ordinance No. 4815, Section 1.

In her comments on the City’s SATC, Petitioner alleges: 1) there was inadequate notice of the public hearing on Ordinance No. 4815; 2) the Ordinance, although passed prior to the Board’s deadline for legislative action, was not signed nor effective by the FDO’s October 28, 2002 deadline; 3) the City did not “read into the record” comments submitted by Petitioners; 4) failure in the process of adoption of Ordinance No. 4815 equates to noncompliance with the GMA; 5) the City should have rescinded Ordinance Nos. 4783 and 4784 as well as 4771; 6) Petitioners also raise SEPA claims and Constitutional – Due Process claims., Miller Comment, at 1-10.

In reply, the City effectively counters each of Petitioners claims. City Reply, at 1-8, and Declaration, with Attachments. The Board agrees with the City. In short, the Board has determined:

1. The City’s notice and public participation process for the consideration of Ordinance No. 4815 was appropriate and compliant with the GMA [RCW 36.70A.035 and .140.
 - The City held three public hearings (10/9/02, 10/16/01 and 10/23/02) on Ordinance No. 4815.
 - Petitioners were specifically notified of the three public hearings, with copies of the Ordinance and amendments sent on 10/2/02 and 10/18/02.
 - The general public had notice of the public hearings on Ordinance No. 4815, since notice was posted at the Bremerton City Hall, on the City’s website and at local

libraries.

- The general public also had notice of the public hearings since they were published in Bremerton's newspaper of general circulation - The Sun, on 10/12/02. Publication was four days prior to the second public hearing (10/16/02) and eleven days prior to the third public hearing (10/23/02).

2. The "legislative action" taken by the City was timely according to the schedule set forth in the Board's FDO.
3. Submittals of written testimony at the October 9, 2002 public hearing are part of the legislative record and are therefore available for review by Council members.
4. The FDO did not direct the repeal, modification or reaffirmation of any or all the Ordinances at issue in CPSGMHB Case No. 02-3-0003. It was within the City's discretion to choose a remedial legislative action that complied with the GMA – The choice of the City did so.
5. The Board does not have jurisdiction to address constitutional claims. The Board will not rehear issues addressed in the FDO or its Order on Motions, ^[6] nor address untimely issues that could have been appropriately raised in the original petition for review challenging the adoption of Ordinance Nos. 4771, 4783 and 4784 – Ordinance No. 4815 is the Ordinance subject to the compliance hearing.

III. FINDINGS and CONCLUSIONS

Findings of Fact:

1. RCW 36.70A.330 requires the Board to conduct a compliance hearing. The Board conducted the compliance hearing on November 21, 2002.
2. The Board's July 29, 2002 FDO remanded and directed the City of Bremerton to take appropriate legislative action to comply with the single (once-per-year) annual plan review and amendment requirements of RCW 36.70A.130. The FDO established a compliance schedule. FDO, at 13.
3. On October 2, 2002, via direct mail, the City provided copies of the proposed ordinance to Petitioners, and notified Petitioners of the scheduled October 9, 2002 and October 16, 2002 public hearing dates on the ordinance. City Reply, at 3, Declaration, at 2; and Attachment A.

4. On October 12, 2002, general public notice of the public hearing dates was published in the Bremerton Sun. Notice of the public hearings was posted at City Hall, on the City's website and at local libraries. City Reply, at 2-3, Declaration, at 2; and Attachment B.
5. On October 18, 2002, via direct mail, the City informed the Petitioners of two changes to the ordinance; copy attached, and notified them of a third hearing date – October 23, 2002. City Reply, at 2-3, Declaration, at 2; Attachment C.
6. On October 23, 2002, the City of Bremerton adopted Ordinance No. 4815, pursuant to the Board's remand to take legislative action on or before October 28, 2002. FDO, at 13; SATC, at 1; and Ordinance No. 4815.
7. On November 4, 2002, consistent with the FDO's compliance schedule, the City filed its SATC, with attached copy of Ordinance No. 4815.
8. All other filings by the parties (Petitioner's Comment and City Reply) were timely.
9. Ordinance No. 4815 repealed Ordinance No. 4771^[7] and reaffirmed Ordinance Nos. 4783 and 4784. Ordinance No. 4815, Section 1 and 2.

Conclusions of Law:

1. The City's notice and public participation process for the consideration of Ordinance No. 4815 was appropriate and compliant with the GMA [RCW 36.70A.035 and .140].
2. Points 1-5 noted in Section II Discussion, *supra*, at 3-4, are incorporated herein as Board conclusions.
3. By repealing Ordinance No. 4771, the City eliminated the effect of the twice-per-year or dual amendments that were passed during 2001. The net effect is that only those ordinances [Nos. 4783 and 4784] that were undisputedly adopted as part of Bremerton's 2001 once-per-year or annual amendment cycle remain in place.
4. The City of Bremerton's enactment of Ordinance No. 4815, that repeals Ordinance No. 4771, **complies** with the goals and requirements of the Growth Management Act, specifically RCW 36.70A.130, as set forth and interpreted in the Board's July 29, 2002 FDO.

IV. FINDING OF COMPLIANCE

Based upon review of the Board's July 29, 2002 FDO, the City's SATC, Ordinance No. 4815, the Petitioners' Comment, the City Reply and Declaration, Petitioner's Presentation Notes, the oral

argument, comments and explanations offered at the compliance hearing, and the findings of fact 1-9 and conclusions of law 1 - 4, *supra*, the Board finds that the City of Bremerton has **complied** with the goals of the GMA and requirements of RCW 36.70A.130 as set forth in the aforementioned Board FDO. The Board therefore enters **Finding of Compliance** for the City of Bremerton re: CPSGMHB Case No. 02-3-0003.

So ORDERED this 25th day of November 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 pursuant to WAC 242-02-832.

[\[1\]](#) The Board notes that November 11, 2002, the FDO's stated deadline for Petitioner Comment, was Veterans Day, a legal holiday, consequently receipt of Petitioner's Comment on November 12, 2002 was timely.

[2] The attached exhibits include: A) 10/9/02 Declaration of Mailing signed by Thelma Swen, indicating the following documents were sent to Petitioners 1) 10/2/02 letter to Petitioners from Thelma Swen indicating public hearings dates of 10/9/02 and 10/16/02 for the proposed ordinance, and 2) copy of proposed ordinance; B) 11/9/02 Affidavit of Publication indicating notice of the proposed ordinance and hearing dates were published in The Sun [Bremerton newspaper of general circulation] on October 12, 2002; and C) 10/18/02 letter to Petitioners from Roger A. Lubovich noting two changes to the proposed ordinance and advising Petitioners of a third public hearing date of 10/23/02, a copy of the revised proposed ordinance was also attached.

[3] The Board's FDO, *supra*, indicated, "With the consent of the parties, the compliance hearing may be conducted telephonically." *Miller* FDO, at 13.

[4] Ordinance No. 4771 was the "first" 2001 Plan amendment Ordinance passed by the City *prior to* its annual Plan amendment process.

[5] Ordinance No. 4783 and 4784 among the "second" 2001 Plan amendment Ordinances passed by the City *as part of* the once-per-year [annual] Plan amendment process.

[6] The Board reminds Petitioners that Legal Issue 2, in the Prehearing Order, pertained to compliance with SEPA but was limited to Ordinance No. 4771. Consequently, this issue was dismissed as untimely. Also Legal Issue 3 included reference to WAC 197-11-340 [SEPA Rules] in challenging compliance with RCW 36.70A.035(1) as it related to Ordinance Nos. 4783 and 4784. The Board found compliance with the notice and publication requirements of WAC 197-11-340 and RCW 36.70A.035(1). *See: Miller v. Bremerton*, CPSGMHB Case No. 02-3-0003, Order on Motions, (Apr. 30, 2002), at 3, and 7-9.

[7] The Board notes that Ordinance No. 4772 was also repealed by Ordinance No. 4815; however, this ordinance was not at issue in the Board's original proceedings, nor is it at issue in this compliance proceeding.